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Summary record of the 1587th meeting

Topic:
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was to be established, which inevitably meant that the boundaries set by coastal States might be contested. As draft article 62 would probably not be adopted in final form before that convention had been concluded, some thought should perhaps be given to the matter with a view to ascertaining whether the Authority would be covered by the terms of the article.

42. The Authority would also have the right to set other types of boundaries, such as those delimiting the area of the sea-bed in which a given entity, which might well be a State, would have the right to carry on mining operations. Although that might not be a boundary in the traditional sense of a boundary between sovereignties, it would nonetheless be a physical boundary in property, agreed between an international organization and a State. He would be grateful for the Special Rapporteur's comments on that point.

43. Sir Francis VALLAT said he was not sure that a boundary, within the meaning of paragraph 2 of article 62, was invariably a territorial boundary in the traditional sense. In a recent case between Greece and Turkey,[11] the International Court of Justice had treated the delimitation of the boundary of the continental shelf appertaining to each of those States as a question that concerned territorial status. If one took the traditionalist view, one might argue that such a boundary was not, strictly speaking, a territorial boundary. Yet it seemed to him that, if one followed the view of the Court, the delimitation would create a boundary that should be treated for legal purposes as if it were a territorial boundary, and he therefore inclined to the view that it would be a boundary within the meaning of paragraph 2 of article 62. By the same token, a boundary established for customs purposes might perhaps be similarly regarded. Or did a boundary have to be one that simply divided the sovereignty between two States?

44. Furthermore, it was possible to visualize a case where a treaty between, say, the United Nations and a former mandatory power and relating to a mandated territory that was due to attain independence, made provision for certain international guarantees to be effected through the Organization. Should such a treaty, concluded between a State and an international organization, be excluded from the scope of the draft articles?

45. He would be grateful for the Special Rapporteur's comments on those points.

46. Mr. REUTER (Special Rapporteur) said he had based his reasoning on the traditional notion of territory, but that notion could obviously be extended. In reply to Mr. Pinto's question concerning the law of the sea, he said that where the limits of the territorial sea were at issue, the area was obviously a territory in the traditional sense of the word, but the problem was much more complicated where the limits of jurisdiction over the continental shelf were involved. An analogous problem arose in connexion with lines of demarcation or armistice lines, which were comparable to boundaries from the point of view of aggression only, but which it would be very dangerous to treat in general as on a par with territorial boundaries.

The meeting rose at 12.55 p.m.

1587th MEETING

Thursday, 8 May 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/327)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 62 (Fundamental change of circumstances)[1] (*concluded*)

1. Mr. REUTER (Special Rapporteur) said that the question whether the term "boundary" could be used to describe boundaries other than the traditional boundaries between States—as in the examples from the law of the sea cited by Mr. Pinto at the previous meeting—arose only in cases where boundaries that could not be established except by treaties to which one or more international organizations were parties. In cases of boundaries which could also be the subject of ordinary treaties between States the question did not arise, since treaties establishing boundaries fell within the scope of the Vienna Convention[2] (which had entered into force), and the introduction of new provisions on that topic would be tantamount to amending that convention.

2. Mr. USHAKOV said that, while he approved of draft article 62 submitted by the Special Rapporteur,

[11] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3.

[1] For text, see 1586th meeting, para. 33.

[2] See 1585th meeting, foot-note 1.

he considered that the text presented exactly the same problem as did that of draft article 61.

3. Both draft articles had the same structure: paragraph 1 stated that a party to a treaty could terminate or withdraw from the treaty by invoking, in the case of article 61, the permanent disappearance or destruction of an object indispensable for the execution of the treaty, or, in the case of article 62, a fundamental change of circumstances. Under article 61, paragraph 2, and article 62, paragraph 3, a party to a treaty could not claim that right if it had itself provoked, in the case of article 61, the permanent disappearance or destruction of an object indispensable for the execution of the treaty, or, in the case of article 62, the fundamental change of circumstances.

4. That exception to the rule laid down in paragraph 1 presented no problem in the case of States, since, under article 27,[3] a State party to a treaty could not plead the provisions of its internal law in defence of non-performance of the treaty. However, the exception did present a problem in the case of international organizations, for it was arguable that such an organization was not able to plead its internal law—i.e. its constituent instrument—in defence of the action which had caused the fundamental change of circumstances or the permanent disappearance or destruction of an object indispensable for the execution of the treaty. Whereas a State could—in fact, should—amend its internal law to conform to the provisions of the treaties that it had concluded, an international organization, by contrast, was not entitled to amend its constituent instrument, which was, after all, an international treaty concluded by the States members of the organization and had the same binding force as the treaty referred to in the draft articles. Only the States members of the organization could amend its constituent instrument. The organization had to comply with the provisions of that instrument, in accordance with the principle *pacta sunt servanda*. An international organization that was party to a treaty could therefore cite its constituent instrument—i.e. an international treaty predating the treaty in question—in justification of the legitimacy of a decision taken in pursuance of that instrument and resulting in a fundamental change of circumstances that made the execution of the treaty impossible. However, paragraph 3 of draft article 62 could be interpreted as meaning that it was not open to an international organization party to a treaty to plead its constituent instrument in justification of an action resulting in a fundamental change of circumstances, if such action constituted a breach of an obligation of the treaty.

5. In the event of a breach of a treaty obligation as a result of an action taken in conformity with the constituent instrument of an international organization, the issue would be, therefore, whether it was the treaty or the constituent instrument which should prevail. That was a very difficult issue, for, since the constituent instrument of an international organization was itself a treaty, the observance of that instrument was also an international obligation by virtue of the principle *pacta sunt servanda*. The problem arose only in the case of international organizations, in that, unlike States, they were not free to amend their internal law. That difference between the situation of States and that of international organizations should be mentioned in the commentary or form the subject of a new paragraph which the Drafting Committee might add to draft article 62.

6. Referring to paragraph 2 of draft article 62, he said that he approved entirely the text proposed by the Special Rapporteur. The Special Rapporteur had been right to exclude treaties concluded between international organizations from the exception provided in that paragraph and to mention only treaties concluded between several States and one or more international organizations. In his view, the concept of a boundary should remain the same as in the Vienna Convention.

7. Mr. TABIBI said that he had occasion earlier, both within the Commission and at the United Nations Conference on the Law of Treaties, to express concern regarding the content of the text that became article 62 of the Vienna Convention, and he had not been alone in raising objections to the exception embodied in that paragraph to the doctrine of *rebus sic stantibus*, which was fundamental to international law. He had therefore voted against the inclusion of the exception in the Vienna Convention and, when he had signed the Convention on behalf of his Government, had entered a reservation on that point. Treaties, after all, were like human beings—they came into being, lived and passed away. They were inevitably subject to any fundamental change of circumstances and could never be permanent. Indeed, it was for that very reason that he had accepted the principle laid down in draft article 61.

8. Paragraph 2 of draft article 62 raised a very complex issue, involving as it did the question of the establishment of boundaries in so far as that question affected international organizations. If the Commission wished to settle the issue, it would have to define the meaning of the term "boundary" or else to spell out its meaning in the commentary. International organizations were not to be compared to sovereign States, for organizations possessed no territory and hence no boundaries; nor did all international organizations have treaty-making capacity.

9. The matter was further complicated by the question of mining areas, as raised in the most recent version of the draft convention on the law of the sea, and also by that of the territorial areas and boundaries of the continental shelf.[4] Were the latter, for instance,

[3] *Ibid.*, foot-note 3.

[4] See 1586th meeting, foot-note 10. See, in particular, articles 133 and 76 of the draft convention.

to be regarded as boundaries in the traditional sense? For all those reasons, he remained convinced that the important doctrine of *rebus sic stantibus* should not be qualified by paragraph 2 of draft article 62, even in the amended form proposed by Mr. Schwebel (1586th meeting, para. 38).

10. Mr. SCHWEBEL, referring to Mr. Ushakov's remarks, said that the amendment he had proposed to article 62, paragraph 2, had been based on the assumption that, when a treaty accorded relevant functions to one or more international organizations, the organization or organizations in question accepted those functions, with the result that an international treaty relationship would arise. Possibly, however, his suggested wording would be improved if the last part of the amendment were modified to read: "... which treaty accords relevant functions to, and which are accepted by, one or more international organizations".

11. His reason for submitting the amendment was that paragraph 2 as drafted was ambiguous. At first glance, the expression "a treaty concluded between several States and one or more international organizations and establishing a boundary" seemed to refer to a treaty concluded between several States, on the one hand, and one or more international organizations, on the other, which treaty established a boundary. But that was not the meaning intended by the Special Rapporteur, who took the view that international organizations did not conclude treaties establishing boundaries, and that was why the language of paragraph 2 should be modified.

12. Sir Francis VALLAT said that, in general, he could support draft article 62. When referring at the previous meeting to the lack of any definition of the term "boundary", he had merely meant to point out that it would be necessary to indicate what class of treaties would be covered by the exception embodied in paragraph 2 of the draft article. Clearly, the possibility of treaties which touched on maritime boundaries would have to be visualized, because it was probable that an international organization would have functions and powers under such treaties.

13. As to paragraph 2 itself, the problem was partly one of drafting and partly one of substance. So far as the expression "between several States" was concerned, he said the word "several" normally meant three or more but, if the intent was to refer to two or more, then it was necessary to say so expressly. The point of substance was whether the draft articles should make provision for the case of an agreement entered into by only one State with an international organization in regard to a boundary. Since such a case was well within the realm of possibility, it should not be excluded from the draft articles. For that reason, he would prefer the expression "between several States and one or more international organizations" to be replaced by "between one or more States and one or more international organizations", which would be perfectly clear.

14. Another question was whether treaties between two or more international organizations should be covered in the draft articles. In his view, no harm would be done if the Commission followed the text of the Vienna Convention and provided for all treaties which fell within the definition laid down in the draft articles. In that way, it would not run the risk of omitting any cases that might arise in future, and, if no such treaties were in fact concluded, it would not matter. At the same time, since the possibility of a treaty between two organizations which determined a boundary within the meaning of article 62 of the Vienna Convention was not actually envisaged, he could accept that treaties of that type should be omitted, provided that it was made quite clear in the commentary why the Commission had adopted that course and that the application of the principle embodied in paragraph 2 of draft article 62 would not be excluded, should the need arise.

15. Lastly, with regard to paragraph 3, he said that while the Commission might wish to draw attention to the type of problem raised by Mr. Ushakov, he did not think that any modification of the paragraph was required.

16. Mr. FRANCIS said that draft article 62 raised certain questions of substance which gave him cause for concern. There had been several fundamental changes of circumstances since the Vienna Convention was adopted, and the Commission, which was also engaged in the progressive development of international law, should not fail to take account of such changes. They included, first, the emergence of a new right of property covering a large area of the globe, forming part of the common heritage of mankind, which had been vested in an international authority. The fact that the property in question was subterranean in no way detracted from its territorial nature. Inevitably, therefore, questions relating to boundaries, in the territorial sense, would arise, and consequently the matter should be dealt with either in the draft article or in the commentary.

17. Another question related to treaties between two or more international organizations. He fully agreed that, even if such treaties were not sure to be concluded in the future, the question merited further consideration. There was also the concept of the new economic zone which, though formerly opposed by many countries, had been incorporated into several national systems of law. The Commission, while remaining faithful to its established practice, should not lay itself open to the charge that it had failed to take account of impending developments. If it was not possible to reflect the issues he had raised in the draft articles, then some way should be found of considering them at a later stage. He would welcome the Chairman's reaction to those views.

18. He added that Mr. Schwebel's proposed amendment to paragraph 2 of draft article 62 did not really settle the issues he had mentioned.

19. Mr. VEROSTA said that it would be preferable to retain paragraph 2 of the draft article proposed by the Special Rapporteur, in view of the very broad meaning which the Conference on the Law of Treaties had attributed to the term "treaty establishing a boundary". He approved of the wording suggested by Sir Francis Vallat, which had the merit of not excluding any form of treaty. He was afraid that Mr. Schwebel's proposal, on the other hand, would complicate the text. In his view, it would be better not to introduce too many details into the body of the article and to provide the necessary explanations in the commentary.

20. The CHAIRMAN, speaking as a member of the Commission, said that, with the increasing importance which maritime boundaries had assumed in recent years, it was more than ever necessary to give serious thought to the meaning of the term "boundary". A boundary, in the sense in which that term was used by the Special Rapporteur, was one between two States, and even where it was drawn between, say, adjacent or opposite States in the territorial sea or on the continental shelf, it remained a boundary between territorial sovereignties. There was therefore no problem in that respect. It had been decided, however, in the latest version of the draft convention on the law of the sea, to establish an International Sea-Bed Authority,[5] which would have a certain jurisdiction over the wide area of the sea-bed which lay beyond any national territorial jurisdiction. In addition to that new jurisdiction, the Authority would also have the capacity to enter into agreements with States and to conclude treaties, which could give rise to difficulties of interpretation so far as paragraph 2 of draft article 62 was concerned.

21. The term "boundary" occurred in several passages in the draft convention on the law of the sea. Reference was made, for example, to the "seaward boundary of [a State's] continental shelf where that shelf extends beyond 200 nautical miles ...",[6] 200 miles being the limit of the "exclusive economic zone".[7] Beyond that limit, territorial jurisdiction, and hence sovereignty, for the purpose of the exploitation of resources, could be claimed. There was a very complex formula for determining the boundary, which would vary from case to case, and the geographical coordinates of the boundary would have to be notified to a "Commission on the Limits of the Continental Shelf".[8] The boundary would be drawn not between two sovereignties, but between one sovereignty and an international organization which shared some of the elements of the jurisdiction of a sovereign State. The question, therefore, was whether the idea underlying paragraph 2 of draft article 62 was adequate to cover such a case, a point on which the Vienna Convention offered little guidance.

22. The matter was further complicated by the inclusion in the draft convention on the law of the sea of an article governing cases where a resource straddled the boundary between a sovereign State and the Authority.[9] Such a resource could, however, only be exploited with the consent of the territorial State concerned, which clearly implied that, in such cases, there would have to be an agreement between the Authority and the territorial State concerning a boundary.

23. Of perhaps somewhat lesser importance were the agreements which the Authority could enter into with States for the award of mining contracts, which might cover areas as extensive as 400,000 square kilometres. There, again, a boundary would be involved, although possibly the area concerned would be one where no State and no international organization enjoyed sovereignty.

24. As regards the principle in paragraph 2 of draft article 62, he said it was not his intention to argue for a change, since his main concern was that provision should be made for the case where a treaty between an international organization and a State established a boundary. There were two possible ways of making such provision: either by adopting the relevant provision of the Vienna Convention and adding in the commentary an explanation of the meaning of the various terms used, together with a reference to the special kind of maritime boundary between an international organization—one that had jurisdiction over a territorial area and a sovereign State—or, alternatively, by adopting the Special Rapporteur's proposed text. Of the two possibilities, he would prefer the former, but he could accept the latter, provided that the ambiguity in paragraph 2 was retained.

25. Mr. DÍAZ GONZÁLEZ said that he supported the wording of draft article 62 proposed by the Special Rapporteur, but wished to make it clear that his support was based on the fact that the wording of that draft article was a faithful transposition of the corresponding provision of the Vienna Convention. Mr. Tabibi had referred to the discussions that had been held on that provision at the Conference on the Law of Treaties with a view to striking a balance between the principle *pacta sunt servanda* and the principle *rebus sic stantibus*, the latter being one to which he (Mr. Díaz González) attached the highest importance and which he would continue to defend.

26. Accordingly, he was of the opinion that the Commission should adopt draft article 62 as it stood, without going into any further discussion of the question of boundaries. Although he agreed with the

[5] *Ibid.*, art. 156.

[6] *Ibid.*, art. 76, para. 7.

[7] *Ibid.*, art. 55.

[8] *Ibid.*, art. 76, para. 8.

[9] *Ibid.*, art. 142.

comments made by the Chairman in his personal capacity and by Mr. Francis concerning the new concept of maritime boundaries, he thought it would be dangerous to hold a lengthy discussion of the meaning and definition of that concept.

27. Mr. SCHWEBEL said he thought that the remarks made by the Chairman in his personal capacity required careful consideration, but so, in his view, did the text of draft article 62 proposed by the Special Rapporteur, primarily because some members of the Commission seemed to interpret draft article 62 to embrace international organizations as potential parties to boundary treaties, and some did not.

28. Now, if the advocates of those two opposing viewpoints supported the text proposed by the Special Rapporteur, it followed necessarily that the text was ambiguous. He submitted that indeed it was. The Chairman seemed to see that ambiguity as the main virtue of the draft article because it would permit international organizations to conclude boundary treaties. That possibility was not, however, altogether clear from the text and certainly seemed to be contrary to the Special Rapporteur's intent. Accordingly, the solution might well be the one proposed by the Chairman, namely, to revert to the original wording of article 62 of the Vienna Convention and prepare a commentary that would make the meaning of the text of draft article 62 clear. The key to agreement on the proposal by the Chairman might lie in the fact that international organizations had only the powers in respect of "boundaries" that were expressly allotted to them by treaty.

29. Mr. REUTER (Special Rapporteur), speaking as a member of the Commission, said that the drafting of paragraph 2 of the article in question was not entirely satisfactory. To his mind, the provision should cover treaties by which at least two States established a boundary between them and to which one or more international organizations could be parties.

30. With regard to the law of the sea, he thought the problem should be approached from the political point of view. Article 62 of the Vienna Convention was a stabilizing article which established a certain political balance. The present issue was not whether the lines under discussion in the United Nations Conference on the Law of the Sea constituted genuine frontiers or not; it was whether those lines should be explicitly or implicitly excluded from the scope of the article—which would be very serious, for it would tend to destabilize the law of the sea.

31. In the recent arbitration case between the United Kingdom and France concerning the delimitation of the continental shelf in the area of the Channel Islands (some of which were so close to the French mainland that the dividing line merged with the limits of the territorial sea), the arbitrators had asked the Governments concerned whether they were competent to delimit the territorial sea and had received a negative reply from both of them.[10] The two kinds of lines had been considered distinctly different.

32. From one point of view, the limits of the territorial sea could be said to constitute true boundaries, but were they really so within the meaning of the stabilizing article 62? If two States separated by a vast stretch of open sea fixed their frontier line by treaty at three nautical miles, could it be argued that, whatever the circumstances, they would be unable to terminate or to withdraw from the treaty?

33. The Conference on the Law of the Sea would probably work out an over-all compromise which would have a stabilizing effect on that area of international law. However, it could not be expected that all States would be quick to acknowledge that the resulting convention constituted a treaty establishing boundaries.

34. As it was out of the question to deal with those matters in the text of the article under consideration, the Commission might do so in the commentary and state that it was leaving the way open to possible solutions. It was not impossible that an international organization might some day conclude a treaty which could properly be regarded as a treaty establishing a boundary. But would it have to be regarded as a stabilized treaty? Personally, he doubted it, for an international organization was very fluid by its very nature. For example, a treaty concerning Namibia should be capable of being adjusted to circumstances. For that reason, he doubted whether it was advisable to stress stabilization, however much he, like other members of the Commission, might want to look forward to the development of international organizations. It was debatable, for example, whether the United Nations Council for Namibia acted on behalf of the United Nations or on behalf of an entity which had already been recognized as possessing a certain existence by many African States. The question might be of importance in the event of an illicit act. Since a nascent State did exist, would it not be fair to consider that the United Nations had given it an organ and that the responsibility for that illicit act devolved on that future State? Although those problems could not be ignored in the commentary, the Commission should nevertheless refrain from making any statement which might have practical consequences, especially for the representatives of certain countries at the Conference on the Law of the Sea who might fear the stabilizing effect of the article under consideration.

35. Summing up the debate on article 62, as Special Rapporteur, he noted that all members of the Commission were in favour of dealing with the problem of the law of the sea in the commentary.

[10] Decision of 30 June 1977, Delimitation of the continental shelf case: *International Law Reports* (Cambridge), vol. 54 (1979), p. 33.

36. With regard to paragraph 2 of the article in question, opinions were divided. Some members of the Commission thought it would be advisable to keep the Special Rapporteur's proposal, which referred to treaties by which States established boundaries and to which one or more international organizations were parties. Others thought that the provision could refer to treaties between one or more States and one or more international organizations which established a boundary, so as to cover the case of a treaty concluded between a State and an international organization. It would then have to be made clear in the commentary that no treaty of that kind had yet been concluded, but that that possibility was not excluded, in so far as the term "boundary" was interpreted in a special sense; it should be added that such an interpretation was not that of the Commission. Lastly, the text of article 62 of the Vienna Convention could be adopted unchanged, but the commentary should then be even more explicit. The Commission should state that it was not expressing any judgement as to the meaning which States might attach to the word "boundary".

37. It seemed that the article in question could be referred to the Drafting Committee, which could prepare two alternative texts in the light of the debate.

38. One question which the Commission had considered earlier in connexion with other articles had been raised by Mr. Ushakov: could a State conclude a treaty by which it debarred itself from changing certain provisions of its constitution? He answered that question in the affirmative. For example, Austria, whose Constitution affirmed the principle of neutrality, had entered into a solemn international commitment to the same effect. What, then, was the position of an international organization? It could not conclude treaties inconsistent with its constituent document. In the case of some entities, such as the European Communities, it was even expressly provided that the conclusion of certain treaties would first require the amendment of their constituent charter. But Mr. Ushakov went further: he envisaged a treaty in conformity with the constitution of an international organization at the time when the treaty was concluded, and wondered whether the existence of that treaty would prevent the organization from amending its constitution or from availing itself of certain powers which were provided for in the constitution but the exercise of which was incompatible with that treaty. In principle, that organization could not subsequently amend its constitution. However, there were certain powers of which it was not clearly known whether they were affected by a treaty. If a State concluded a treaty with an international organization, the number of the organization's member States was not thereby stabilized. It would seem, therefore, that a big change in the number of member States would constitute a fundamental change of circumstances. It was inconceivable that a treaty should freeze a power recognized to the sovereign States which were members of an international organization. Problems of that kind raised practical difficulties which ought to be mentioned. When it had the comments of Governments before it, the Commission would be able to judge whether article 27, as amended on first reading, was sufficient to cover that point. Perhaps the Drafting Committee might try to revise article 62 in the light of that problem.

39. The CHAIRMAN said that, in the absence of objections, he would take it that the Commission decided to refer draft article 62 to the Drafting Committee for consideration in the light of the debate.

It was so decided.[11]

ARTICLE 63 (Severance of diplomatic or consular relations)

40. The CHAIRMAN invited the Special Rapporteur to introduce draft article 63 (A/CN.4/327), which read:

Article 63. Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between States parties to a treaty does not affect the legal relations established between those States by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

41. Mr. REUTER (Special Rapporteur), introducing draft article 63, said that diplomatic or consular relations existed only between States. No relationship between an international organization and member States or non-members could be equated with diplomatic or consular relations. The existence of permanent representatives or observers did not imply any relationship of a diplomatic or consular character. Consequently, the text he was proposing for draft article 63 referred only to States parties to a treaty.

42. Sir Francis VALLAT said that he would not dispute what was so clearly stated in the commentary concerning the non-existence of diplomatic and consular relations between international organizations, although, even on that point, he had a slight doubt. In London, there had been for many years a representative of the European Communities who had had the title of ambassador and whose functions might have been considered as coming more within the category of diplomatic representation than within that of the representation of a State to an international organization. Nevertheless, that was perhaps an exceptional case, and the title may have been misused.

43. He was of the opinion that the members of the Commission should reflect on the question of relations between States and international organizations and on the implications of draft article 63. Under the draft

[11] For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

article as it stood, a severance of diplomatic and consular relations between States would not affect the existence of a treaty between States and international organizations. Relations between States and international organizations were not mentioned. What would happen if draft article 63 was included in the draft articles under consideration? If, in the hypothetical case in which a treaty was concluded by a State and an international organization, a crisis occurred between the two and the permanent representative of the State was withdrawn, it might be argued on the basis of draft article 63, which dealt only with diplomatic and consular relations, but not with the status of permanent representatives, that the recall of the permanent representative implied an intention to repudiate the treaty between the State and the international organization and that the change in the relations between them would have an effect on the standing of the treaty.

44. He also referred to article 6 of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character[12] and to article 3 of the 1961 Vienna Convention on Diplomatic Relations,[13] drawing attention to the fact that there was a remarkable parallel between the functions of the permanent mission and those of the diplomatic mission. Perhaps the most pertinent function of the permanent mission was the one referred to in article 6 (*c*) of the 1975 Vienna Convention, that of "negotiating with and within the Organization". Article 3, paragraph 1 (*c*), of the 1961 Vienna Convention provided that diplomatic missions had a similar function, namely that of "Negotiating with the Government of the receiving State". Moreover, article 12, paragraph 1, of the 1975 Vienna Convention provided that:

> The head of mission, by virute of his functions ..., is considered as representing his State for the purpose of adopting the text of a treaty between that State and the Organization.

45. Since a comparison of the functions of diplomatic and permanent missions showed how similar they were, it seemed to him that, if draft article 63 failed to mention the representation of States in their relations with international organizations, there would be a powerful argument for saying that the termination of representation in the case of States and international organizations would have an effect on the existence of a treaty, whereas, in the case of the Vienna Convention on the Law of Treaties, the termination of diplomatic relations would not have such an effect.

46. He was not pressing for an amendment of the wording of draft article 63. He merely thought that the problem raised in that article merited more careful consideration than had been given to it in the commentary by the Special Rapporteur.

47. Mr. USHAKOV inquired why the first phrase in the article in question referred to States parties "to a treaty", whereas, according to the commentary on that provision, only those treaties were taken into consideration to which "at least two States and one or more organizations" were parties.

48. If it was the intention to refer to that class of treaties, it was unnecessary to provide that the severance of diplomatic or consular relations did not affect the legal relations established "between those States" only: it also did not affect the legal relations established between those States and the other parties to the treaty.

49. Mr. REUTER (Special Rapporteur) replied, first, that the words "to a treaty" referred to a treaty in the general meaning of the word and did not include treaties concluded between two international organizations, since it appeared from the preceding words that they referred to the severance of diplomatic or consular relations between States parties. However, there would hardly be any objection to redrafting the beginning of article 63 to read:

> "The severance of diplomatic or consular relations between States parties to a treaty between two or more States and one or more international organizations does not affect . . .".

50. In reply to Mr. Ushakov's second question, he said that the Vienna Convention itself was not very specific on the point. Even as regards the case of a treaty concluded between three States, the Convention provided simply that the severance of diplomatic or consular relations between two States did not affect the legal relations established by those two States, and did not mention the third. If the Commission wished to draft the article under consideration in clearer language than that of the corresponding provision of the Vienna Convention, it could add the words "and between those States and the other parties" after the words "between those States".

51. Referring to Sir Francis Vallat's comments, he explained that representatives of the European Communities abroad were not considered diplomats by the Commission of the European Communities, even assuming that the Communities were really international organizations. However, the United Kingdom often granted diplomatic status to persons who did not hold the title of ambassador, such as the Commissioners of the Dominions who recognized the Head of State as their sovereign, and the United Kingdom had no doubt accorded analogous treatment to the representatives of the Communities as a matter of courtesy.

52. Concerning the problem raised by Sir Francis, he would wait to hear the opinion of the other members of the Commission.

[12] *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207. The convention is hereinafter called "1975 Vienna Convention".

[13] United Nations, *Treaty Series*, vol. 500, p. 95.

53. Sir Francis VALLAT said that he wished to give further examples to illustrate the problem to which he had referred earlier in the discussion. The European Economic Community could, for instance, make commercial treaties and it might be possible to argue that the termination of any representation there might be between a State non-member of the United Nations and the European Communities could have an effect on such commercial treaties. Another more relevant example was that of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations.[14] If draft article 63 did not mention relations between States and organizations, it might be possible to argue that, in the event of the severance of those relations, that kind of treaty would be terminated. It would be unfortunate if the Commission, by omitting a specific provision on the point from article 63, might be thought to imply that, by withdrawing its permanent representation, a host State could cast doubt on the validity, standing or operation of a headquarters agreement.

54. The CHAIRMAN said it was clear from the comments made by members of the Commission that draft article 63 would require further consideration.

Drafting Committee

55. The CHAIRMAN said that, in the absence of objections, he would take it that the Commission decided to appoint a Drafting Committee composed of 12 members: Mr. Verosta (Chairman), Mr. Barboza, Mr. Díaz González, Mr. Evensen, Mr. Jagota, Mr. Njenga, Mr. Reuter, Mr. Schwebel, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat and (*ex officio*) Mr. Yankov, Rapporteur of the Commission.

It was so decided.

Absence of a member of the Commission

56. The CHAIRMAN said that he had received a letter from Mrs. Dadzie informing him that her husband, Mr. Emmanuel Dadzie, would be unable to attend the current session of the Commission because he was seriously ill.

57. If the members of the Commission agreed, he would write to Mrs. Dadzie expressing the Commission's wishes for Mr. Dadzie's speedy recovery.

It was so decided.

The meeting rose at 1.05 p.m.

[14] United Nations, *Treaty Series*, vol. 11, p. 11.

1588th MEETING

Friday, 9 May 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/327)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 63 (Severance of diplomatic or consular relations)[1] (*concluded*)

1. Mr. FRANCIS said that, for the purpose of establishing the connexion—which was missing in the text as drafted—between draft article 63 and the draft articles as a whole, a provision should be added in the article on the lines of the passage in the Special Rapporteur's commentary which stated that in the case of the treaties under discussion the rule laid down could apply only to a special group of treaties: those to which at least two States and one or more organizations were parties.

2. Referring to the questions of substance that had been raised at the previous meeting by Mr. Ushakov and Sir Francis Vallat and that should be taken into account in improving the commentary, he said it was generally agreed, as was quite obvious from the text of draft article 63, that heads of mission accredited by States to international organizations were not ambassadors, and that diplomatic and consular relations existed only between States. Hence he suggested, for the purposes of draft article 63, that the words "relations of representation" be used to describe the reciprocal relations between States and international organizations.

3. In the case of the issue of relations between South Africa and the United Nations, it could be said that there had been a severance of representational relations which could, by analogy, be compared to a severance of diplomatic relations between States. In such a case, he did not think that it could justifiably be claimed that a treaty between the State and the

[1] For the text, see 1587th meeting, para. 40.