U.S. Government Comments

1937 *Secretary Hull.* … We advocate faithful observance of international agreements. Upholding the principle of sanctity of treaties, we believe in modification of provisions of treaties, when need therefor arises, by orderly processes carried out in a spirit of mutual helpfulness and accommodation.[24]

1966 *The United States Comments.* The concept of rebus sic stantibus embodied in [Article 62] has long been of so controversial a character and recognized as being so liable to the abuse of subjective interpretation that the United States has reservations about its incorporation in the draft, at any rate in its present form. In the absence of accepted law, it seems highly questionable whether this concept is capable of codification. Moreover, we doubt whether its incorporation, at least in its present form, would be a progressive development of international law. The doctrine of rebus sic stantibus would have unquestionable utility if it were adequately qualified and circumscribed so as to guard against the abuses of subjective interpretation to which it lends itself. If it is applied with the agreement of the parties to the treaty, so as to give rise to a novation of the treaty, it would certainly be acceptable. If, failing that, an international court or arbitral body were entrusted with making a binding, third-party determination of the applicability of the doctrine to the particular treaty, that, too, would be acceptable. But, while there is opportunity to consider the question further, particularly in light of comments of other Governments, the United States desires at this juncture to place on record its opposition to [Article 62] as it is now drafted.[25]

U.S. Discusses Draft Articles on the Law of Treaties

[See Vienna Conv. Arts. 59, 62, 65]

Statement by Richard D. Kearney[1]

When is a change of circumstance fundamental? Are the circumstances only those directly related to the treaty or may they be indirectly related or even not related at all? How is the subjective criterion that the change was not foreseen to be established? Is this requirement really one that implies improbability of knowing or does it imply impossibility of knowing? Or would the parties be required to have foreseen only what would be predictable by recourse to such means as extrapolation by statistical analysis? A

[24] 5 Whiteman at 223.
[25] 21 U.N. GAOR, Supp. 9, U.N. Doc. A/6309/Rev. 1, at 179 (1966).

[1] Made in Committee VI (Legal) of the U.N. General Assembly on Oct. 20 (U.S./U.N. press release 162).

dozen other questions of similar complexity could be drawn from article 59, and there are no conclusive answers.

…

[W]hen we examine article [65] we do not find real safeguards against the possibility of abuse. To be sure, there is a 3-month period during which a party claiming invalidity or breach must wait before taking action to terminate or withdraw from or suspend the treaty, though even this period is subject to an exception. But if, as is likely, the other party or parties object during this period, there is no further safeguard provided in the articles. The parties are left to seek a settlement of the dispute under article 33 of the United Nations Charter.

What safeguard against misuse of the draft article is contained in the provision to seek a solution under charter article 33? There is nothing in article 33 which could be construed as requiring a party to refrain from terminating or suspending a treaty while an effort is being made to seek a solution by negotiation, inquiry, mediation, or any of the other methods enumerated in that article. This in itself is not objectionable. There will undoubtedly be numerous occasions on which a party to a treaty will be fully entitled to terminate or suspend it in the absence of any agreed settlement.

What is objectionable is that a party not entitled to suspend or terminate may do so and that article 33 does not provide any secure methods of protecting the other parties against such an illegal action. The world is full of international disputes which, if this were a perfect world, would have been settled under the procedures provided in article 33. But this is, as we all know, an imperfect world; and article 33 in operation has proven to be an imperfect method for insuring that disputes will be settled.

We are confronted with a situation in which there is general agreement that a safeguard is required and a situation in which the safeguard proposed does not afford real protection. We are also dealing with a situation in which the problems are of a peculiarly legal character, as has been illustrated by the necessity of referring to analogies in municipal legal systems. The validity of agreements, the interpretation of agreements, the breach of agreements – these are questions which in every legal system are subject to some form of judicial decision in order to insure the proper performance of valid obligations. The same safeguard should be provided in this fundamental set of provisions respecting international agreements. Failure to provide for ready recourse to some mandatory means for the impartial settlement of disputes would mean a Convention on the Law of Treaties which is incomplete, one-sided, and susceptible to misuse.

The treaty must be balanced by extending article 62 to provide methods of resolving disputes. These methods could and should be flexible. They should permit parties to select that method of settling a dispute that best suited to determination of the questions at issue. The essential element is that a party to a dispute should not be able to refuse settlement of a dispute over a treaty and at the same time be left free to take unilateral action with respect to the treaty.