

INVALIDITY OF TREATIES

1. Article 46 of the Vienna Convention on the Law of Treaties has seldom been invoked by any state as a basis for a claim of invalidity. When challenging the presumed boundary between Iraq and Kuwait in 1990, Iraq agreed that the 1962 Exchange of Notes, which established principles concerning the location of the boundary was invalid because its approval by the Iraqi government had not been accompanied by the approval of the Iraqi Parliament. This argument was not widely accepted on the merits. Article 46 was also invoked in the 1970s in the U.S. Senate in connection with two bilateral agreements to which the United States adhered. One was an agreement between the United States and Israel in 1975 connected with the withdrawal of Israel from the Sinai peninsula, which involved a number of commitments by the United States with respect to meeting Israeli's supply needs and defense requirements. The Legislative Counsel to the Senate took the position that since the agreement was concluded without the advice and consent of the Senate, it was without force under domestic law. Moreover, since it violated in that respect a rule of fundamental importance and since Israel should reasonably have known of this constitutional defect, the agreement was without force in international law. The State Department rejected that position and no action was taken by the Senate. The Department of State memorandum is reproduced in 15 I.L.M. 198 (1976). For an analysis of the issues, see Meron, Article 46 of the Vienna Convention on the Law of Treaties (*ultra vires* treaties), 49 Brit. Y.B.I.L. 175-199 (1978).

2. The question of constitutional competence was also raised in the Senate in regard to the agreement between the United States and Panama concluded in 1977 with respect to the Panama Canal. In this case, the issue related to an alleged violation by Panama of its constitutional requirements for entering into an agreement of the character of the Canal treaty. A group of U.S. Senators contended that the Panama constitution clearly required a plebiscite to approve a treaty. They asserted that the plebiscite conducted prior to ratification did not meet that requirement because subsequently the United States, on the advice of the Senate, included a number of reservations, conditions and understandings in the instruments of ratification. While these were accepted by the President of Panama, they were not submitted to a second plebiscite. Several Senators argued that the violation was "manifest" and concerned a rule of fundamental importance. They maintained that unless this was corrected by renegotiation, Panama would be able in the future to claim the invalidity because of the constitutional defect. Sen. Exec. Report 95-12 of the Comm. on Foreign Relations, 95 Cong., 2d Sess. (1978). Also 71 A.J.I.L. 635-43 (1978). The Government of Panama responded that under Panamanian law, a second plebiscite was not required. Panama had accepted the Senate's conditions, reservations and understandings but regarded them as interpretations of the treaties, not as alteration or amendments. The Executive Branch of the U.S. Government considered the legal position of Panama as "reasonable." They did not see any violation of Panama law and certainly no manifest violations within the meaning of Article 46. Meron, at 190.

2 Invalidity

Would there be a basis for a future Panamanian Government to seek to invalidate the agreements on the ground of article 46? Would Article 45 apply in that event?

3. The reluctance of tribunals to look behind the ostensible authority of a foreign minister to commit his state was evidenced in the *Eastern Greenland Case* decided by the Permanent Court of International Justice in 1933. P.C.I.J., Ser. A/B, No. 53. The case involved a dispute between Norway and Denmark regarding Norwegian occupation of parts of Greenland. The Norwegian Foreign Minister had informed Denmark orally that the “Norwegian Government would not make any difficulty in the settlement of this question.” Before the court, Norway contended that under its constitution the foreign minister could not enter into a binding international agreement on “matters of importance” without approval of the “King in Council.” The Court rejected the Norwegian claim that this constitutional limitation invalidated the commitment of the foreign minister. It was sufficient, the Court found, that the foreign minister acted “within his province” in replying to an inquiry of the Danish Government. Presumably, the Court meant “within his province” under international customary law. In view of that oral statement, Norway was held bound to refrain from contesting Danish sovereignty and from occupying any part of Greenland.