

**United Nations Conference on the Law of Treaties between States
and International Organizations or between International Organizations**

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**Draft articles on the law of treaties between States and international organizations or
between international organizations adopted by the International Law
Commission at its thirty-fourth session**

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the Law of Treaties between States and International Organizations or between
International Organizations (Documents of the Conference)*

B. DRAFT ARTICLES ON THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN INTERNATIONAL ORGANIZATIONS ADOPTED BY THE INTERNATIONAL LAW COMMISSION AT ITS THIRTY-FOURTH SESSION

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NOTE: The text is reproduced as it appears in section D of chapter II of the *Yearbook of the International Law Commission, 1985*, Vol. II, Part Two.

PART I
INTRODUCTION

Article 1. Scope of the present articles

The present articles apply to:

- (a) treaties between one or more States and one or more international organizations, and
- (b) treaties between international organizations.

Commentary

The title of the draft articles was modified in the course of the second reading to align it more closely to the title of the Vienna Convention, by specifying that what is being codified is the law of treaties to which international organizations are parties. The titles of part I and article 1 are in the same form as those in the Vienna Convention. The scope of the draft articles is described in the body of article 1 in more precise terms than in the title in order to avoid any ambiguity. Furthermore, the two categories of treaties concerned have been presented in two separate subparagraphs because this distinction will sometimes have to be made in the treaty regime to which the draft articles apply. The separation into two subparagraphs, (a) and (b), does not affect the fact that many of the draft articles are formulated in general terms, referring to "a treaty" as defined in article 2, subparagraph 1 (a), without distinguishing between the two types of treaties.

Article 2. Use of terms

1. For the purposes of the present articles:

(a) "treaty" means an international agreement governed by international law and concluded in written form:

- (i) between one or more States and one or more international organizations; or
- (ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(b bis) "act of formal confirmation" means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty;

(b ter) "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State or an international organization establishes on the international plane its consent to be bound by a treaty;

(c) "full powers" means a document emanating from the competent authority of a State and designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty or for accomplishing any other act with respect to a treaty;

(c bis) "powers" means a document emanating from the competent organ of an international organization and designating a person or persons to represent the organization for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the organization to be bound by a treaty or for accomplishing any other act with respect to a treaty;

(d) "reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization;

(e) "negotiating State" and "negotiating organization" mean respectively:

- (i) a State, or
 - (ii) an international organization,
- which took part in the drawing-up and adoption of the text of the treaty;

(f) "contracting State" and "contracting organization" means respectively:

- (i) a State, or
 - (ii) an international organization,
- which has consented to be bound by the treaty, whether or not the treaty has entered into force;

*Section D only.

(g) "party" means a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force;

(h) "third State" and "third organization" mean respectively:

(i) a State, or

(ii) an international organization, not a party to the treaty;

(i) "international organization" means an intergovernmental organization;

(j) "rules of the organization" means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be given to them in the internal law of any State or in the rules of any international organization.

Commentary

(1) *Subparagraph 1 (a)*, defining the term "treaty", follows the corresponding provision of the Vienna Convention but takes into account article 1 of the present draft. No further details have been added to the Vienna Convention text.

(2) The definition of the term "treaty" contains a fundamental element by specifying that what is involved is an agreement "governed by international law". It has been suggested that a further distinction should be introduced into the article according to whether or not a State linked by an agreement to an international organization is a member of that organization. The Commission fully recognizes that special problems arise, particularly as regards matters such as reservations or the effects of treaties on third States or third organizations, when an organization and some or all of its member States are parties to the same treaty, but the draft articles cannot be designed to cater exhaustively for all difficulties. Furthermore, while the distinction may be relevant in the case of regional organizations, it is less important in the case of universal organizations. For those reasons, the Commission has, not without regret, left it aside, except as regards the particularly important questions dealt with below in connection with article 36 *bis*.

(3) The suggestion noted above is also of interest in so far as it raises the possibility of investigating whether some agreements are of an "internal" nature as far as the international organization is concerned, that is, whether they are governed by rules peculiar to the organization in question. The Special Rapporteur addressed inquiries on this point to various international organizations without receiving any conclusive replies.⁴² However, the draft articles, in referring to agreements "governed by international law", have established a simple and clear criterion. It is not the purpose of the draft articles to state whether agreements concluded between organizations, between States and international organizations, or even between organs of the same international organization may be governed by some system other than general international law, whether the law peculiar to an organization, the national law of a specific country, or even, in some cases, the general principles of law. Granting that, within certain limits, such a possibility exists in some cases, the draft articles do not purport to provide criteria for determining whether an

⁴² See the second report of the Special Rapporteur, *Yearbook* . . . 1973, vol. II, pp. 88-89, document A/CN.4/271, paras 83-87

agreement between international organizations or between States and international organizations is not governed by general international law. Indeed, that is a question which, within the limits of the competence of each State and each organization, depends essentially on the will of the parties and must be decided on a case-by-case basis.

(4) What is certain is that the number of agreements dealing with the administrative and financial questions has increased substantially in relations between States and organizations or between organizations, that such agreements are often concluded in accordance with streamlined procedures and that the practice is sometimes uncertain as to which legal system governs such agreements. If an agreement is concluded by organizations with recognized capacity to enter into agreements under international law and if it is not by virtue of its purpose and terms of implementation placed under a specific legal system (that of a given State or organization), it may be assumed that the parties to the agreement intended it to be governed by general international law.⁴³ Such cases should be settled in the light of practice; the draft articles are not intended to prescribe the solution.

(5) The texts of *subparagraphs 1 (b) and (b ter)* reproduce the same meanings attributed to the terms in question as are given in article 2, *subparagraph 1 (b)*, of the Vienna Convention with regard to the establishment by a State of its consent to be bound by a treaty. *Subparagraph (b ter)* also applies the definition of the Vienna Convention concerning "acceptance", "approval" and "accession" to the establishment by an international organization of its consent to be bound by a treaty.

(6) The use of the term "ratification" to designate a means of establishing the consent of an international organization to be bound by a treaty, however, gave rise to considerable discussion within the Commission in the context of the consideration of article 11 on means of expressing consent to be bound by a treaty.⁴⁴

(7) To put the elements of the problem in clearer perspective, it should be remembered that there is no question of the meaning which may be given to the terms in question in the internal law of a State or in the rules of an international organization (art. 2, para. 2). It is therefore irrelevant to

⁴³ Concerning the implementation of an agreement, see the commentary to article 27, below. Attention may also be drawn to agreements referred to as "interagency" agreements, about whose legal nature there may sometimes be doubt. What seems certain is that some important agreements concluded between international organizations are not subject either to the national law of any State or to the rules of one of the organizations that is a party to the agreement and hence fall within the purview of general public international law. A case in point is that of the United Nations Joint Staff Pension Fund, which was established by General Assembly resolution 248 (III) of 7 December 1948 (subsequently amended on several occasions). The principal organ of the Fund is the Joint Staff Pension Board (art. 5 of the Regulations (JSPB/G.4/Rev.10)). Article 13 of the Regulations provides that:

"The Board may, subject to the concurrence of the General Assembly, approve agreements with member Governments of a member organization and with intergovernmental organizations with a view to securing continuity of pension rights between such Governments or organizations and the Fund".

Agreements have been concluded in pursuance of that article with several States (Canada, the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic and the USSR) and intergovernmental organizations (the European Communities, the European Space Agency, EFTA, IBRD, IMF, OECD and the European Centre for Medium-range Weather Forecasts). For the texts of these agreements, see *Official Records of the General Assembly, Supplement No. 9, Thirty-second Session (A/32/9/Add.1)*; *ibid.*, *Thirty-third Session (A/33/9/Add.1)*; *ibid.*, *Thirty-fourth Session (A/34/9/Add.1)*, *ibid.*, *Thirty-fifth Session (A/35/9 and Add.1)*. An agreement has legal effect only when the General Assembly "concur" (for an example see resolution 35/215 A, sect. IV, of 17 December 1980)

⁴⁴ See commentary to article 11 below

ascertain whether an international organization employs the term "ratification" to designate a particular means of establishing its consent to be bound by a treaty. In point of fact, international organizations use the term only in exceptional cases, which appear to be anomalous.⁴⁵ It is obvious, however, that the draft articles do not set out to prohibit an international organization from using a particular vocabulary within its own legal order.

(8) At the same time, the draft articles, like the Vienna Convention, make use of a terminology accepted "on the international plane" (art. 2, subpara. 1 (b), of the Vienna Convention). The Commission considered in this connection that the term "ratification" should be reserved for States, since in accordance with a long historical tradition it always denotes an act emanating from the highest organs of the State, generally the Head of State, and there are no corresponding organs in international organizations.

(9) Looking not at the organs from which the ratification proceeds, however, but at the technical mechanism of ratification, we find that ratification amounts to the definitive confirmation of a willingness to be bound. Such a mechanism may sometimes be necessary in the case of international organizations, and there is no reason for denying it a place among the means of establishing their consent to be bound by a treaty. At present, however, there is no generally accepted international designation of such a mechanism in relation to an international organization. In the absence of an accepted term, the Commission has confined itself to describing this mechanism by the words "act of formal confirmation", as indicated in *subparagraph 1 (b bis)*. When necessary, international organizations, using a different terminology, can thus establish on an international plane their consent to be bound by a treaty by means of a procedure which is symmetrical with that which applies to States.

(10) In *subparagraph 1 (c)*, the term "full powers" is confined to documents produced by representatives of States, and in *subparagraph 1 (c bis)*, the term "powers" to those produced by representatives of international organizations. The Commission is aware of how much the terminology varies in practice (a situation exemplified by articles 12 and 44 of the Convention on the Representation of States), but it considers that the terminology which it proposes makes a necessary distinction. It seemed inappropriate to use the term "full powers" for an organization, for the capacity of such a body to bind itself internationally is never unlimited.

(11) The Commission, in first reading, believed that to apply the verb "express" in this context ("expressing the consent . . . to be bound by . . . a treaty") to the representative of an international organization might give rise to some doubt; the term might be understood in some cases as giving the representative of an international organization the right to determine by himself, as representative, whether or not the organization should be bound by a treaty. As a means of avoiding that doubt in such cases, the verb "communicate" was used instead of the verb "express". The Commission in second reading at first retained the expression "communicating the consent of the organization to be bound by a treaty"; later, however, it decided not to use the verb "to communicate", but to replace it by the verb "to express", as already used for the consent of States. The reasons for this change are given below in the commentary to article 7 (paras. (11) to (14)).

(12) Apart from the modifications made necessary by the incorporation of international organizations in the text,⁴⁶ *subparagraph 1 (d)*, dealing with the term "reservation", follows the corresponding provision of the Vienna Convention and does not call for any special comment.

(13) It will be recalled that the definition of the term "reservation" which appeared in the text of *subparagraph 1 (d)* adopted in first reading was adopted by the Commission in 1974 prior to its examination of articles 11 and 19. The Commission, instead of waiting at that time, decided to adopt provisionally the wording found in the first-reading draft, which included the phrase "made by a State or by an international organization when signing or consenting [by any agreed means] to be bound by a treaty". In so doing, the Commission saw the advantage of a text simpler than the corresponding text of the Vienna Convention and of leaving in abeyance the question whether the terms "ratification", "acceptance", "approval" and "accession" could also be used in connection with acts whereby an organization expresses its consent to be bound by a treaty. Nevertheless, the Commission stressed that the wording so adopted was provisional and put the expression "by any agreed means" in brackets to indicate its intention to review the adequacy of such an expression at a later stage.⁴⁷

(14) Having adopted article 11 and article 2, *subparagraph 1 (b bis)*, which established an "act of formal confirmation" for international organizations as equivalent to ratification for States, the Commission could, in second reading, see no reason which would justify maintaining the first reading text rather than reverting to a text which could now more closely follow that of the corresponding definition in the Vienna Convention.

(15) *Subparagraph 1 (e)* defines the terms "negotiating State" and "negotiating organization". It follows the corresponding provision of the Vienna Convention, but takes into account article 1 of the present draft. Since the term "treaty" refers here to a category of conventional acts different from that covered by the same term in the Vienna Convention, the wording need not allow for the fact that international organizations sometimes play a special role in the negotiation of treaties between States by participating through their organs in the preparation, and in some cases even the establishment, of the text of certain treaties.

(16) *Subparagraph 1 (f)* also follows the corresponding provision of the Vienna Convention, taking into account article 1 of the present draft.

(17) Except for the addition of the words "or an international organization", the definition given in *subparagraph 1 (g)* follows exactly the wording of the Vienna Convention. It therefore leaves aside certain problems peculiar to international organizations. But in this case the words "to be bound by the treaty" must be understood in their strictest sense—that is to say, as meaning to be bound *by the treaty itself* as a legal instrument and not merely "to be bound by the rules of the treaty". For it can happen that an organization will be bound by legal rules contained in a treaty without being a party to the treaty, either because the rules have a customary character in relation to the organization, or because the organization has committed itself by way of a unilateral declaration (assuming that to be possible),⁴⁸ or because the organization has concluded with the parties to

⁴⁶ As well as consequential slight drafting changes in the French text only

⁴⁷ *Yearbook . . . 1974*, vol. II (Part One), p. 295, document A/9610/Rev.1, chap. IV, sect. B, para. (4) of the commentary to article 2.

⁴⁸ See the examples given on p. 16 above, para. 60.

⁴⁵ See *Yearbook . . . 1975*, vol. II, p. 33, document A/CN.4/285, para. (4) of the commentary to article 11 and footnote 31.

treaty X a collateral treaty whereby it undertakes to comply with the rules contained in treaty X without, however, becoming a party to that treaty. Furthermore, it should be understood that the relatively simple definition given above cannot be used in the case of international organizations which, at the time of the drawing-up of a treaty, lend their technical assistance in the preparation of the text of the treaty, but are never intended to become parties to it.

(18) The definition given in *subparagraph 1 (h)* merely extends to third organizations the Vienna Convention's definition of third States.

(19) *Subparagraph 1 (i)* gives the term "international organization" a definition identical with that in the Vienna Convention. This definition should be understood in the sense given to it in practice; that is to say, as meaning an organization composed mainly of States and, in exceptional cases, one or two international organizations⁴⁹ and having in some cases associate members which are not yet States or which may be other international organizations. Some special situations have been mentioned in this connection, such as that of the United Nations within ITU, EEC within GATT or other international bodies, or even the United Nations acting on behalf of Namibia, through the Council for Namibia, within WHO after Namibia became an associate member of WHO.⁵⁰

(20) It should, however, be emphasized that the adoption of the same definition of the term "international organization" as that used in the Vienna Convention has far more significant consequences in the present draft than in that Convention.

(21) In the present draft, this very elastic definition is not meant to prejudge the regime that may govern, within each organization, entities (subsidiary or connected organs) which enjoy some degree of autonomy within the organization under the rules in force in it. Likewise, no attempt has been made to prejudge the amount of legal capacity which an entity requires in order to be regarded as an international organization within the meaning of the present draft. The fact is that the main purpose of the present draft is to regulate, not the status of international organizations, but the regime of treaties to which one or more international organizations are parties. The present draft articles are intended to apply to such treaties irrespective of the status of the organizations concerned.

(22) Attention should be drawn to a further very important consequence of the definition proposed. The present draft articles are intended to apply to treaties to which international organizations are parties, whether the purpose of those organizations is relatively general or relatively specific, whether they are universal or regional in character, and whether admission to them is relatively open or restricted; the draft articles are intended to apply to the treaties of all international organizations.

(23) Yet the Commission has wondered whether the concept of international organization should not be defined by something other than the "intergovernmental" nature of the organization. In connection with the second reading of the article, several Governments also suggested that this

should be the case.⁵¹ After having further discussed this question, the Commission has decided to keep its earlier definition, taken from the Vienna Convention, because it is adequate for the purposes of the draft articles; either an international organization has the capacity to conclude *at least one treaty*, in which case the rules in the draft articles will be applicable to it, or, despite its title, it does not have that capacity, in which case it is pointless to state explicitly that the draft articles do not apply to it.

(24) *Subparagraph 1 (j)* is a new provision by comparison with the Vienna Convention. In the light of a number of references which appear in the present draft articles to the rules of an international organization, it was thought useful to provide a definition for the term "rules of the organization". Reference was made in particular to the definition that had recently been given in the Convention on the Representation of States. The Commission accordingly adopted the present subparagraph, which reproduces verbatim the definition given in that Convention.

(25) However, a question which occupied the Commission for some considerable time was that of the terms referring to the organization's own law, or that body of law which is known as "the internal law" of a State and which the Commission has called "the rules" of an international organization. The Commission has, finally, left its definition unchanged. There would have been problems in referring to the "internal law" of an organization, for while it has an internal aspect, this law also has in other respects an international aspect. The definition itself would have been incomplete without a reference to "the constituent instruments . . . of the organization"; it also had to mention the precepts established by the organization itself, but the terminology used to denote such precepts varies from organization to organization. Hence, while the precepts might have been designated by a general formula through the use of some abstract theoretical expression, the Commission, opting for a descriptive approach, has employed the words "decisions" and "resolutions"; the adverbial phrase "in particular" shows that the adoption of a "decision" or of a "resolution" is only one example of the kind of formal act that can give rise to "rules of the organization". The effect of the adjective "relevant" is to underline the fact that it is not all "decisions" or "resolutions" which give rise to rules, but only those which are of *relevance* in that respect. Lastly, reference is made to *established practice*. This point once again evoked comment from Governments and international organizations.⁵² It is true that most international organizations have, after a number of years, a body of practice which forms an integral part of their rules.⁵³ However, the reference in question is in no way intended to suggest that practice has the same standing in all organizations; on the contrary, each organization has its own characteristics in that respect. Similarly, by referring to "established" practice, the Commission seeks only to rule out uncertain or disputed practice; it is not its wish to freeze practice at a particular moment in an organization's history. Organizations stressed this point at the United Nations

⁴⁹ This line of analysis may be compared with that adopted in paragraph 2 of article 9 below, regarding the adoption of the text of a treaty at international conferences. See also the commentary to article 5 below

⁵⁰ In connection with situations in which an organization is called upon to act specifically on behalf of a territory, see the secretariat study on "Possibilities of participation by the United Nations in international agreements on behalf of a territory", *Yearbook . . . 1974*, vol II (Part Two), p 8, document A/CN.4/281

⁵¹ See "Topical summary . . ." (A/CN.4/L.311), para 171; and *Yearbook . . . 1981*, vol. II (Part Two), pp. 188-189, annex II, sect. A.10, subsect. IV.1.

⁵² See, for example, *Yearbook . . . 1981*, vol II (Part Two), p. 189, annex II, sect A.10, subsect. IV.2.

⁵³ This was the view taken by the International Court of Justice with regard to the effect of abstentions by permanent members of the Security Council in voting in that body, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I C.J. Reports 1971*, p. 22, para. 22.

Conference on the Law of Treaties (1969) and the United Nations Conference on the Representation of States in Their Relations with International Organizations (1975).⁵⁴

(26) *Article 2, paragraph 2*, extends to international organizations the provisions of article 2, paragraph 2, of the Vienna Convention, adjusted in the light of the adoption of the term "rules of the organization" as explained above.

Article 3. International agreements not within the scope of the present articles

The fact that the present articles do not apply:

- (i) to international agreements to which one or more States, one or more international organizations and one or more subjects of international law other than States or organizations are parties; or
- (ii) to international agreements to which one or more international organizations and one or more subjects of international law other than States or organizations are parties; or
- (iii) to international agreements not in written form between one or more States and one or more international organizations, or between international organizations;

shall not affect:

- (a) the legal force of such agreements;
- (b) the application to them of any of the rules set forth in the present articles to which they would be subject under international law independently of the present articles;
- (c) the application of the present articles to the relations between States and international organizations or to the relations of organizations as between themselves, when those relations are governed by international agreements to which other subjects of international law are also parties.

Commentary

(1) It is pretty well beyond dispute that the situation under international law of certain international agreements not within the scope of the present articles needs to be safeguarded by a provision on the lines of article 3 of the Vienna Convention. Suffice it to point out that it is not unusual for an international agreement to be concluded between an international organization and an entity other than a State or than an international organization. Reference might be made here (if the Vatican City were not recognized as possessing the characteristics of a State) to agreements concluded between the Holy See and international organizations. Similarly, there can be little doubt that agreements concluded between the International Committee of the Red Cross and an international organization (such as those concluded with EEC under the World Food Programme) are indeed governed by international law. The development of world humanitarian law and its extension for the benefit of entities which have not yet been constituted as States will provide further examples of this kind, and there will even be agreements between one or more international organizations, one or more States and one or more entities which are neither States nor international organizations.

(2) On the other hand, there is no need to belabour the frequency and importance of agreements not in written form

between one or more States and one or more international organizations. There may indeed be some doubt as to whether agreements resulting from an offer made by a State and accepted by an international organization at a meeting of which only a summary record is to be kept are written agreements; it must also be borne in mind that many agreements between organizations are set down, for example, in the verbatim records of conferences or co-ordination committees. Lastly, the development of telecommunications necessarily leads to a proliferation of unwritten international agreements on a variety of matters ranging from peace-keeping to intervention on economic markets—so much so that voices have been raised against what has sometimes been considered the abuse of such agreements. However, even if such comment may in some cases be deemed justified, it does not affect the need for concluding such agreements. It is for each organization, under the rule laid down in article 6 of the draft, so to organize the regime of agreements not concluded in written form that no organ goes beyond the limits of the competence conferred on it by the relevant rules of the organization.

(3) It therefore seemed to the Commission that some agreements should have the benefit of provisions similar to those of article 3, subparagraphs (a), (b) and (c), of the Vienna Convention. The text of those subparagraphs of the Convention has been adopted for draft article 3, subject, in the case of subparagraph (c), to the changes obviously necessitated by the difference in scope between the Vienna Convention and the draft articles.

(4) On the other hand, a problem might arise in defining the agreements to which the rules laid down in subparagraphs (a), (b) and (c) apply. The Commission considered that, for the sake of clarity, it should enumerate those agreements and it discarded global formulae which, though simpler in form, were less precise; it has accordingly enumerated the agreements in question in separate categories in subparagraphs (i), (ii) and (iii) of draft article 3; categories (i) and (ii), as is implicit in the general meaning of the term "agreement", include both agreements in written form and agreements not in written form.

(5) On considering the three categories referred to in subparagraphs (i), (ii) and (iii), it will be seen that the Commission has excluded agreements between States, whether or not in written form, and agreements between entities other than States or international organizations, whether or not in written form. It took the view that, after the Vienna Convention, there was no need to reiterate that agreements between States, whatever their form, were subject to international law. Agreements between entities other than States or than international organizations seem too heterogeneous a group to constitute a general category, and the relevant body of international practice is as yet too exiguous for the characteristics of such a general category to be inferred from it.

(6) The Commission in second reading, after having considered shorter versions of this article, decided that the present wording, although cumbersome, should be maintained for the sake of clarity. It decided to replace the expression "one or more entities other than States or international organizations" by the phrase "one or more subjects of international law other than States or organizations". The term "subject of international law" is used in the Vienna Convention where it applies to international organizations in particular. The Commission avoided this term in first reading in order to preclude discussion of the question whether there are currently subjects of interna-

⁵⁴ See *Yearbook* . . . 1972, vol. II, pp 106 and 107, document A/CN.4/258, para 51.

tional law other than States and international organizations. It became apparent in second reading, however, that the term "entity" is too vague and could cover any subject of private law, including associations or societies, and that such an extension of the scope of the article could give rise to all kinds of problems. The reference to subjects of international law is, as things stand, far narrower in scope and the area of discussion which it opens up is very limited.

Article 4. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the present articles, the present articles apply only to such treaties concluded after the entry into force of the present articles with regard to those States and those organizations.

Commentary

Except for the reference to the treaties which are the subject of the present draft articles, this text follows that of article 4 of the Vienna Convention. In referring to the "entry into force" of the present articles with regard to specific States and international organizations, the draft article implies that a treaty will be concluded to ensure the binding force of the articles. In its report, the Commission has submitted a corresponding recommendation to the General Assembly;⁵⁵ but, as it has stressed, it has no intention of prejudging the General Assembly's decision on the matter. If the General Assembly opts for a different course, it will suffice to alter the tenor of article 4. Furthermore, the Commission has already observed that, even if the General Assembly decides to entrust the draft articles to a conference with the task of drawing up a treaty, that will not necessarily mean that the international organizations will become "parties" to such a treaty, since the rules of that instrument can enter into force with regard to the organizations without the latter acquiring the status of parties.

Article 5. Treaties constituting international organizations and treaties adopted within an international organization

The present articles apply to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any relevant rules of the organization.

Commentary

(1) In its first reading of the draft articles, the Commission subscribed to the Special Rapporteur's view that there was no need for a provision paralleling article 5 of the Vienna Convention.

(2) On reviewing the question, the Commission came to the conclusion that even though its substance would relate to what are still rather exceptional circumstances, such a provision was perhaps not without value; it has therefore adopted a draft article 5 which follows exactly the text of article 5 of the Vienna Convention. The differences resulting from the attribution to the term "treaty" of a distinct

meaning in each of those texts must now be spelt out and evaluated.

(3) First, draft article 5 evokes the possibility of the application of the draft articles to the constituent instrument of one organization to which another organization is also a party. While—with the exception of the special status which one organization may enjoy within another as an associate member thereof⁵⁶—such cases are at present rare, not to say unknown, there is no reason to consider that they may not occur in the future. There are already commodity agreements admitting as members certain organizations having special characteristics.⁵⁷ However, the Commission did not feel it necessary to draw from this the consequence that the definition of the expression "international organization" should be amended to take account of such cases, for they will most probably never involve more than the admission by an essentially intergovernmental organization of one or two other international organizations as members.⁵⁸ The Commission did not consider the hypothesis that an international organization might have *nothing but* international organizations as members. One member of the Commission did, however, express the view that, for the moment, it would have been sufficient to deal in article 5 with the hypothesis discussed in paragraph (4) below.

(4) Second, draft article 5 extends the scope of the draft to treaties adopted within international organizations. Such a situation arises principally when a treaty is adopted within an international organization of which another such organization is a member. But it is also conceivable that an international organization all of whose members are States might adopt a treaty designed for conclusion by international organizations or by one or more international organizations and one or more States. In referring to "the adoption of a treaty", article 5 seems to mean the adoption *of the text of a treaty*, and it is, for example, conceivable that the text of a treaty might be adopted within the United Nations General Assembly, even though certain organizations might subsequently be invited to become parties to the instrument.

PART II

CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION I. CONCLUSION OF TREATIES

Article 6. Capacity of international organizations to conclude treaties

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

⁵⁶ See para. (19) of the commentary to article 2, above.

⁵⁷ See *International Wheat Agreement, 1971* (United Nations, *Treaty Series*, vol. 800, p. 45); *International Cocoa Agreement, 1975* (United Nations *Cocoa Conference, 1975* (United Nations publication, Sales No. E.76.II.D.9 and Corr.1)); *International Coffee Agreement, 1976* (publication of the International Coffee Organization, London, 1976); *International Sugar Agreement, 1977* (United Nations *Sugar Conference, 1977* (United Nations publication, Sales No. E.78.II.D.17)); *International Rubber Agreement, 1979* (United Nations publication, Sales No. E.80.II.D.5 and Corr.); *International Olive Oil Agreement, 1979* (United Nations publication, Sales No. E.80.II.D.1); *Sixth International Tin Agreement [1981]* (United Nations publication, Sales No. E.82.II.D.16).

⁵⁸ The situation is comparable to that contemplated by article 9 with respect to "international conferences of States".

⁵⁵ See p. 16 above, paras. 56-61

Commentary

(1) When the question of an article dealing with the capacity of international organizations to conclude treaties was first discussed in the Commission, members were divided on the matter; varied and finely differentiated views were expressed on this subject. With some slight simplification, these may be reduced to two general points of view. According to the first, such an article would be of doubtful utility, or should at least be limited to stating that an organization's capacity to conclude treaties depends only on the organization's rules. According to the second point of view, the article should at least mention that international law lays down the principle of such capacity; from this it follows, at least in the opinion of some members of the Commission, that, in the matter of treaties, the capacity of international organizations is the ordinary law rule, which can be modified only by express restrictive provisions of constituent instruments.

(2) The wording eventually adopted by the Commission for article 6 is the result of a compromise based essentially on the finding that this article should in no way be regarded as having the purpose or effect of deciding the question of the status of international organizations in international law; that question remains open, and the proposed wording is compatible both with the concept of general international law as the basis of international organizations' capacity and with the opposite concept. The purpose of article 6 is merely to lay down a rule relating to the law of treaties; the article indicates, for the sole purposes of the regime of treaties to which international organizations are parties, by what rules the capacity to conclude treaties should be assessed.

(3) Thus set in context, article 6 is nevertheless of great importance. It reflects the fact that every organization has its own distinctive legal image which is recognizable, in particular, in the individualized capacity of that organization to conclude international treaties. Article 6 thus applies the fundamental notion of "rules of any international organization" already laid down in article 2, paragraph 2, of the present draft. The addition in article 6 of the objective "relevant" to the expression "rules of that organization" is due simply to the fact that, while article 2, paragraph 2, relates to the "rules of any organization" *as a whole*, article 6 concerns only *some* of those rules, namely those which are relevant in settling the question of the organization's capacity.

(4) A question naturally arises as to the nature and characteristics of the "relevant rules" in the matter of an organization's capacity, and it might be tempting to answer this question in general terms, particularly with regard to the part played by *practice*. That would obviously be a mistake, and one which the text of draft article 6 seeks to avert by specifying that "the capacity of an international organization to conclude treaties is governed by the relevant rules of *that organization*".

(5) It should be clearly understood that the question how far practice can play a creative part, particularly in the matter of international organization's capacity to conclude treaties, cannot be answered uniformly for all international organizations. This question, too, depends on the "rules of the organization"; indeed, it depends on the highest category of those rules—those which form, in some degree, the constitutional law of the organization and which govern in particular the *sources* of the organization's rules. It is theoretically conceivable that, by adopting a rigid legal framework, an organization might exclude practice as a

source of its rules. Even without going as far as that, it must be admitted that international organizations differ greatly from one another as regards the part played by practice and the form which it takes, *inter alia*, in the matter of their capacity to conclude international agreements. There is nothing surprising in this; the part which practice has played in this matter in an organization like the United Nations, faced in every field with problems fundamental to the future of all mankind, cannot be likened to the part played by practice in a technical organization engaged in humble operational activities in a circumscribed sector. For these reasons, practice as such was not specifically mentioned in article 6; practice finds its place in the development of each organization in and through the "rules of the organization", as defined in article 2, subparagraph 1 (j), and that place varies from one organization to another.

(6) These considerations should make it possible to clear up another point which has been of keen concern to international organizations in other contexts,⁵⁹ but which is open to no misunderstanding so far as the present draft articles are concerned. In matters such as the capacity to conclude treaties, which are governed by the rules of each organization, there can be no question of fixing those rules as they stand at the time when the codification undertaken becomes enforceable against each organization. In reserving the practice of each organization in so far as it is recognized by the organization itself, what is reserved is not the practice *established at the time of entry into force of the codification* but the very *faculty* of modifying or supplementing the organization's rules by practice to the extent permitted by those rules. Thus, without imposing on the organizations the constraint of a uniform rule which is ill-suited to them, article 6 recognizes the right of each of them to have its own legal image.

(7) Lastly, it would, strictly speaking, have been possible for article 6 to restate in an initial paragraph the rule laid down in article 6 of the Vienna Convention: "Every State possesses capacity to conclude treaties". But it was felt that such a reminder was unnecessary and that the whole weight of article 6 could be concentrated on the case of international organizations.

Article 7. Full powers and powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by such a treaty if:

(a) he produces appropriate full powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the State for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers of Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty between one or more States and one or more international organizations;

(b) heads of delegations of States to an international conference of States in which international organiza-

⁵⁹ See *Yearbook* . . . 1972, vol II, pp. 186-187, document A/CN.4/258, para. 51.

tions participate, for the purpose of adopting the text of a treaty between States and international organizations;

(c) heads of delegations of States to an organ of an international organization, for the purpose of adopting the text of a treaty within that organization;

(d) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between the accrediting States and that organization;

(e) heads of permanent missions to an international organization, for the purpose of signing, or signing *ad referendum*, a treaty between the accrediting States and that organization, if it appears from practice or from other circumstances that those heads of permanent missions are considered as representing their States for such purposes without having to produce full powers.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty if:

(a) he produces appropriate powers; or

(b) it appears from practice or from other circumstances that that person is considered as representing the organization for such purposes without having to produce powers.

4. A person is considered as representing an international organization for the purpose of expressing the consent of that organization to be bound by a treaty if:

(a) he produces appropriate powers; or

(b) it appears from the practice of the competent organs of the organization or from other circumstances that that person is considered as representing the organization for such purpose without having to produce powers.

Commentary

(1) The first two paragraphs of this draft article deal with representatives of States and the last two paragraphs with representatives of international organizations. The former provisions implicitly concern only treaties between one or more States and one or more international organizations; the latter relate to treaties within the meaning of draft article 2, subparagraph 1 (a), namely both to treaties between one or more States and one or more international organizations and to treaties between international organizations.

(2) In the case of representatives of States, the draft broadly follows article 7 of the 1969 Vienna Convention: as a general rule, these representatives are required to produce "appropriate full powers" for the purpose of adopting or authenticating the text of a treaty between one or more States and one or more international organizations or for the purpose of expressing the consent of the State to be bound by such a treaty. There are nevertheless exceptions to this rule. First of all, as in the Vienna Convention, practice or other circumstances might result in a person being considered as representing a State despite the fact that full powers are not produced.

(3) Secondly, as in the Vienna Convention, certain persons are considered as representing a State *in virtue of their functions*. The enumeration of these persons which is given in the Vienna Convention has had to be altered to some extent. In the case of Heads of State and Ministers for Foreign Affairs (subparagraph 2 (a)) there is no change, but some amendments have been made as regards other representatives. First, article 7, subparagraph 2 (b), of the

Vienna Convention, which refers to "heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited", was not required, since it is inapplicable to the present draft article. In addition, account had to be taken not only of certain advances over the Vienna Convention represented by the Convention on the Representation of States but also of the limitations which affect certain representatives of States by virtue of their functions.

(4) Subparagraph 2 (b) of the present draft article is therefore symmetrical with article 7, subparagraph 2 (c), of the Vienna Convention in its treatment of international conferences, but it replaces the latter subparagraph's expression "representatives accredited by States to an international conference" by the more precise wording "heads of delegations of States to an international conference", which is based on article 44 of the Convention on the Representation of States. Drawing inspiration from article 9, further precision is introduced by describing that conference as one "of States in which international organizations participate".

(5) Subparagraph 2 (c) deals with the case of heads of delegations of States to an organ of an international organization and restricts their competence to adopt the text of a treaty without producing full powers to the single case of a treaty between one or more States and the organization to the organ of which they are delegated. This is because their functions do not extend beyond the framework of the organization in question.

(6) Lastly, with regard to missions to international organizations, the wording "representatives accredited by States . . . to an international organization" used in the Vienna Convention has been dropped in favour of the term "head of mission" employed in the Convention on the Representation of States; subparagraph 2 (d) and (e) of the present draft article are based on paragraphs 1 and 2 of article 12 of the latter instrument, which contain the most recent rule drafted by representatives of States in the matter. Heads of permanent missions to an international organization are competent by the very fact of their functions to *adopt* the text of a treaty between accrediting States and that organization. They may also be competent, but only by virtue of practice or other circumstances, to *sign*, or to sign *ad referendum* the text of a treaty between accrediting States and the organization concerned.

(7) The matter of representatives of international organizations raises new questions and, first, one of principle. Should the rule be established that the representative of an organization is required, like the representative of a State, to prove by an appropriate document that he is competent to represent a particular organization for the purpose of performing certain acts relating to the conclusion of a treaty (the adoption and authentication of the text, consent to be bound by the treaty, etc.)? The Commission answered that question in the affirmative, since no reason exists for international organizations not to be subject to a rule which is already firmly and universally established with regard to treaties between States. It is perfectly true that, in the practice of international organizations, formal documents are not normally used for this purpose. The treaties at present being concluded by international organizations are in large measure bilateral treaties or are restricted to very few parties; they are preceded by exchanges of correspondence which generally determine beyond all doubt the identity of the individuals who will perform on behalf of the organization certain acts relating to the procedure for the

conclusion (in the broadest sense) of the treaty. In other cases, the highest-ranking official of the organization ("the chief administrative officer of the Organization" within the meaning of article 85, paragraph 3, of the Convention on the Representation of States), with his immediate deputies, is usually considered in practice as representing the organization without further documentary evidence.

(8) These considerations should not, however, obscure the fact that, in the case of organizations with a more complex institutional structure, formal documents are necessary for the above purposes. Moreover, the present draft articles provide for the possibility, with the consent of the States concerned, of participation by international organizations in treaties drawn up at an international conference composed mainly of States (article 9), and it seems perfectly proper that in such cases organizations should be subject to the same rules as States. It is nevertheless necessary that the general obligation thus imposed on international organizations should be made as flexible as possible and that authority should exist for a practice which is accepted by all concerned, namely that of making whatever arrangements are desirable; these ends are achieved by subparagraphs 3 (b) and 4 (b), which apply the rule accepted for representatives of States to the case of representatives of international organizations. The Commission did not, however, think it possible to draw up a list of cases in which a person would be absolved by *reason of his functions* in an international organization from the need to furnish documentary proof of his competence to represent an organization in the performance of an act relating to the conclusion (in the broadest sense) of a treaty. If impossible complications are to be avoided, the present draft articles, unlike the Convention on the Representation of States, must apply to *all organizations*; and international organizations, taken as a whole, exhibit structural differences which rule out the possibility of making them the subject of general rules.

(9) There are other considerations which support this view. As has been mentioned, no organization has the same treaty-making capacity as a State; the capacity of every organization is restricted, under the terms of *draft article 6*. These differences are asserted through appropriate terminology, and the limited competence of representatives of international organizations by comparison with what applies to States is spelt out. Thus, as indicated in the commentary to article 2 above, subparagraph 1 (c) of that article confines the term "full powers" to documents produced by representatives of States, and subparagraph 1 (c bis) confines the term "powers" to documents produced by representatives of international organizations.

(10) Moreover, in the case of representatives of international organizations, the Commission felt it necessary to distinguish between the adoption and authentication of the text of a treaty, on the one hand, and consent to be bound by a treaty, on the other; the two cases are dealt with in paragraphs 3 and 4 of the present draft article, respectively. With regard to the adoption or authentication of the text of a treaty, the formulation proposed corresponds to that of subparagraph 1 (a) relating to representatives of States. With regard to consent to be bound by a treaty, however, the Vienna Convention and paragraph 1 of the present draft article provide for a case in which "a person is considered as representing a State . . . for the purpose of *expressing* the consent of the State to be bound by such a treaty". May the same provision be used in connection with the consent of international organizations to be bound by a treaty?

(11) It would seem that, generally speaking, the answer should be affirmative. As has, however, already been said, in practice the representatives of organizations rarely possess powers; the representative of an organization is often none other than the head of the secretariat of that organization and for him to confer powers on himself is inconceivable. Hence the exception laid down for the representatives of States to the rule of producing powers and the reference to practice or other circumstances leading to a person's being considered as representing a State without producing powers, becomes extremely important for organizations. The fear was expressed both within the Commission and outside it that the representatives of organizations, who are, more often than not, members of international secretariats, might declare a consent that had never been formulated by the competent organs of the organization. In order to circumvent that difficulty, the Commission in first reading made a change by comparison with the terminology employed for States. While the representative of a State "expresses" the consent of a State to be bound by a treaty, the representative of an organization merely "communicates" that body's consent (the use of the term "communicates" implying that the consent is given by an organ other than the one which declares it). The Commission retained this term in the text adopted on second reading at its thirty-third session.

(12) This solution had, however, serious disadvantages which had already been pointed out, particularly by international organizations. If the verb "to communicate" was always to be taken in the sense of "to transmit", its use would not always reflect reality, since organizations' consent is, in fact, often established at the level of their representative organs. If "to communicate" was to mean, depending on circumstances, either "to transmit" or "to establish", employing it would not provide the desired assurances. Furthermore, ambiguous use of this term is very unusual and would make for inconsistency in the wording of the draft articles, for article 67 employs the term "communication" in the normal sense of "transmission".

(13) Following the second reading of articles 27 *et seq.*, the Commission at its thirty-fourth session decided to use the same wording for representatives of organizations and of States and therefore replaced the verb "to communicate" by the verb "to express", not only in article 7, paragraph 4, but also in article 2, subparagraph 1 (c bis) and in article 47; article 67 remains unchanged. In the text of the draft articles, the verb "to express" covers, as appropriate and without distinction, the case of a consent made public by the person that established it legally and the case of a consent made public by a person other than the person or entity (the competent organ, whatever that might be) that established it legally.

(14) The Commission has also made a small change in the text of paragraph 4 to take account, in a more satisfactory form than by employing the verb "to communicate", of the concerns which first led to the use of that term. Instead of referring baldly to "practice", the Commission has specified in the final text that what is meant is "the practice of the competent organs of the organization". This has removed an ambiguity. It is a fact that the constituent treaties of many of the most important organizations contain no provision specifying which organ is competent to bind the organization. In fact, "practice" has filled the gap by means of subtle solutions denoting admission that, in many cases, the head of the secretariat of the organization (whatever his title) is competent to express the consent of that organization without reference to another organ. This

solution emanates from the requirements of international life. With regard to the question of how this practice became established, however, it must be admitted that, initially, such competence was not "established" and that it has not been "established" on the initiative solely of heads of secretariats, but just as much by the attitude adopted by all the other organs that might have been entitled to claim the competence and did not do so. Through their conduct, they allowed the practice in question to develop, take root and so become a "rule of the organization". It is the acquiescence of these organs which constitutes the practice. Should it become useful for the competences of the head of the secretariat to be developed further at a later stage, it will not suffice for him actually to exercise such competence, since the other organs of the organization can question this solution and seek to condition and limit it; if they do not do so, it will be their acceptance—tacit though it may be—which will permit the practice in question to acquire legal standing.

(15) Although the suggestion that it should do so was made in some comments,⁶⁰ the Commission did not feel it possible to provide that the executive head of an organization should have a general right, such as Heads of States, Heads of Government and Ministers for Foreign Affairs have for States, to represent an organization for the purposes of concluding a treaty. It is quite true that one cannot confer "powers" on oneself and that there is in fact a person responsible in the organizations for providing others with "powers" without giving any to himself.⁶¹ But it is necessary to uphold firmly the principle that each organization has its own highly individualized structure, and that it decides, according to its own rules, on the capacity, status and title of the person responsible for representing it without powers and, when necessary, for conferring powers on others.

Article 8. Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or that organization.

Commentary

This article reproduces the corresponding text of the Vienna Convention except for the changes necessitated by the subject-matter of the present draft articles.

Article 9. Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States and international organizations or, as the case may be, all the organizations participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty between States and international organizations at an international conference of States in which organizations participate takes place by the vote of two-thirds of the States and organizations present and voting, unless by the same majority they shall decide to apply a different rule.

⁶⁰ *Yearbook* . . . 1981, vol. II (Part Two), p. 183, annex II, sect. A.3, para. 7.

⁶¹ *Ibid.*, pp. 196-197, sect. B.1, subsect. II, para. 2.

Commentary

(1) The corresponding article of the Vienna Convention establishes a rule, namely that the adoption of the text of a treaty shall take place by the consent of all the States participating in its drawing up, together with an exception concerning the adoption of the text of the treaty at an "international conference", but it does not define an "international conference". The general view, however, has always been that this term relates to a relatively open and general conference in which States participate without the final consent of one or more of them to be bound by the treaty being regarded by the other States as a condition for the entry into force of the treaty.

(2) The present draft article exhibits a number of particular aspects which derive from the specific characteristics of international organizations. In the first place, article 9, paragraph 1, of the Vienna Convention refers, as regards a treaty, to "all the States participating in its drawing up"; no definition is given for this expression, the meaning of which is sufficiently clear when only States are involved. Where organizations are concerned, it is only possible to regard as "organizations" participating in the drawing up of the text those organizations which participate in the drawing up on the same footing as States, and that excludes the case of an organization which merely plays a preparatory or advisory role in the drawing up of the text.

(3) In examining the possible place of international organizations in the development of the international community, the Commission has had to decide whether a conference consisting only of international organizations is conceivable. The hypothesis, although exceptional, cannot be excluded; it is possible, for example, that international organizations might seek through an international conference to resolve certain problems or at least to bring uniformity into certain arrangements relating to the international civil service. It was felt, however, that even in an eventuality of that kind, each organization would possess such specific characteristics by comparison with the other organizations that there would be little point in bringing such a "conference" within the scope of the rule in article 9, paragraph 2. In the draft article proposed above, a "conference" consisting only of international organizations would fall under paragraph 1 in regard to the adoption of the text of a treaty: the text would have to be adopted by all the participants, unless a rule other than unanimous consent were established.

(4) The only specific hypothesis calling for the application of a rule symmetrical with the rule in article 9, paragraph 2, of the Vienna Convention would be that of a "conference" between States within the meaning of that Convention, in which one or more international organizations also participated with a view to the adoption of the text of a treaty between those States and the international organization or organizations concerned. In such a case, it would be proper that the rule of the two-thirds majority laid down in the text of the Vienna Convention should apply, with the two-thirds majority meaning two-thirds of all the participants, both States and international organizations. This is the aim of paragraph 2 of the present draft article. In the absence of such a provision, if States participating in the conference decided to invite one or two international organizations to participate in the conference on the same footing as States themselves, the rule in article 9, paragraph 2, of the Vienna Convention would be inapplicable; that would leave no alternative but to follow a rule of unanimous consent, possibly for the adoption of the text of a treaty and in any

case for the adoption of the rule according to which the text of a treaty is to be adopted. It was not the intention of the Commission, in proposing paragraph 2 of draft article 9, to recommend the participation of one or more international organizations in the drawing up of a treaty at an international conference; this is a question which must be examined case by case and is a matter for States to decide. The Commission merely wished to make provision for that possibility. At least in some cases, customs and economic unions may be called on to participate as such in the drawing up of conventions at international conferences. Nor was it the intention of the Commission that the provisions of paragraph 2 should be interpreted as impairing the autonomy of international conferences in the adoption of their own rules of procedure, which might prescribe a different rule for the adoption of the text of a treaty, or in filling any gaps in their rules of procedure on the subject.

(5) In second reading, the Commission modified the wording of article 9, while leaving all substantive provisions intact, in order to make it more explicit: it will be noted that paragraph 1 speaks of "The adoption of the text of a treaty" (as does article 9 of the Vienna Convention). In addition, the capacity of the "participants" in the drawing up of the text of a treaty has been clarified by distinguishing between the two categories of treaty that are the subject of the draft articles:

The adoption of the text of a treaty takes place by the consent of all the States and international organizations or, as the case may be, all the organizations participating in its drawing up. . . .

Article 10. Authentication of the text

1. The text of a treaty between one or more States and one or more international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the States and organizations participating in its drawing up; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States and those organizations of the text of the treaty or of the final act of a conference incorporating the text.

2. The text of a treaty between international organizations is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the organizations participating in its drawing up; or

(b) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those organizations of the text of a treaty or of the final act of a conference incorporating the text.

Commentary

This draft article reproduces the corresponding text (article 10) of the Vienna Convention, except for differences of presentation reflecting the two particular kinds of treaty with which it is concerned. The brief allusion at the end of paragraph 2 to a conference consisting only of international organizations should be regarded as providing for an exceptional case, as explained in connection with article 9.⁶²

⁶² See para. (3) of the commentary to article 9, above.

Article 11. Means of expressing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

2. The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.

Commentary

(1) Paragraph 1 of this draft article reproduces, in respect of the consent of States to be bound by a treaty which is implicitly between one or more States and one or more international organizations, the enumeration of the various means of expressing consent given in article 11 of the Vienna Convention as regards treaties between States.

(2) It is more difficult to enumerate the various means of establishing the consent of an international organization to be bound by a treaty to which it intends to become a party. There is no difficulty, as regards international organizations, in allowing signature, exchange of instruments constituting a treaty, acceptance, approval or accession. The Commission considers that the same principle could be accepted for international organizations as for States, namely, the addition to this list of the expression "any other means if so agreed". This formulation, adopted by the United Nations Conference on the Law of Treaties, is of considerable significance, since it introduces great flexibility in the means of expressing consent to be bound by a treaty; the freedom thus given to States, which it is proposed to extend to international organizations, bears on the terminology as well, since the Vienna Convention enumerates, but does not define, the means of expressing consent to be bound by a treaty. Practice has shown, however, that the considerable expansion of treaty commitments makes this flexibility necessary, and there is no reason to deny the benefit of it to international organizations.

(3) Article 11 reflects the decision explained above, in the commentary to article 2, to reserve for States the expression "ratification" as a means of expressing consent to be bound by a treaty and to utilize a new term, "act of formal confirmation", as the analogous means for an international organization to express consent to be bound by a treaty.⁶³

(4) During the second reading of this article, at its thirty-third session, the Commission concluded that there were no convincing reasons to maintain the distinction which had been made in the text adopted in first reading between the consent of a State to be bound by a treaty being "expressed" and that of an international organization being "established". The terminology as adopted in second reading is now uniform in that regard. This change has also been reflected in the articles which follow.

Article 12. Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of the representative of that State when:

(a) the treaty provides that signature shall have that effect;

⁶³ See article 2, subparas. 1 (b) and (b bis), above.

(b) it is otherwise established that the negotiating States and negotiating organizations were agreed that signature should have that effect; or

(c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is expressed by the signature of the representative of that organization when:

(a) the treaty provides that signature shall have that effect:

(b) it is otherwise established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations were agreed that signature should have that effect; or

(c) the intention of the organization to give that effect to the signature appears from the powers of its representative or was expressed during the negotiation.

3. For the purposes of paragraphs 1 and 2:

(a) the initialling of a text constitutes a signature when it is established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations so agreed:

(b) the signature *ad referendum* of a treaty by the representative of a State or an international organization, if confirmed by his State or organization, constitutes a full signature of the treaty.

Commentary

(1) Article 12 corresponds to article 12 of the Vienna Convention and basically provides for the same regime for both States and international organizations. It was deemed advisable to maintain separate paragraphs for States and organizations because of the important distinction between "full powers" (subpara. 1 (c)) and "powers" (subpara. 2 (c)).

(2) The other distinction, which was made at the first reading stage, involved the denial to international organizations of the faculty accorded to States under subparagraph 1 (b). The Commission concluded that there was no sound reason why the consent of an international organization to be bound by a treaty could not be expressed by signature when, in the absence of a relevant provision in the treaty, it was established that the negotiating States and negotiating organizations or, as the case might be, the negotiating organizations were agreed that signature should have that effect. In that connection, it may be stressed that the use of the term "negotiating organization" must be read in the light of the fact that the consent of an organization to be bound by signature can only be given in conformity with the relevant rules of the organization.

(3) Finally, the Commission decided in second reading to replace the ambiguous expression "participants in the negotiation" by a more precise formula inspired by the text of the corresponding article of the Vienna Convention: "the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations".

Article 13. Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty

The consent of States and international organizations or, as the case may be, of organizations to be bound by

a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or

(b) it is otherwise established that those States and those organizations or, as the case may be, those organizations were agreed that the exchange of instruments should have that effect.

Commentary

(1) This draft article reproduces article 13 of the Vienna Convention, except for the changes necessitated by the subject-matter of the draft articles. The wording of this draft article reflects the fact, although cases of the kind are now rare, that a treaty may also be constituted by an exchange of instruments when there are more than two contracting parties.

(2) The text adopted in first reading consisted of two paragraphs, one dealing with treaties between one or more States and one or more international organizations and the other dealing with treaties between international organizations. In second reading, it was decided to simplify the article by merging the two paragraphs into a single one applicable to both kinds of treaties.

Article 14. Consent to be bound by a treaty expressed by ratification, act of formal confirmation, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(a) the treaty provides for such consent to be expressed by means of ratification;

(b) it is otherwise established that the negotiating States and negotiating organizations were agreed that ratification should be required;

(c) the representative of the State has signed the treaty subject to ratification; or

(d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is expressed by an act of formal confirmation when:

(a) the treaty provides for such consent to be expressed by means of an act of formal confirmation;

(b) it is otherwise established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations were agreed that an act of formal confirmation should be required;

(c) the representative of the organization has signed the treaty subject to an act of formal confirmation; or

(d) the intention of the organization to sign the treaty subject to an act of formal confirmation appears from the powers of its representative or was expressed during the negotiation.

3. The consent of a State or of an international organization to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification or, as the case may be, to an act of formal confirmation.

Commentary

(1) This draft article deals separately with, in paragraph 1, the consent of the State in the case of treaties implicitly between one or more States and one or more international organizations and, in paragraph 2, the consent of an international organization in the case of a treaty as defined in article 2, subparagraph 1 (a)—that is to say, a treaty between one or more States and one or more international organizations or a treaty between a number of international organizations. It does not call for any comment as regards the question of the use, for the case of international organizations, of the term “act of formal confirmation”, which has already been discussed.⁶⁴ It will merely be noted that the wording of the title of this article makes it clear that the expression used there (“act of formal confirmation”) is a verbal expression describing an operation which has not so far had any generally accepted term bestowed on it in international practice.

(2) At its thirty-third session, the Commission basically maintained the text as adopted in first reading, except for a few drafting adjustments already explained⁶⁵ in connection with other articles.

Article 15. Consent to be bound by a treaty expressed by accession

The consent of a State or of an international organization to be bound by a treaty is expressed by accession when:

(a) the treaty provides that such consent may be expressed by that State or that organization by means of accession;

(b) it is otherwise established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations were agreed that such consent may be expressed by that State or that organization by means of accession; or

(c) all the parties have subsequently agreed that such consent may be expressed by that State or that organization by means of accession.

Commentary

Draft article 15 corresponds to the provisions of article 15 of the Vienna Convention and, in its present form, is the result of an attempt to simplify the text adopted in first reading by the merger into one paragraph of the earlier text's two paragraphs dealing with the two types of treaties covered by the present draft articles. As a result, there is no description of the two types of treaty involved, since the same rule applies to both. One member of the Commission abstained in the adoption of the consolidated text since, in his view, it was not possible to contemplate, in the case of a treaty concluded solely between international organizations, later accession to that treaty by States. It was also felt that such a situation should not be dealt with in the present draft, since the corresponding situation of treaties concluded solely between States being acceded to by international organizations had not been covered by the Vienna Convention. The text of article 15 as adopted in second

⁶⁴ See paras. (8) and (9) of the commentary to article 2, above.

⁶⁵ See para. (4) of the commentary to article 11 and para. (3) of the commentary to article 12, above.

reading shows changes similar to those previously made in other articles.⁶⁶

Article 16. Exchange or deposit of instruments of ratification, formal confirmation, acceptance, approval or accession

1. Unless the treaty otherwise provides, instruments of ratification, instruments relating to an act of formal confirmation or instruments of acceptance, approval or accession establish the consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations upon:

(a) their exchange between the contracting States and the contracting organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting States and to the contracting organizations or to the depositary, if so agreed.

2. Unless the treaty otherwise provides, instruments relating to an act of formal confirmation or instruments of acceptance, approval or accession establish the consent of an international organization to be bound by a treaty between international organizations upon:

(a) their exchange between the contracting organizations;

(b) their deposit with the depositary; or

(c) their notification to the contracting organizations or to the depositary, if so agreed.

Commentary

The draft article follows the provisions of article 16 of the Vienna Convention, but has two paragraphs dealing separately with the two different kinds of treaties which are the subject of this set of draft articles. In the case of acts of formal confirmation, the description of the instruments establishing their existence had been rendered in the first and second reading texts as “instruments of act of formal confirmation”. At the present session, to avoid grammatical awkwardness, it was altered to read “instruments relating to an act of formal confirmation”. The use of this term is in harmony with the expression “act of formal confirmation” in draft article 2, subparagraph 1 (b bis), and in draft articles 11 and 14, since these terms help to avoid any confusion with the confirmation referred to in draft article 8 and, as has already been explained,⁶⁷ they do not denominate, but rather describe the operation referred to.

Article 17. Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles 19 to 23, the consent of a State or of an international organization to be bound by part of a treaty between one or more States and one or more international organizations is effective only if the treaty so permits or if the other contracting States and the contracting organizations or, as the case may be, the other contracting organizations and the contracting States so agree.

2. Without prejudice to articles 19 to 23, the consent of an international organization to be bound by part of

⁶⁶ *Ibid.*

⁶⁷ See para. (9) of the commentary to article 2, above.

a treaty between international organizations is effective only if the treaty so permits or if the other contracting organizations so agree.

3. The consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

4. The consent of an international organization to be bound by a treaty between international organizations which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Commentary

This draft article deals with the two separate questions which are the subject of article 17 of the Vienna Convention. It deals with these questions in four paragraphs, giving separate consideration to the two kinds of treaties which are the subject of the present set of draft articles.

Article 18. *Obligation not to defeat the object and purpose of a treaty prior to its entry into force*

A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

(b) that State or that organization has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Commentary

The draft article follows the principle set forth in article 18 of the Vienna Convention. Again, as in articles 13 and 15 and for similar reasons of simplification, the text of article 18 as it has emerged from second reading at the thirty-third session is the result of the merger into one paragraph of what was originally two. Consequently, the reference is to "a treaty" as defined in article 2, subparagraph 1 (a), but without distinguishing between the two types of treaties involved.

SECTION 2. RESERVATIONS

General commentary to section 2

(1) Even in the case of treaties between States, the question of reservations has always been a thorny and controversial issue, and even the provisions of the Vienna Convention may not have eliminated all these difficulties.⁶⁸

⁶⁸ See P.H. Imbert, *Les réserves aux traités multilatéraux: Evolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de Justice le 28 mai 1951* (Paris, Pedone, 1979); see also the same author's "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord", *Annuaire français de droit international*, 1978 (Paris), vol. XXIV, p. 29.

Difficulties attended the Commission's discussions in first reading with regard to treaties to which international organizations are parties;⁶⁹ the compromise text finally adopted did not receive unanimous support within the Commission.⁷⁰ In the Sixth Committee, the question was discussed extensively, and widely diverging points of view emerged in 1977;⁷¹ the question was also touched upon in 1978 and 1979.⁷² It is brought out in the written observations submitted by a number of Governments and international organizations.⁷³

(2) Before examining the considerations which led to the conclusions reached by the Commission in second reading, it should be considered whether it would not in fact be possible to find some information concerning practice, despite the prevailing view that practice is lacking in this regard. In fact, this view is not entirely justified; there are a certain number of cases in which such questions have arisen. Admittedly the value of these cases is open to question: do the examples to be adduced involve genuine reservations, genuine objections or even genuine international organizations? It would seem difficult to claim that the problem of reservations has never arisen in practice, although the issue is a debatable one.

(3) An interesting legal opinion has been given in the form of an aide-mémoire addressed to the Permanent Representative of a Member State from the Secretary-General of the United Nations concerning the "Juridical standing of the specialized agencies with regard to reservations to the Convention on the Privileges and Immunities of the Specialized Agencies",⁷⁴ which was adopted by the General Assembly of the United Nations on 21 November 1947.⁷⁵ In becoming parties to this Convention, States have sometimes entered reservations, and several specialized agencies have "objected to the reservation"; after various representations, four States which had formulated reservations withdrew them. It is at the level of objections to reservations that such precedents can be invoked. According to the Secretary-General's legal opinion:

... Practice ... has established ... the right ... to require that a reservation conflicting with the purposes of the Convention and which can result in unilaterally modifying that agency's own privileges and immunities, be not made effective unless and until it consents thereto.⁷⁶

As an example of an objection by an international organization to a reservation formulated by a State, the 1947 Convention is open to dispute, in that the specialized agencies are not usually considered as "parties" to that

⁶⁹ *Yearbook* ... 1975, vol. I, pp. 237-249, 1348th to 1350th meetings; and *Yearbook* ... 1977, vol. I, pp. 70-103, 1429th to 1435th meetings.

⁷⁰ One member of the Commission did not associate himself with the compromise solution adopted and proposed another text (A/CN.4/L.253), see *Yearbook* ... 1977, vol. II (Part Two), pp. 109-110, footnote 464, and p. 113, footnote 478).

⁷¹ See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 112, document A/32/433, paras. 169-177. While some representatives supported the compromise submitted by the Commission (*ibid.*, para. 170), some sought a stricter system on the lines envisaged in the previous note (*ibid.*, para. 171), while others asked for a more liberal system (*ibid.*, para. 172).

⁷² *Ibid.*, *Thirty-third Session, Annexes*, agenda item 114, document A/33/419, para. 228; and "Topical summary ..." (A/CN.4/L.311), paras. 175-176.

⁷³ See *Yearbook* ... 1981, vol. II (Part Two), annex II.

⁷⁴ United Nations, *Juridical Yearbook 1964* (Sales No.: 66.V.4), pp. 266 et seq.

⁷⁵ General Assembly resolution 179 (II). For the text of the Convention, see United Nations, *Treaties Series*, vol. 33, p. 261.

⁷⁶ United Nations, *Juridical Yearbook 1964* ... , p. 267, para. 6.

Convention.⁷⁷ However, even if they are denied this status, there is obviously a link under the terms of the Convention between each specialized agency and each State party to the Convention, and it is on the basis of this link that the objection is made.⁷⁸

(4) A second case which arose a little later involved reservations not only to the 1947 Convention but also to the Convention on the Privileges and Immunities of the United Nations, which was approved by the General Assembly on 13 February 1946.⁷⁹ In a letter addressed to the Permanent Representative of a Member State,⁸⁰ the Secretary-General of the United Nations referred still more specifically to the position of a State which has indicated its intention of acceding to the Convention with certain reservations. Without using the term "objection", the Secretary-General indicated that certain reservations were incompatible with the Charter of the United Nations and strongly urged that the reservation should be withdrawn, emphasizing that he would be obliged to bring the matter to the attention of the General Assembly if, despite his objection, the reservation was retained, and that a supplementary agreement might have to be drawn up "adjusting" the provisions of the Convention in conformity with section 36 of the Convention. This precedent is of additional interest in that the Convention contains no provision concerning reservations and objections to reservations and also in that the States parties have made a considerable number of reservations.⁸¹

(5) A number of precedents concern the European Economic Community, and at least one of them is of particular interest. The Community is a party to several multilateral conventions, usually on clearly specified conditions. Some of these conventions prohibit reservations or give a restrictive definition of the reservations authorized; in other cases there are no indications.⁸² The Community has already entered reservations authorized under such conventions.⁸³ One case which merits some attention is the Customs

Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention) concluded at Geneva on 14 November 1975.⁸⁴ This Convention has provided that customs or economic unions may become parties to the Convention, either at the same time as all the member States do so or subsequently; the only article to which reservations are authorized is the article relating to the compulsory settlement of disputes. Both Bulgaria and the German Democratic Republic have made *declarations* to the effect that:

... the possibility envisaged in article 52, paragraph 3, for customs or economic unions to become Contracting Parties to the Convention, does not bind Bulgaria [the German Democratic Republic] with any obligations whatsoever with respect to these unions.⁸⁵

The nine (at that time) member States of the Community and the European Economic Community jointly formulated an objection in the following terms:

... The statement made by Bulgaria [the German Democratic Republic] concerning article 52(3) has the appearance of a reservation to that provision, although such reservation is expressly prohibited by the Convention.

The Community and the Member States therefore consider that under no circumstances can this statement be invoked against them and they regard it as entirely void.⁸⁶

There is no need to discuss or even to consider the legal problems created by this precedent. It merely indicates that international organizations (or at least organizations sharing certain common features with international organizations) may be called upon to take cognizance of questions relating to reservations at a time when it would not perhaps be universally recognized, even in the context of inter-State relations, that the rules of the Vienna Convention have become customary rules of international law. All that can be said is that these precedents, especially that of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies and the 1946 Convention on the Privileges and Immunities of the United Nations, show that it is not unknown in current practice for international organizations to formulate what may be considered reservations or objections.

(6) At its thirty-third session, the Commission made a general review of the articles on reservations which it had adopted in first reading. It was encouraged to pay particular attention to this issue by the difficulty of the subject, on the one hand, and by the differences of opinion that had become apparent among its members in first reading and the oral and written comments of Governments, on the other.

(7) Apart from tackling the difficult drafting problems involved, the Commission devoted a long discussion to the substantive problem of the *formulation* of reservations (art. 19 of the Vienna Convention). It was left in no doubt that this was the question that gave rise to the greatest difficulties, and that its solution required both a statement of principle and the admission of exceptions to that principle.

(8) With regard to the principle, the options are either to extend to organizations the freedom to formulate reservations conferred upon States by article 19 of the Vienna Convention or, on the contrary, to state by way of a general rule that organizations are prohibited from making reservations. In either case, the consequences of the choice can be alleviated by appropriate exceptions.

Legislation, vol. 18 (1975), No. L 100, p. 1; *ibid.*, vol. 21 (1978), No. L 160, p. 13; *ibid.*, vol. 23 (1980), No. L 100, p. 27.)

⁸⁴ ECE/TRANS/17.

⁸⁵ United Nations, *Multilateral Treaties* . . . , p. 335.

⁸⁶ *Ibid.*

⁷⁷ The legal opinion states that:

"Each specialized agency enjoys the same degree of legal interest in the terms and operation of the Convention as does a State party thereto, irrespective of the question whether or not each agency may be described as a 'party' to the Convention in the strict legal sense". (*Ibid.*, para. 5.) See also the report of the Secretary-General entitled "Depositary practice in relation to reservations" (*Yearbook* . . . 1965, vol. II, p. 102, document A/5687, paras. 23-25).

⁷⁸ See the view expressed by the Special Rapporteur in his first report: *Yearbook* . . . 1972, vol. II, p. 194, document A/CN.4/258, footnote 181.

⁷⁹ General Assembly resolution 22 (I) For the text of the Convention, see United Nations, *Treaty Series*, vol. 1, p. 15.

⁸⁰ United Nations, *Juridical Yearbook 1965* (Sales No. E.67.V.3), pp. 234 *et seq.*

⁸¹ See United Nations, *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc., as at 31 December 1979* (Sales No. E.80.V.10), pp. 35 *et seq.*

⁸² Examples of prohibition have already been cited in the report of the Commission on the work of its twenty-ninth session (*Yearbook* . . . 1977, vol. II (Part Two), pp. 108-109, footnotes 458-462). Mention can also be made of the convention on the Conservation of Migratory Species of Wild Animals signed at Bonn on 23 June 1979, which, in article 1, subpara. 1 (k), recognizes "any regional economic integration organization" as a party; article XIV restricts the right to enter reservations, but states that the reservations permitted are open to "any State or any regional economic integration organization" (*International Protection of the Environment, Treaties and Related Documents*, B. Rüster, B. Simma and M. Bock, eds. (Dobbs Ferry, N.Y., Oceana, 1981), vol. XXIII, pp. 14 and 24). One State (the USSR) objected to the mention of such organizations and has not become a party to the Convention.

⁸³ The International Convention on the Simplification and Harmonization of Customs Procedures, concluded at Kyoto on 18 May 1973, authorizes certain reservations; EEC, which is a party to the Convention, has on several occasions accepted "annexes" while availing itself of the power to formulate reservations. (*Official Journal of the European Communities*,

(9) In first reading, the Commission tried to establish a compromise between two approaches that became apparent during its discussions, the one favouring the principle of freedom and the other the principle of prohibition. As a result, it provided that the principle of freedom would apply with respect to treaties between international organizations and to reservations formulated by States, but that the possibility of reservations by international organizations to a treaty between international organizations would depend on the circumstances of the case.

(10) Not all members of the Commission subscribed to this choice, and one of them proposed a consistent series of articles based on the principle of prohibition.⁸⁷

(11) Numerous comments were made concerning the articles in first reading. In particular, it was said that the distinctions made by the Commission lacked logical justification and employed imprecise criteria. Furthermore, as an extension of the compromise solution that it had adopted concerning the formulation of reservations in articles 19 and 19 *bis*, the Commission had devoted an article 19 *ter*, having no equivalent in the Vienna Convention, to the formulation of objections to reservations, and it was claimed that the rules laid down in that article were pointless, complicated and ambiguous.

(12) Finally, the Commission had proposed in articles 19, 19 *bis* and 19 *ter* a description of the treaties in question which implied that the articles and, in consequence, the formulation of reservations applied only to multilateral treaties. While it is certain that reservations take on their full significance only in relation to multilateral treaties, it was pointed out that there had been examples in practice of reservations to bilateral treaties, that the question was the subject of dispute, and that the Vienna Convention was cautiously worded and took no stand on the matter.

(13) After a thorough review of the problem, a consensus was reached within the Commission, which, choosing a simpler solution than the one it had adopted in first reading, assimilated international organizations to States for the purposes of the formulation of reservations.

(14) Hence, the rules laid down in article 19 of the Vienna Convention now extend, in the cases of treaties between States and international organizations and treaties between international organizations, both to reservations formulated by States and to reservations formulated by international organizations. The principle of the freedom to formulate reservations that had been established for States is also valid for international organizations; this is in accordance with the wishes of such organizations and, it would seem, with a number of pointers from the realm of practice. The limits to that freedom which subparagraphs (a), (b) and (c) of article 19 of the Vienna Convention lay down for States have been applied without change to international organizations.

(15) This substantive change from the solutions chosen by the Commission in first reading makes for far simpler drafting. There is no longer any need to make a fundamental distinction between treaties between States and international organizations and treaties between international organizations; in some instances, it is even possible to forego distinguishing between the case of States and that of international organizations. Articles 19 and 19 *bis* as adopted in first reading have been reduced to a single provision, the new article 19; article 19 *ter* as adopted in first reading, which varied the regime for the formulation of objections to reservations according to whether the objection came from an organization or a State and whether the

treaty was between international organizations or between one or more States and one or more international organizations, has been deleted as having lost its *raison d'être*. The Commission has also been able, either as a direct consequence of the change in the rules it proposes concerning the formulation of reservations, or merely by the use of simpler wording, substantially to refine the text of the other articles concerning reservations and, in particular, to reduce each of the combinations of articles 20 and 20 *bis* and 23 and 23 *bis* to a single article.

Article 19. Formulation of reservations

1. A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty or it is otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

2. An international organization may, when signing, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty or it is otherwise established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations were agreed that the reservation is prohibited;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Commentary

Article 19 replaces articles 19 and 19 *bis* as adopted in first reading. It is only for the sake of clarity that the article retains separate paragraphs for States and international organizations; the rules it lays down are substantially the same in each case. Paragraph 1, concerning States, differs from article 19 of the Vienna Convention only in that it mentions both "negotiating States and negotiating organizations"; paragraph 2, concerning international organizations, speaks of "formally confirming" rather than "ratifying" and distinguishes, in subparagraph (a) between the case of treaties between States and international organizations and that of treaties between international organizations.

Article 20. Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the contracting States and contracting organizations or, as the case may be, by the contracting organizations unless the treaty so provides.

2. When it appears from the object and the purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition

⁸⁷ A/CN.4/L.253 (see footnote 70 above).

of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance of a reservation by a contracting State or by a contracting organization constitutes the reserving State or international organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force for the author of the reservation and for the State or organization which has accepted it;

(b) an objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization;

(c) an act expressing the consent of a State or of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting organization or, as the case may be, one other contracting organization or one contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Commentary

(1) As stated above, article 20 results from the merger of articles 20 and 20 *bis* as adopted in first reading. Like the corresponding provision in the Vienna Convention, the article moves directly to the problem of acceptance of and objection to reservations without the question of the "formulation" of objections having been tackled in any way in the earlier articles; this was not the case with the articles adopted in first reading, since they included article 19 *ter* (now eliminated), which was devoted to that question.

(2) Comparison of the present article 20 and article 20 of the Vienna Convention reveals two substantive points⁸⁸ which merit comment and a number of drafting changes

⁸⁸ There is a further substantive difference which was approved in first reading and to which the Commission considered it unnecessary to revert, namely the omission from paragraph 2 of the present text of all reference to the "limited number of negotiating States". Such a reference could hardly be transposed either to the field of treaties between organizations or to that of treaties between States and international organizations. The object of article 20, paragraph 2, of the Vienna Convention is to place treaties under a special regime in cases where "the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty". That text gives two criteria for the nature of such consent: the limited number of negotiating States, and the object and purpose of the treaty. The second criterion is perfectly valid for treaties between international organizations or between States and international organizations, but the first is not and has therefore been discarded. The limited degree of participation in a negotiation cannot, indeed, be measured in the same way for treaties between States as for treaties between international organizations or between States and international organizations, since the membership of international organizations already represents a multiplicity of States

which it is sufficient simply to point out. The latter concern subparagraphs 4 (a) and (b), where mention of an international organization appears alongside that of a State, and paragraph 1 and subparagraph 4 (c), where a distinction is made between the case of treaties between States and international organizations and that of treaties between international organizations.

(3) Until the second reading of the draft articles the Commission had not adopted any text symmetrical with article 5 of the Vienna Convention, and article 20 consequently contained no provision symmetrical with article 20, paragraph 3, of the Vienna Convention. The adoption of an article 5 brings within the scope of the present articles the constituent instruments of the international organizations of which at least one member is another international organization; it thus becomes necessary to insert a paragraph 3 which reproduces word for word the corresponding provision of the Vienna Convention. It is, of course, understood that the meaning of the term "treaty" is not the same in the draft articles as in the Vienna Convention.

(4) The second comment on the substance concerns article 20, paragraph 5, which deals with the effects of silence during a specified period (twelve months) with regard to a reservation formulated by a contracting State. The text of this provision as proposed in second reading is identical to that of article 20, paragraph 5, of the Vienna Convention; it provides that:

... a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

The rule therefore applies to reservations whether they are formulated by international organizations or by States; however, this new paragraph 5 does not state any rule concerning the acceptance of a reservation by an international organization in the event that the organization does not react to the reservation within a specified period. In this respect, the paragraph as adopted in first reading assimilated the situation of international organizations to that of States.

(5) The majority of the members of the Commission accepted this change only after protracted discussion. Several protests had been raised, in oral and written comments, against the assimilation of international organizations to States in this respect. It had been asserted that the paragraph in effect established "tacit acceptance" of reservations and that:

... any actions by an international organization relating to a treaty to which it is a party must be clearly and unequivocally reflected in the actions of its competent body.⁸⁹

It was also remarked that twelve months was too short a period to serve as the basis for a rule of tacit acceptance, since, in the case of some international organizations, the bodies competent to accept reservations did not hold annual sessions. It was suggested in that connection that the twelve months' time-limit might have been extended in the case of international organizations. In contrast to this, it was said that the expiry of the twelve months' time-limit had less the effect of tacit acceptance than of the prescription of a right and that organizations could not be given the privilege of prolonging uncertainty concerning the substance of treaty obligations. It was further stated that constitutional considerations specific to an organization could not in any case be taken into consideration when that organization expressed

⁸⁹ *Yearbook* 1981, vol. II (Part Two), p. 190, annex II, sect. A.13, para 2

its consent to be bound by a treaty *after* the formulation of a reservation by one of its partners. That was because the competent organs of the organization would have been aware of the reservation when they took the decision to bind the organization and their silence would therefore have been voluntary.

(6) Finally, the Commission, without thereby rejecting the principle that even where treaties are concerned, obligations can arise for an organization from its conduct,⁹⁰ has refrained from saying anything in paragraph 5 of article 20 concerning the problems raised by the protracted absence of any objection by an international organization to a reservation formulated by one of its partners. It was the Commission's view in this respect that practice would have no greater difficulty in producing remedies for the prolongation of a situation whose drawbacks should not be exaggerated.⁹¹

Article 21. *Legal effects of reservations and of objections to reservations*

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State or international organization.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State or international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization to the extent of the reservation.

Article 22. *Withdrawal of reservations and of objections to reservations*

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State or a contracting organization or, as the case may be, another contracting organization or a contracting State only when notice of it has been received by that State or that organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

⁹⁰ This question was studied again in connection with draft article 45.

⁹¹ Prolongation of uncertainties concerning the acceptance of a reservation has drawbacks principally in the case referred to in article 20, paragraph 2, since it then delays the entry into force of the treaty.

Article 23. *Procedure regarding reservations*

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by a treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

Commentary to articles 21, 22 and 23

By comparison with the texts adopted in first reading, these three articles exhibit only drafting changes, all of which have been made in order to lighten the text: article 22 now has only three paragraphs instead of four, and the new version of article 23 is a product of the merger of articles 23 and 23 *bis* as adopted in first reading. The result is that the new texts are very close to the corresponding provisions of the Vienna Convention, from which they differ only by their mention of international organizations in addition to States (art. 21, subparas. 1(a) and (b), and para. 3; art. 22, para. 1 and subpara. 3(b); art. 23, paras. 1 and 2) or by the fact that they distinguish between treaties between States and international organizations and treaties between international organizations (art. 22, subpara. 3 (a)).

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

Article 24. *Entry into force*

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States and negotiating organizations or, as the case may be, all the negotiating organizations.

3. When the consent of a State or of an international organization to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State or that organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25. Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

- (a) the treaty itself so provides; or
- (b) the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization shall be terminated if that State or that organization notifies the other States and the organizations or, as the case may be, the other organizations and the States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Commentary to articles 24 and 25

No substantive changes were made to these two articles after their second reading. Their wording is, however, considerably lighter than that of the corresponding provisions as adopted in first reading, articles 24 and 24 *bis* and articles 25 and 25 *bis* respectively having been merged to form single articles. Articles 24 and 25 as now drafted differ from the corresponding articles of the Vienna Convention only in so far as is necessary to cater for the distinction between treaties between States and international organizations and treaties between international organizations (art. 24, paras. 1, 2 and 3; art. 25, subpara. 1 (b) and para. 2).

PART III

OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION 1. OBSERVANCE OF TREATIES

Article 26. Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Commentary

This text reproduces the corresponding provision of the Vienna Convention. It calls for no comment other than that it may be said to constitute a definition of the very essence of treaties, thus recognizing that international organizations are genuine parties to legal instruments which are genuine treaties, even if some differences exist between their participation and that of States.

Article 27. Internal law of States, rules of international organizations and observance of treaties

1. A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.

3. The rules contained in the preceding paragraphs are without prejudice to article 46.

Commentary

(1) From the purely drafting point of view, the preparation of a draft article adapting article 27 of the Vienna Convention to the treaties covered by the present draft quickly led to a proposal containing three paragraphs, dealing respectively with the case of States, the case of international organizations and the reservation of article 46, which is common to both those cases.

(2) It soon appeared, however, that the case of international organizations raised major difficulties for some members of the Commission. They considered that the "rules of the organization", as newly defined in article 2, subparagraph 1 (j), could not be assimilated to the internal law of a State since those rules themselves constituted rules of international law; treaties concluded by an international organization to implement those rules, far from being exempt from compliance with them, must be subject to them so that, at least in one member's opinion, the international organization should have the right to modify the treaties in question whenever that was necessary for the legitimate and harmonious exercise of its functions. Various examples were given. For instance, resolutions of the Security Council concerning the dispatch of peace-keeping forces could result in treaties being concluded between certain States and the United Nations, but no such treaty could prevent the Council from amending the resolutions it had adopted. Again, an organization might undertake by treaty to supply certain assistance to a State, but the treaty could not prevent the organization from suspending or terminating that assistance if it decided that the State in question had failed in its obligations concerning, for example, respect for human rights. Another member of the Commission did not accept the foregoing line of argument, but maintained that international organizations are no less bound by their treaties than are States and that, consequently, international organizations are not free to amend their resolutions or to take other measures which absolve them from their international obligations without engaging their responsibility under international law.

(3) A broad exchange of views thus took place in the Commission. While there was agreement among its members on questions of principle, the Commission expressed doubts as to the advisability of drafting for organizations a paragraph 2 drawing attention to an aspect of the question which was of particular importance for international organizations, and as to the terms of such a paragraph. In first reading, it adopted the following text, subject to review of its terms in second reading:

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization.

Since the Commission considered the wording used unsatisfactory and had doubts about the need to provide for such a broad exception, it adopted in second reading paragraph 2 as set forth above. The paragraph lays down a rule for organizations which is identical to that laid down for States in paragraph 1, the term "rules of the organization" simply being substituted for the term "internal law" which is used in the case of States. The various stages along the path taken by the Commission are discussed below.

(4) One point is certain: article 27 of the Vienna Convention pertains more to the regime of international responsibility than to the law of treaties. It can thus be seen as an incomplete reference to problems which the Convention did

not purport to deal with (art. 73),⁹² even though some of its articles are not unconnected with questions of responsibility (for example, arts. 18, 48, 49, 50, 60). Hence it cannot be claimed that article 27 provides an answer to all the questions arising from the rules of international responsibility, nor can the article be transposed to the case of international organizations in the expectation of finding such an answer. According to the principles of international responsibility, a State may invoke a wrongful act of another State in order to deny it the benefit of performance of a treaty. An international organization may deny a contracting State the benefit of performance of a treaty if that State has committed a wrongful act against the organization, no matter whether that wrongful act consists in a breach of the treaty or of a general rule of international law, *or in a breach of the rules of the organization if the State is also a member of the organization*. Here then is a very clear case in which an international organization may invoke the rules of the organization, or rather a breach of the rules of the organization, or rather a breach of the rules of the organization, as a ground for its own non-performance of a treaty. However, this involves the operation of the rules of responsibility, a process which must be fully reserved in accordance with article 73 of the Vienna Convention.

(5) Another equally certain point is that article 27 contemplates only valid treaties which have been properly concluded. Where that is not the case, invalidity and not international responsibility is involved.⁹³ The problem thus becomes much more specific. Each organization has certain limits to the treaties it may conclude concerning the exercise of its functions and powers. If those limits are overstepped, the question of the validity of the treaties will arise; if they are respected, the treaties will be valid.⁹⁴ It must therefore be acknowledged that, to an extent to be determined for each organization, the possibility exists for an organization to bind itself by treaty in regard to the exercise of its functions and powers. Not to recognize this would simply be to deny the organization the right to bind itself otherwise than under purely discretionary conditions. It must be recognized, however, that it may be a delicate matter to determine the margin within which each organization can commit itself.

(6) For although the organization has some margin of freedom, constitutionally, to bind itself by treaty in regard to the exercise of its functions, the treaty which the organization concludes must still make it clear that such is its object and purpose, and this depends essentially on the will of the parties to the treaty, i.e. on their intention. In this connection, there are two conceivable hypotheses. The first

is that the organization freely and unilaterally takes a decision, by means of a resolution of one of its organs, which it reserves the right to revoke or alter unilaterally, and the sole purpose of the treaty which it concludes is to provide for the implementation of that resolution, if it is subject to that resolution, on which it is entirely dependent and whose fate it automatically follows.⁹⁵ The second hypothesis is that the organization concludes a treaty which, without being conditional on prior resolutions of the organization and without being subject to the retention or non-alteration of such resolutions, binds it in an *autonomous* manner.

(7) In the case of a treaty concluded by the organization, the question whether the first or second of the hypotheses considered above applies is, subject to article 46,⁹⁶ a question of interpretation of the treaty and has to be solved in accordance with articles 31 *et seq.*, on interpretation of treaties. This was a decisive factor in second reading; the Commission considered that it was not possible to refer here to other elements that could be taken as guides in interpreting the treaty; it also considered that it was unnecessary to add further references—to articles 6 and 31, for example—to that of article 46.

(8) If these problems are considered from a more general standpoint, the following observations can also be made. The Vienna Convention accords only a few brief references in paragraph 2 of article 30 to the question of the subordination of one treaty to another or, to put the problem in still broader terms, to the question of groups of treaties.⁹⁷ *A fortiori* it has ignored the question of the subordination of a treaty to a unilateral act of an organization; but the latter question must be set in the wider context of the regime of treaties concluded by an organization *with a member State*, which will be taken up later in the commentary to article 46. The subordination of a treaty to a unilateral act of the organization can only arise in practice for States whose status as members of an organization renders them substantially subject to the "rules of the organization".

SECTION 2. APPLICATION OF TREATIES

Article 28. *Non-retroactivity of treaties*

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

⁹² Article 27 is the result of an amendment (A/CONF.39/C.1/L.181), which was discussed at the United Nations Conference on the Law of Treaties (Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (United Nations publication, Sales No. E.68.V.7), pp. 151-158, 28th meeting of the Committee of the Whole, para. 58, and 29th meeting, para. 76). The amendment was adopted, but not before the Expert Consultant had expressed his doubts about the acceptance of a text which related mainly to international responsibility (*ibid.*, p. 158, 29th meeting, Committee of the Whole, para. 73). After consideration by the Drafting Committee, the text was approved as a separate article from article 23 (which became article 26) because it could not be placed on the same footing as the *pacta sunt servanda* rule (*ibid.*, pp. 427-428, 72nd meeting of the Committee of the Whole, paras. 29-48).

⁹³ The reservation in article 27 concerning article 46 of the Vienna Convention, which was inserted in the circumstances described in the preceding note, is of considerable importance in the case of treaties concluded by an organization *with one of its member States*, since the latter may find that breaches of the rules of the organization are invoked against it.

⁹⁴ See the commentary to article 46, below

⁹⁵ This hypothesis would also be conceivable in the case of a treaty between States. The following are two examples. The constitution of a State grants its nationals the right to vote even if they are resident abroad; to implement this provision, the State concluded a treaty with another State. Or again, a national law grants certain benefits to aliens who are resident in the country and who satisfy certain conditions; the State concludes treaties which determine the regime of administrative evidence and certification required from the country of origin to enable these aliens actually to secure without difficulty the benefits provided for by the national law. The treaties concluded for this purpose do not affect any international consolidation of the national law.

⁹⁶ If the interpretation does not lead to a choice between two constructions that are equally possible as regards the constitutionality of the commitment, but offers a choice between one construction in favour of an unconstitutional commitment and another in favour of a legally valid commitment, the latter construction should be preferred, even if it reduces the scope of the commitment.

⁹⁷ See the commentary to article 36 *bis*, below

Commentary

Neither the machinery nor the regime of the treaties covered by the present draft articles offer any reasons for departing from the text of the Vienna Convention.

Article 29. Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory.

Commentary

(1) Article 29 of the Vienna Convention, which stems from the International Law Commission's draft and an amendment adopted by the United Nations Conference on the Law of Treaties, expresses a fundamental principle: that with regard to its international commitments, a State is bound indivisibly in respect of all its parts.

(2) This principle can be extended without difficulty, by modifications of wording, to the obligations of States under treaties between one or more States and one or more international organizations, but is it possible to imagine a parallel provision concerning the obligations of international organizations? Despite the somewhat loose references which are occasionally made to the "territory" of an international organization,⁹⁸ we cannot speak in this case of "territory" in the strict sense of the word. However, since this is so and since account must nevertheless be taken of the variety of situations which the multiple functions of international organizations may involve, it seemed preferable to avoid a formula which was too rigid or too narrow. If the draft articles said that, in the case of an international organization which is a party to a treaty, the scope of application of the treaty extended to the entire territory of the States members of that organization, the draft would diverge from article 29 of the Vienna Convention by raising the question of the scope of application of a treaty, which is not expressly covered by that Convention.

(3) A problem comparable to that affecting States, and one which might in fact arise for international organizations in different and yet parallel terms, is the question of the extension of treaties concluded by an international organization to all the entities, subsidiary organs, connected organs and related bodies which come within the orbit of that international organization and are incorporated in it to a greater or lesser extent. It would be useful to make it clear that, unless there is a properly established indication to the contrary, when an international organization binds itself by treaty, it also binds all these other bodies. Conversely, a treaty concluded on behalf of a subsidiary organ should bind the entire organization as well. However, as pointed out elsewhere,⁹⁹ this is an area in which notions, vocabulary and the practice of international organizations are not settled, and it seemed wisest to leave aside a subject which it is too early to codify.

⁹⁸ "Postal territory" (Constitution of UPU, art. 1 (United Nations, *Treaty Series*, vol. 611, p. 64)); "territory of the Community" (Court of Justice of the European Communities, *Reports of Cases before the Court, 1974-78* (Luxembourg), vol. XX, p. 1421); and other examples relating, for instance, to the territory of a customs union.

⁹⁹ *Yearbook . . . 1973*, vol. II, pp. 85-86, document A/CN.4/271, paras. 65-68.

Article 30. Application of successive treaties relating to the same subject-matter

1. The rights and obligations of States and international organizations parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between two parties, each of which is a party to both treaties, the same rule applies as in paragraph 3;

(b) as between a party to both treaties and a party to only one of the treaties, the treaty to which both are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State or an organization or, as the case may be, towards another organization or a State not party to that treaty, under another treaty.

6. The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations.

Commentary

(1) The adoption, in regard to the treaties which form the subject-matter of the present draft articles of a text similar to article 30 of the Vienna Convention raised only one question of substance, which the Commission discussed but failed to settle, and which its proposed draft article 30 does not solve. Article 30 of the Vienna Convention begins with a reservation: "Subject to Article 103 of the Charter of the United Nations . . .". Could this provision, about which there can be no question so far as States are concerned, be extended to international organizations as well? Article 103 provides that:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Two arguments were advanced in the Commission. The first was that the provision extends to international organizations as well as to States because the membership of the United Nations is quasi-universal, because international organizations constitute instruments for collective action by States and because it is inconceivable that, in regard to collective action, States should rid themselves of limitations to which they are subject individually. The second argument was that Article 103 does not mention international organizations, which can therefore conclude any agreement whatsoever without having to take account of the Charter, to which they are not and cannot be parties. Besides the fact that these two arguments are diametrically opposed, some

members considered that it was not the Commission's function to interpret the Charter and that the Commission should state the proviso regarding Article 103 of the Charter in such a way that both interpretations would be possible. To that end, the reservation of Article 103 has been separated from paragraph 1 of the draft article and placed at the end of the article as paragraph 6, in terms which are deliberately ambiguous. The Commission also considered, in second reading of article 30, whether it would be advisable to propose that paragraph 6 should be stated in the form of a general article applicable to the draft articles as a whole. It decided against doing so on the grounds that such an article would add nothing to the obligations set forth in the draft articles.

(2) The various paragraphs of article 30 reproduce almost literally the corresponding paragraphs of the Vienna Convention, except for paragraph 6 which has been taken from paragraph 1 of the Vienna Convention for the reasons stated above. In second reading, the Commission simplified the wording of paragraph 4 considerably and made paragraph 5 more explicit.

SECTION 3. INTERPRETATION OF TREATIES

General commentary to section 3

(1) Draft articles 31, 32 and 33 below reproduce unchanged articles 31, 32 and 33 of the Vienna Convention. This is rendered possible by the fact that, in substance, these articles of the Convention are based on the fundamental characteristics of a consensus of wills, whoever the parties to the consensus may be, and that, in form, none of these articles defines the nature of the parties, for instance by using the term "State".

(2) This by no means implies that the practical application of the rules stated in these articles will not differ according to the parties to the treaty, its object or some other characteristic of the treaty. This is true of treaties between States, and no less true of treaties between international organizations or between one or more States and one or more international organizations. For example, it has been pointed out that "preparatory work" may have specific aspects, particularly for international organizations. The international engagement of an international organization generally entails intervention by a number of bodies and work and discussion in public of a kind likely to confer on the preparatory work various features whose importance should not be underestimated.

Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33. Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of a treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4. TREATIES AND THIRD STATES OR THIRD ORGANIZATIONS

General commentary to section 4

The articles which make up section 4 of the Vienna Convention have been transposed to treaties that are the subject of the present draft articles without causing any substantive problems, save for one point concerning article 36. A general regime has thus been established which corresponds to articles 34, 35, 36, 37 and 38 whereby the situation of international organizations is assimilated, with the exception of article 36, to that of States. Article 36 *bis* deals with a special situation, which calls for special rules, namely, that of treaties to which organizations are parties and which are designed to create rights and obligations for the member States of those organizations.

Article 34. General rule regarding third States and third organizations

A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

Commentary

The principle which the Vienna Convention lays down is only the expression of one of the fundamental consequences of consensuality. It has been adapted without difficulty to treaties to which one or more international organizations are parties; in second reading, the Commission combined in a single paragraph the two paragraphs of the draft adopted in first reading,¹⁰⁰ thus emphasizing the parallel with the Vienna Convention.

Article 35. Treaties providing for obligations for third States or third organizations

1. An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

2. An obligation arises for a third organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third organization expressly accepts that obligation in writing. Acceptance by the third organization of such an obligation shall be governed by the relevant rules of that organization.

Commentary

The provisions of this article are the rules of the Vienna Convention extended to treaties to which international organizations are parties. In first reading, the Commission provided for a further condition, namely, that the obligation established for the organization should be "in the sphere of its activities". However, acceptance by the organization is governed by the relevant rules of the organization, and as article 35 refers to that rule, it was considered unnecessary to add that further condition, since the competence of the organization is always restricted to a particular sphere of activity. In second reading, the restriction was deleted and the draft article reduced to two paragraphs.

Article 36. Treaties providing for rights for third States or third organizations

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and if the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

¹⁰⁰ *Yearbook* . . . 1977, vol. II (Part Two), p. 123. Examples will also be found in the commentary of treaties between two international organizations which offer to create rights and obligations for a third State. As already stated, a treaty between States which has as its object the creation of rights and obligations for a third organization does not fall within the scope (so far as acceptance by the organization is concerned) of either the present articles or the Vienna Convention. Such treaties are common where an existing organization is to be entrusted with new functions and powers. For another example, see article 34 of the draft articles on succession of States in respect of State property, archives and debts (*Yearbook* . . . 1981, vol. II (Part Two), pp. 80-81).

2. A right arises for a third organization from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third organization, or to a group of international organizations to which it belongs, or to all organizations, and the third organization assents thereto. Its assent shall be governed by the relevant rules of the organization.

3. A State or an international organization exercising a right in accordance with paragraph 1 or 2 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Commentary

(1) The text of article 36 distinguishes between the case where a right arises for a State and the case where it arises for an international organization. The solution embodied in article 36 of the Vienna Convention is proposed in the former circumstance (paragraph 1), but a somewhat stricter regime in the latter (paragraph 2).

(2) The presumption of consent provided for in article 36, paragraph 1, of the Vienna Convention and in paragraph 1 of the present article in respect of States has thus been eliminated in regard to the expression of the consent of an organization to accept a right accorded it by a treaty to which it is not a party. This stricter regime is justified by the fact that the international organization has not been given unlimited capacity and that, consequently, it is not possible to stipulate that its consent shall be presumed in respect of a right.¹⁰¹ The consent of the organization is therefore never presumed, but paragraph 2 of the article lays down no special conditions as to the means whereby such consent is to be expressed.

(3) Paragraph 2, like paragraph 2 of article 35, also carries a reminder, that consent continues to be governed by the relevant rules of the organization. This reminder is particularly necessary since the Vienna Convention does not define the legal theory that justifies the effects of consent. In regard to obligations, the Commission's commentary to its draft article which formed the basis for article 35 of the Vienna Convention referred to the mechanism of a "collateral agreement",¹⁰² that is, of a treaty that would come within the scope of the present articles. But, in the case of rights, other legal mechanisms, including that of *stipulation pour autrui*, have been mentioned.¹⁰³

(4) Paragraph 3 states a rule identical to that in the Vienna Convention (art. 36, para. 2), but adapts it to treaties to which international organizations are parties.

Article 36 bis. Obligations and rights arising for States members of an international organization from a treaty to which it is a party

Obligations and rights arise for States members of an international organization from the provisions of a treaty to which that organization is a party when the

¹⁰¹ It is possible to go even further and to argue that the very idea of a right, in the sense of a "subjective right", of an organization seldom corresponds to all the facts. The "rights" of an organization correspond to "functions", which the organization is not at liberty to modify. In other words, the exercise by an organization of certain "rights" is generally also a matter of performing an "obligation", at least in regard to its members, and for that reason the situation of an organization cannot be fully equated with that of a State.

¹⁰² *Yearbook* . . . 1966, vol. II, p. 227, document A/6309/Rev.1, part. II, chap. II, commentary to article 31.

¹⁰³ *Ibid.*, pp. 228-229, commentary to article 32.

parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if:

(a) the States members of the organization, by virtue of the constituent instrument of that organization or otherwise, have unanimously agreed to be bound by the said provisions of the treaty; and

(b) the assent of the States members of the organization to be bound by the relevant provisions of the treaty has been duly brought to the knowledge of the negotiating States and negotiating organizations.

Commentary

(1) Article 36 *bis* is unquestionably the one that has aroused most comment, controversy and difficulty, both in and outside the Commission. Since the first proposal submitted by the Special Rapporteur in 1977,¹⁰⁴ its form and content have undergone many changes that have modified, not only its wording, but also its scope. The evolution of the Commission's thinking on the question must first be summarized (paras. (2) to (10) below), following which the text as finally adopted by the Commission will be discussed in the commentary.

(2) There can be no question as to the development of a *de facto* situation which the Vienna Convention did not contemplate—and indeed did not have to—¹⁰⁵namely a situation where several treaties, each involving in a distinctive manner an international organization and its member States, lead to a single result which creates certain relationships between those separate commitments.¹⁰⁶ For example, a customs union, in the case where it takes the form of an international organization, normally concludes tariff agreements to which its members are not parties. Such tariff agreements would be pointless unless they were to be immediately binding on member States; this is what is provided for under the constituent treaty of the customs union¹⁰⁷ and in this way certain relationships are established between two or more treaties. But other, more modest, examples may also be given. For instance, an international organization, before concluding a headquarters agreement

¹⁰⁴ *Yearbook* . . . 1977, vol. II (Part One), pp. 128-129, document A/CN.4/298; for the different versions of article 36 *bis*, see also *Yearbook* . . . 1978, vol. II (Part Two) p. 134; tenth report of the Special Rapporteur (A/CN.4/341 and Add.1), para. 104, reproduced in *Yearbook* . . . 1981, vol. II (Part One); and eleventh report of the Special Rapporteur (A/CN.4/353), para. 26, reproduced in *Yearbook* . . . 1982, vol. II (Part One).

¹⁰⁵ It was pointed out, however, that the Vienna Convention applies to treaties between States which create an international organization and that such an organization, while not a party to its constituent instrument, is not a third party *vis-à-vis* that instrument. The effects of a treaty between States as regards a third international organization are governed neither by the Vienna Convention nor by the present draft articles.

¹⁰⁶ So far as the regime of a "group" of treaties is concerned, it is merely pointed out that article 30, para. 2, of the Vienna Convention refers to the case when "a treaty specifies that it is subject to . . . an earlier . . . treaty". However, as is noted further on, article 37 does not even mention the concept of a "collateral treaty". The Commission encountered a similar problem in connection with article 27, namely, the subordination of a treaty to a resolution of an organ of an international organization, the implementation of which must be provided for by that treaty. Another case concerns the effects of a most-favoured-nation clause which establishes a relationship between the effects of a treaty and the conclusion of other treaties; but special draft articles on most-favoured-nation clauses have been prepared by the Commission (*Yearbook* . . . 1978, vol. II (Part Two), pp. 8 *et seq.*).

¹⁰⁷ This is the well-known case of EEC. In the earlier versions of article 36 *bis*, as well as in some commentaries, it may perhaps have appeared that the article had been drafted solely in the light of the case of the Community, which would have raised *inter alia* an objection of principle, namely, that the draft articles were not meant to govern specific situations. The wording finally adopted indicates that article 36 *bis* is entirely general in scope

with a State, may wish its member States to agree among themselves, and with the organization itself, *beforehand* so as to establish, at least in part, some of the provisions of the headquarters agreement. Another possible case is where a regional organization has reason to conclude a treaty with one or more States, which are to provide substantial financial support, for the execution of a regional development project. In such cases it will often happen that State or States concerned make their assistance subject to certain financial or other undertakings on the part of the States members of the organization. The organization will then have to make sure of those commitments before the final stage of the negotiation of the assistance treaty. Consequently, in present circumstances, it is certainly possible to envisage many instances where a treaty to which an organization is party is concerned with the obligations of member States.

(3) The question which then immediately arises is whether such cases call for special rules or whether they do fall, quite simply, within the scope of articles 34 to 37 of the Vienna Convention. To start with, it should be noted that neither the Commission in its work on the law of treaties, nor the United Nations Conference on the Law of Treaties, ever referred to these or similar cases. It was always very conventional situations that were contemplated, and although theories such as *stipulation pour autrui* were sometimes mooted within the Commission, the Convention remained extremely reticent as regards the legal mechanism whereby rights and obligations could arise for third States. Only in the commentaries of the Commission and its Special Rapporteur is reference made to a "collateral agreement" to the basic treaty. By establishing two different regimes—one for rights and one for obligations—concerning the consent given by the third State, the Vienna Convention also raised difficulties in the most frequent case, where rights and obligations are created simultaneously.

(4) The advantage of including special provisions in the draft articles stems mainly from the following reasons.

(5) In the first place, the creation of obligations for a third State is made subject, both in the Vienna Convention and under the general regime established by article 35 of the draft articles, to express consent given in writing by the third State and normally subsequent to the conclusion of the treaty; the same applies to the creation of obligations for third organizations. The Commission's intention is to lay down the rule to the effect that the creation of an obligation for a third party requires, in addition to the consent of all the parties to the basic treaty, the consent of the States on whom the obligation is to be imposed, and that such consent must be express. The Commission therefore rejected a number of proposals by the Special Rapporteur which failed to underline sufficiently the need for such consent, or even provided for the possibility of presumed or implicit consent. However, in the case provided for under article 36 *bis* the requirement of express consent in writing, instituted as a general rule by article 35, needs to be made more flexible, or at least clarified, in certain respects. This is because in practice, it is apparent that in some cases, as the examples given make clear, the consent of States members of the organization is given *prior* to the conclusion of the treaty by the organization, whereas article 35 seems rather to refer to *subsequent* consent. Then the requirement of consent *in writing* also seems to refer to consent given in an instrument within the meaning of the law of treaties, and this is why the idea of a *collateral treaty* to which the third State is party is suggested by article 35. However, while the Commission

readily agrees with the finding that *proof* of the requisite consent will in point of fact be derived only from written documents, it considers that it must be made clear that the actual *idea of a collateral treaty must not be imposed or discarded in any general way* in the case contemplated by article 36 *bis*. This again is an important point which came up in the Commission only at the end of its discussions and which relates to the regime, that is, to the actual effects of the requisite consent.

(6) This is a second, and even more fundamental, reason for providing for a solution, for the case covered by article 36 *bis*, which departs from the ordinary law regime established both in the Vienna Convention and in the draft articles for article 37.

(7) Article 37 adopts different solutions as regards the extent of the consents given and the relationship between the treaty and the effects of the consents given, depending on whether rights or obligations are involved. Paragraph 1 of article 37 stipulates that an obligation may be modified only "with the consent of the parties to the treaty and of the third State": the parties to the treaty are therefore bound by the consent of the third State. That solution might seem a little surprising: why require the consent of the third State when the aim is to relieve it of a burden? The only explanation is that it is no more than the logical consequence of the requirement of consent laid down for the establishment of the obligation. In other words, even though the Vienna Convention does not make any formal reference to such an explanation, everything happens as though a treaty relationship had arisen between the parties to the treaty and third parties. This is the case of a *collateral agreement* referred to in the *travaux préparatoires* of the Special Rapporteur and the Commission. For a right, the solution is a different one, since it may be revoked by the parties to the treaty unless it is established that it "was intended not to be revocable or subject to modification without the consent of the third State". The text of the Vienna Convention¹⁰⁸ gives rise to problems of interpretation, in particular because of the combination of two separate rules when rights and obligations are established simultaneously for the benefit of a third party. But above all, it should be noted that the Convention leaves unanswered many questions concerning the links that exist between two sets of rights and obligations, the first of which binds the parties to the treaty to one another and the second which unites those same parties and a State not party to that treaty.

(8) Nonetheless, in the particular case where States are members of an international organization party to a treaty which is designed to create obligations and rights for them and to which they are not parties, the rules laid down by article 37 seem to be inappropriate. Even though they may be of only a residual character, and the parties concerned may adopt other provisions, they nonetheless lay down rules of principle which are not valid for this particular case. Actually, the case cannot be the subject of any general rule, so broad is the possible diversity of specific situations. This can be easily illustrated by referring to some of the examples given above, such as the case of an organization that has been given its form by a customs union and concludes tariff agreements with States. It will be readily agreed that the States members of such an organization are

bound to respect those tariff agreements, and it is conceivable that the States which have concluded those tariff agreements with the organization have acquired the right to insist directly on their observance by the member States of the organization. However, short of paralysing the customs union, the member States do not have the right to make their consent subject to the modification and repeal of agreements concluded by the organization. Nevertheless, in other circumstances, other organizations may postulate a contrary solution. For instance, an organization whose object is to pursue a policy of very close and very active economic co-operation among its members may conclude with a State an economic co-operation treaty that will establish a general framework for agreements which each of the States members of the organization will conclude with that same State. But, once concluded, such agreements will be completely independent of the treaty concluded by the organization, and they can continue in force even if the treaty concluded by the organization disappears.¹⁰⁹ In the case cited above, in which the States members of an organization undertake in advance to contribute up to a given sum to the implementation of a development programme, and to grant a certain status to technicians placed at the disposal of the organization by a State granting technical and financial aid to enable the programme to be implemented, the treaty which the organization concludes with the State granting the aid for the implementation of the programme will be in general linked with those commitments on the part of member States. Treaties concluded in this way will be mutually interdependent in that any infringement of one will have repercussions on the others.

(9) In view of the wide variety of situations, it is not possible to lay down a general rule, even on a residual basis. It is for the parties concerned to adjust their treaty relationships. Many problems could arise whenever a new factor happens to affect the conclusion or life of a treaty (nullity, extinction, withdrawal and suspension of implementation). It is incumbent upon the parties concerned to provide for such problems in their undertakings or, at any rate, to lay down the principles that will enable them to be solved. And it is precisely here that the need becomes apparent to give all the contracting parties, the partners of an international organization in a treaty, all the information relating to the rights and obligations that are going to arise among themselves and among the members of that organization. This obligation of information relates not only to the *substance* of those rights and obligations, but also to their *status*, that is, to the conditions and effects, to the *regime* of those rights and obligations. This may result in the inclusion of fairly lengthy, and sometimes even complicated, provisions being introduced into treaties.¹¹⁰ If the parties concerned want to make several treaties interdependent, it is necessary, in the interests of all and for the security of legal relationships,¹¹¹ that the regime of rights and obligations

¹⁰⁹ This is so in the case of treaties concluded by the CMEA. The member States, without becoming parties to those treaties, participated in their negotiation and approved them so as to enable them to enter into force. Thus, the Agreement on Co-operation between CMEA and Finland signed on 16 May 1973, provides in article 9 for the full autonomy of treaties concluded between the member States of CMEA and Finland (*International Affairs* (Moscow, October 1973), p. 123).

¹¹⁰ In order to make provision, in the Convention on the Law of the Sea, concluded on 30 April 1982 (A/CONF.62/122 and corrigenda), for organizations to which their member States had transferred the exclusive exercise of certain powers, a set of fairly complex rules was laid down in a lengthy annex IX.

¹¹¹ The States which conclude treaties with EEC have several times pointed out that serious doubts exist as to the effects of the relationships formed in this way, whether it is the implementation of responsibility, the

¹⁰⁸ The rule is expressed in article 37 in the following way.

"2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State."

thus created should be established as clearly as possible and case-by-case, since it is not possible to lay down a general rule, even on a residual basis.

(10) This is how the ideas central to article 36 *bis*, as finally put before the General Assembly, gradually took shape during the work of the International Law Commission: need for express consent of all the parties concerned in order to establish rights and obligations between, on the one hand, the States members of an international organization and, on the other, the partners of that organization in a treaty; impossibility of formulating a general rule concerning the regime of rights and obligations thus established and the correlative need to regulate by treaty, case-by-case, the solutions adopted and to inform the co-contracting parties of the organization concerned of the conditions and effects of the relations established. On the negative side, the Commission did not accept certain suggestions which were made to it and which either weakened the requirement of express consent or seemed to refer in too exclusive a manner to a case as special as that of the European Communities. Lastly, article 36 *bis* serves as a reminder—so far as situations which are highly individual but which might well multiply are concerned—of certain needs for legal security; although the initial intent that prevailed when it was first formulated has remained unchanged, namely, to take into consideration the situation of States members of an international organization which, although third parties vis-à-vis treaties concluded by the organization, *can in certain cases* find themselves in a very special situation, the actual content of article 36 *bis* has undergone profound change as a result of all the observations submitted by Governments and of the very lengthy debates in the Commission. But, after having given rise to many doubts and to some strong opposition, article 36 *bis* has been given a more specific, more precise and more modest direction than in its initial substance and, in the form in which it is now submitted at the end of that lengthy endeavour, it was possible for the members of the Commission to adopt it unanimously.

(11) The new text submitted by the Commission first calls for a preliminary remark. It refers only to the case of an international organization formed exclusively of States. By virtue of the text of article 5, adopted in second reading, the Commission has recognized, as one possibility that could materialize and of which certain indications are to be seen in practice,¹¹² the case of an organization which could include, in addition to States, one or more international organizations. These, however, are exceptional cases which would suffice neither to cause the international organization in question to lose their “intergovernmental” character, nor to modify the provisions of the draft articles as a whole. However, it will be noted that article 36 *bis* is so worded as to relate only to organizations all of whose members are States. The reason for this restriction lies in the equally exceptional character of the situations covered by article 36 *bis*. It seemed to the Commission that it would be sufficient to take account of the simplest case which, for the time being, is virtually the only one known in practice.

exercise of diplomatic protection or any other matter that is involved. The Court of Justice of the European Communities has so far proved extremely cautious in its decisions, particularly as regards the question that arose concerning the regulation of fishing in Community waters; see case 812/79, judgment of 14 October 1980 (Court of Justice of the European Communities, *Reports of Cases before the Court, 1980-7* (Luxembourg), pp. 2789 *et seq.*), and cases 181/80 and 180/80 and 266/80, judgments of 8 December 1981 (*ibid.*, 1981-9, pp. 2964 *et seq.* and 2999 *et seq.* respectively).

¹¹² The references quoted above in the commentary to article 5 may be added to the references quoted by the Special Rapporteur in his first report, *Yearbook . . . 1972*, vol. II, p. 193, document A/CN.4/258, paras. 69 and 73 and footnote 173 (see footnote 57 above).

(12) Article 36 *bis* in its final version relates both to the *obligations* and to the *rights* which could arise for the States members of an international organization out of the treaties concluded by the organization. At one stage of its work, the Commission thought that it could confine itself to *obligations*, but it ultimately transpired that this distinction was, in the event, very arbitrary, since the rights of some are the obligations of others and it was therefore necessary to consider them simultaneously.

(13) In order for the obligations and rights to be created for the member States of the organization, three conditions are necessary, two of which relate to the consent of the parties concerned and one to the information of future parties to the treaty concluded by the organization.

(14) An initial consent is necessary, that of the States and organizations parties to the treaty concluded by the organization. This consent must be *expressed*. The will to create such obligations and rights must be real. A mere intention, with little thought having been given to the full import of such a step in all its aspects, is here not enough; consent given in the abstract to the actual principle that such rights and obligations should be created is not enough; such consent must define the *conditions* and the *effects* of the obligations and rights thus created. Normally, the parties to the treaty will define the regime for these obligations and rights in the treaty itself, but they may come to some other arrangement, in a separate agreement.

(15) The second consent necessary is that of the States members of the organization. This consent must relate to those provisions of the treaty which will create obligations and rights for them. Such consent must be forthcoming from all members of the organization, for it is by virtue of their status as “members” that the effects in question will arise. Provided that it is established, this consent can be given in any manner. Article 36 *bis*, paragraph (a), starts by giving an important but exceptional example, where consent is given *in advance* in the treaty creating the organization. It is conceivable—to revert to the example of an organization given its form by a customs union—that the States have conferred upon the organization the right to conclude not only treaties which lay down rules that the member States must respect, but also treaties that give rise to obligations and rights for member States vis-à-vis third parties. However, this case remains the exception by reason of its extent, since the treaty which will create the organization will generally provide for these effects in respect of a whole category of treaties (tariff agreements, for example). Member States may, however, consent “otherwise”, that is, by a separate agreement that a particular treaty to be concluded by the organization gives rise to such effects.

(16) Lastly, under the terms of paragraph (b) of article 36 *bis*, the consent of member States must have been brought to the knowledge of States and organizations that participated in the negotiation of the treaty. This condition, laid down at the end of paragraph (b), shows clearly that what the Commission had mainly in mind when drafting the article were situations where the consent of member States to the creation of obligations and rights was prior to, or at least concomitant with, the negotiations concerning the treaty. It is the interdependence that *may* exist in some cases between an organization and its members that results in the binding of the latter vis-à-vis the treaty partners of the organization. But these partners must be fully informed of the obligations and rights that are going to arise for them vis-à-vis the members of the organization. As this situation

may alter their intentions on their position during negotiations, they must receive this information before the closure of the negotiations, since the elements communicated in this way are a vital factor. Article 36 *bis* does not specify *who* must furnish this information; depending on the circumstances, it will be the organization or the member States, or perhaps both, if the partners of the organizations so request.

(17) Lastly, it will be noted that article 36 *bis*, like articles 34, 35 and 36 of the Vienna Convention and of the present draft, does not specify the kind of legal machinery involved. As explained above, it is less necessary to do so in the case of article 36 *bis* than in the case of other articles, since the main point of article 36 *bis* is to afford the parties concerned the widest possibilities and choice, on the sole condition that they keep one another informed, that they make known exactly what they wish to do and each bring it to the attention of the others.

Article 37. Revocation or modification of obligations or rights of third States or third organizations

1. When an obligation has arisen for a third State in conformity with paragraph 1 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When an obligation has arisen for a third organization in conformity with paragraph 2 of article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third organization, unless it is established that they had otherwise agreed.

3. When a right has arisen for a third State in conformity with paragraph 1 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

4. When a right has arisen for a third organization in conformity with paragraph 2 of article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third organization.

5. The consent of an international organization party to the treaty or of a third organization, as provided for in the foregoing paragraphs, shall be governed by the relevant rules of that organization.

Commentary

The effect of the text of article 36 *bis* as adopted in second reading, is to provide for flexible solutions. In so doing, it departs from paragraphs 5 and 6 of article 37 as agreed in first reading;¹¹³ it was therefore decided that the latter should be deleted. The amended text of article 37 thus establishes as a regime of ordinary law a regime identical to that of the Vienna Convention.

Article 38. Rules in a treaty becoming binding on third States or third organizations through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or

¹¹³ See the commentary to article 36 *bis* above.

a third organization as a customary rule of international law, recognized as such.

Commentary

(1) Article 38 differs from the corresponding article in the Vienna Convention only in that it refers to both third States and third organizations. Its adoption by the Commission gave rise, in regard to international organizations, to difficulties similar to those encountered in regard to States at the United Nations Conference on the Law of Treaties.

(2) In its final report on the draft articles on the law of treaties, the Commission explained the significance of article 34 in the following terms:¹¹⁴

... It [the Commission] did not, therefore, formulate any specific provisions concerning the operation of custom in extending the application of treaty rules beyond the contracting States. On the other hand, having regard to the importance of the process and to the nature of the provisions in articles 30 to 33,¹¹⁵ it decided to include in the present article a general reservation stating that nothing in those articles precludes treaty rules from becoming binding on non-parties as customary rules of international law.

The Commission desired to emphasize that the provision in the present article is purely and simply a reservation designed to negate any possible implication from articles 30 to 33 that the draft articles reject the legitimacy of the above-mentioned process. . . .¹¹⁶

(3) Doubts were nevertheless expressed at the Conference on the Law of Treaties, and Sir Humphrey Waldock (Expert Consultant) again pointed out, at the end of one of his statements, that:

Article 34 was simply a reservation designed to obviate any misunderstanding about articles 30 to 33. It in no way affected the ordinary process of the formulation of customary law. The apprehensions under which certain delegations seemed to be labouring originated in a misunderstanding of the purpose and meaning of the article.¹¹⁷

(4) Following other statements,¹¹⁸ the Conference adopted article 34 (which subsequently became article 38) by a very large majority.¹¹⁹

(5) The present draft article does not prejudice in one way or the other the possibility that the effects of the process of the formulation of customary law might extend to international organizations, and it was with that consideration in mind that the article was approved after consideration in first reading and finally adopted by the Commission in second reading.

PART IV

AMENDMENT AND MODIFICATION OF TREATIES

General commentary to part IV

Of the three articles of part IV, only article 39 calls for comment; the other two articles show no changes, or only

¹¹⁴ Renumbered to become article 38 in the Vienna Convention.

¹¹⁵ Renumbered to become articles 34 to 37 in the Vienna Convention.

¹¹⁶ *Yearbook . . . 1966*, vol. II, p. 231, document A/6309/Rev. I, part II, chap. II, paras. (2) and (3) of the commentary to art. 34.

¹¹⁷ *Official Records of the United Nations Conference on the Law of Treaties, First session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole . . .*, p. 201, 36th meeting of the Committee of the Whole, para. 43.

¹¹⁸ Sir Francis Vallat, for example, said that:

“... article 34 was essentially a saving clause intended to prevent the preceding articles from being construed possibly as excluding the application of the ordinary rules of international law. Article 34 had never been intended as a vehicle for describing the origins, authority or sources of international law . . .” (*ibid.*, *Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 63, 14th plenary meeting, para. 38.)

¹¹⁹ *Ibid.*, p. 71, 15th plenary meeting, para. 58.

minor ones, from the corresponding texts of the Vienna Convention.

Article 39. General rule regarding the amendment of treaties

1. A treaty may be amended by agreement between the parties. The rules laid down in part II apply to such an agreement except in so far as the treaty may otherwise provide.

2. The consent of an international organization to an agreement provided for in paragraph 1 shall be governed by the relevant rules of that organization.

Commentary

The purpose of article 39 of the Vienna Convention is to establish a simple principle: what the parties have decided to do, they may also undo. Since the Convention does not lay down any particular rule as to the form of conclusion of treaties, it excludes the "*acte contraire*" principle, under which an agreement amending a treaty must take the same form as the treaty itself. The rule laid down in article 39 of the Vienna Convention is also valid for treaties between international organizations and treaties between one or more States and one or more international organizations. In first reading, the Commission had considered that such permissiveness extended only to form and that the wording of the Vienna Convention should be amended slightly so that its scope would be clearer. It had therefore replaced the expression "by agreement" by the more explicit wording "by the conclusion of an agreement", thus clarifying, but not altering, the rule of the Vienna Convention, which provides that the rules laid down in part II apply to such agreements. In second reading, the Commission preferred to revert to the text of the Vienna Convention. In first reading, the Commission had also omitted the proviso "except in so far as the treaty may otherwise provide", considering that it served no purpose since all the rules in part II are merely residual and respect the freedom of will of the parties. In second reading, however, the Commission reverted to the text of the Vienna Convention, which the new wording follows more closely. The Commission also considered that reference should be made in paragraph 2, as in many other articles, to the need for compliance in respect of such an agreement with the relevant rules of the organization.

Article 40. Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and contracting organizations or, as the case may be, to all the contracting organizations, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State or international organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any party to the treaty which does not become a party to the

amending agreement; article 30, paragraph 4 (b), applies in relation to such a party.

5. Any State or international organization which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State or organization:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41. Agreement to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

PART V

INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

SECTION I. GENERAL PROVISIONS

Article 42. Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State or an international organization to be bound by a treaty may be impeached only through the application of the present articles.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present articles. The same rule applies to suspension of the operation of a treaty.

Article 43. Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it or the suspension of its operation, as a result of the application of the present articles or of the provisions of the treaty shall not in any way impair the duty of any State or of any international organization to fulfil any obligation embodied in the treaty to which that State or that organization would be

subject under international law independently of the treaty.

Article 44. Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty, may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present articles may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State or the international organization entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52, and 53, no separation of the provisions of the treaty is permitted.

Commentary to articles 42, 43 and 44

(1) These articles, which are merely a transposition of the corresponding provisions of the Vienna Convention, raised no substantive problems either in first or in second reading and were not the subject of any comments by Governments or international organizations. The wording of article 42, which was made even less cumbersome in second reading, did not give rise to any particular difficulties.

(2) It is article 42, paragraph 2, which, as the Commission recalled following the first reading,¹²⁰ required more thorough consideration since it is open to question whether the draft articles really do cover all the grounds for terminating, denouncing, withdrawing from or suspending the operation of a treaty. In this connection, the expansion of the provisions of article 73 provides all the necessary safeguards with regard to the problems of "succession" that may arise between an international organization and a State. Since the provisions of the Vienna Convention and those of the draft articles are, moreover, only of a residual nature, the parties may, by agreement, decide to provide for specific cases of termination (for example, through the operation of a resolutive condition) or of suspension. Comments on Article 103 of the Charter of the United Nations, which some persons interpret as providing for a special case of the suspension of treaties, have already been presented in connection with article 30 above.

¹²⁰ *Yearbook* . . . 1979, vol. II (Part Two), p. 149, commentary to art. 42.

Article 45. Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

1. A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

2. An international organization may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of the conduct of the competent organ be considered as having renounced the right to invoke that ground.

Commentary

(1) Article 45 of the Vienna Convention deals with the problem of the loss by a State of the right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. By implication, but quite clearly, it excludes the possibility of disappearance of a right to invoke coercion of a representative or coercion by the threat or use of force (arts. 51 and 52) or violation of a peremptory norm (art. 53) as grounds for invalidating a treaty. The article recognizes that a State may renounce its right to invoke any ground for invalidating a treaty other than those three and any ground for terminating, withdrawing from or suspending the operation of a treaty. With regard to the means whereby the right may be renounced, article 45 mentions express agreement (subpara. (a)) and acquiescence by reason of conduct (subpara. (b)). The former has never caused any difficulty, but at the United Nations Conference on the Law of Treaties, the latter provoked discussion and some opposition,¹²¹ based on the fear that the principle it established might be used to legitimize situations secured under cover of political domination. The Conference, following the view of the Commission, adopted subparagraph (b) as a statement of a general principle based on good faith and well founded in jurisprudence.¹²² Furthermore, the articles submitted to the Conference did not provide for prescription and a number of proposals to introduce it were rejected by the Conference; this justified still further the maintenance of a certain flexibility in the means whereby States can manifest their renunciation.

(2) The Commission has retained, in draft article 45, paragraph 1, the rule laid down at the Conference for the consent of States. The Commission discussed at length the

¹²¹ *Official Records of the United Nations Conference on the Law of Treaties, First session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* . . . , pp. 390-402, 66th meeting of the Committee of the Whole, paras 46 *et seq.*, and 67th meeting.

¹²² *Yearbook* . . . 1966, vol. II, pp. 239-240, document A/6309/Rev.1, part. II, chap. II. commentary to article 42.

case of the consent of international organizations and, in first reading, dealt with it in two paragraphs. In second reading, it made very minor drafting changes in paragraph 1 to bring it into line with the corresponding provision of the Vienna Convention; and it amended and combined paragraphs 2 and 3 in a single paragraph, thus arriving at a text which was adopted without reservation by all members of the Commission.

(3) The question to be decided came down to whether the same regime should be applicable to international organizations as to States. Some members of the Commission thought that it should, on the ground that inequalities between States and international organizations should not be created in treaty relations.

(4) Other members inclined to the view that the far-reaching structural differences between States and organizations made it necessary to provide special rules for the latter. The unity of the State, it was said, meant that the State could be regarded as bound by its agents, who possessed a general competence in international relations. If one of them (a Head of State, a Minister for Foreign Affairs, or in certain cases an ambassador) became aware of the facts contemplated in article 45, it was the State which became aware of them; if one of them engaged in certain conduct, it was the State which engaged in that conduct. International organizations, on the other hand, had organs of a completely different kind; and unlike a State, an organization could not be held to be duly informed of a situation because any organ or agent was aware of it, or to be bound by conduct simply because any organ or agent had engaged in it. It was therefore considered that the Commission should retain only the case provided for in subparagraph (a) of paragraph 2, which no one disputed, and avoid any provision referring to the conduct of the organization. The same members were also of the opinion that the situation dealt with in article 46, paragraphs 3 and 4, namely, invalidity of the consent of an international organization to be bound by a treaty on the grounds of the violation of a rule of the organization regarding competence to conclude treaties, ought not to be subject to paragraph 2 in the case of international organizations; conduct governed by the relevant rules of the organization could not amount to renunciation of the right to invoke a manifest violation of a rule regarding competence to conclude treaties. Several Governments had supported that point of view.

(5) Other members of the Commission took the view that it was even more necessary for an organization than for a State that the organs able to bind it should be aware of the situation and that the "conduct" amounting to renunciation should be the conduct of those same organs; but they believed that for the security of the organization's treaty partners, and even out of respect for the principle of good faith, the rule laid down for States should be extended to international organizations, with the stipulation that the conduct of an organization duly aware of the facts might amount to the renunciation of certain rights. That solution, it was pointed out, would better protect the organization's interests; for without sacrificing any principles, it would be able to renounce a particular right in the simplest manner possible, usually by continuing to apply the treaty after becoming aware of the relevant facts. With regard to the reference, in the case of international organizations, to article 46 as one to which the rule of paragraph 2 applies, most members of the Commission had considered that organizations differed widely and that, although the relevant rules of some organizations might be very strict and rule out any possibility, even in accordance with established

practice, of supplementing or amending the constitutional rules regarding competence to conclude treaties, that was not generally the case.

(6) Since the first reading, viewpoints have converged considerably, but do not completely coincide. The draft article as adopted then contained a paragraph 2 relating to international organizations, subparagraph (b) of which retained for organizations the effects of their conduct. Two provisions took account of the problems of international organizations. First of all, the term "acquiesced" used for States in paragraph 1 and in article 45 of the Vienna Convention was eliminated in paragraph 2 as having connotations of passivity and facility which the Commission wished to avoid. By slightly amending the wording of subparagraph (b), the Commission referred to "renunciation of the right to invoke" the ground in question. In order to extend the scope of that amendment, a paragraph 3 was added as a reminder that both express agreement and conduct are subject to the relevant rules of the organization. For some members, that was a concession because they considered paragraph 3 unnecessary since it merely restated a principle clearly established elsewhere. Other members, however, welcomed the reminder. With regard to the reference to article 46 in paragraph 2, some members still had doubts and reservations.

(7) In second reading, any remaining doubts in the way of a unanimous solution to that problem were dispelled by means of the solution which had been adopted in article 7, paragraph 4, above and which could easily be applied to article 45. It consisted in referring not simply to "its conduct" in subparagraph (b) but, rather, to the "conduct of the competent organ". As stated in paragraph (14) of the above commentary to article 7, this new formula guarantees that renunciation of the right to invoke a ground for invalidity will *never* be used against the will or even without the participation of the competent organ. It is not the conduct of just any organs that will alone determine whether there has been a renunciation, but, rather, the conduct of the competent organ, whose competence may have been overlooked. To take a theoretical example, it may be said that a treaty giving rise to a financial debt for an organization must, according to the relevant rules of that organization, be authorized by an assembly of Government representatives. Such a treaty concluded by the head of the secretariat *without* such prior authorization is irregularly concluded. However, if the assembly adopts measures to implement the agreement (for example, by approving funds or an agreement concerning the immunities of the members of a mission sent to implement that treaty), it will normally be considered that the organization has, by its conduct, renounced its right to invoke the invalidity of that agreement. This explicit reference to the competence of the organ whose conduct amounts to renunciation made it unnecessary to refer in paragraph 3, as adopted in first reading, to the relevant rules of the organization and paragraph 3 was therefore eliminated.

SECTION 2. INVALIDITY OF TREATIES

Article 46. Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to

conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. In the case of paragraph 1, a violation is manifest if it would be objectively evident to any State or any international organization referring in good faith to normal practice of States in the matter.

3. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

4. In the case of paragraph 3, a violation is manifest if it is or ought to be within the knowledge of any contracting State or any contracting organization.

Commentary

(1) Article 46 of the Vienna Convention is one to which the Commission and the Conference on the Law of Treaties devoted a great deal of time and attention. With regard to an issue which was the subject of much theoretical discussion (question of “unconstitutional treaties” and “imperfect ratifications”), the Commission proposed and the Conference adopted a solution making reasonable provision for the security of legal relations. The Vienna Convention recognizes the invalidity of a treaty concluded in violation of the internal law of a State, but on two conditions: the rule violated must be one of fundamental importance and the violation must have been manifest, that is to say, “objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith”.

(2) The Commission discussed at length the question whether a provision similar to article 46 of the Vienna Convention should apply to the treaties governed by the draft articles. Although it generally agreed that the reply to that question should be affirmative, it decided to make special provision for the consent of international organizations and even slightly to amend the text of the Vienna Convention relating to the consent of States. Draft article 46 contains four paragraphs, the first two relating to the consent of States and the last two to the consent of international organizations. The title of the article, which was amended in second reading to bring it into line with that of the article 46 of the Vienna Convention, refers to provisions of internal law of a State and rules of an international organization.

(3) Paragraph 1 does not give rise to any difficulties; it reproduces the text of the Vienna Convention. The same basic solution was adopted in paragraph 3 dealing with the consent of international organizations, but the Commission hesitated to stipulate, with regard to the invalidity of the consent of international organizations, that the violation of the rules of the organization regarding competence to conclude treaties must concern “a rule of fundamental importance”. It had deleted those words in first reading, considering that organizations required full protection against a violation regardless of the importance of the rule violated. In second reading, the Commission decided that there was no reason to establish different regimes for organizations and for States. Some members also pointed out that the second condition provided for in article 46, namely, that the violation must have been *manifest*, did not overlap with the first condition.

(4) It was mainly the “manifest” character of a violation that occupied the Commission’s attention both with regard to the consent of States and to that of organizations.

(5) With regard to the consent of States, the Commission had confined itself in first reading to proposing a text of paragraph 2 that was identical with that of paragraph 2 of the Vienna Convention. In second reading, the suggestion that a reference to international organizations should be added to the definition of the manifest character of a violation would have led to the following text:

A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with normal practice and in good faith.

In discussing the merits of the addition of those words, the Commission found that the text of the Vienna Convention was ambiguous and that, if account was taken of the presence of one or more organizations in treaty relations, different wording from that of the Vienna Convention would have to be adopted and it would, in particular, have to be made clear that it is the normal practice of *states* which serves as the basis to which the other parties to the treaty are entitled to refer. If a violation of the internal law of a State is not apparent to one of the partners, whether a State or an international organization, which compares the conduct of the State whose internal law has been violated with the normal conduct of States in the matter, the violation is not manifest. If, however, that partner learned of the violation by other means, the violation could be invoked against it since it would not have the benefit of good faith, the need for which, in this connection and in others, is recalled in paragraph 2.

(6) With regard to the “manifest” character of the violation of the relevant rules of an organization regarding competence to conclude treaties, the problem is a different one. In the case of States, reference can rightly be made to the practice of States because such practice is, broadly speaking, the same for all States and it invests with exceptional importance the expression by certain high-level agents of the State (Heads of State or Government and Ministers for Foreign Affairs, under article 7 of the Vienna Convention) of the will of a State to be bound by a treaty. But no such agents exist in the case of international organizations. The titles, competence and terms of reference of the agents responsible for the external relations of an international organization differ from one organization to another. It can therefore not be said that there is a “normal practice of organizations”; there are thus no general guidelines or standards by which the basis for the conduct of the treaty partners of an organization may be defined.

(7) Other criteria may, however, be used to define the “manifest” character of a violation by reference to those partners. In the first place, if they are aware of the violation, the organization will be able to invoke it against them as a ground for the invalidity of its consent in accordance with the principle of good faith, which applies both to States and to organizations. There is, however, another criterion: invalidity can be invoked when the partners *ought to* have been aware of the violation, but in fact were not. Either through indifference or through lack of information, they violate an obligation incumbent on them and therefore cannot claim that by invoking invalidity, an international organization is refusing them the security to which they are entitled. Cases in which the partners of the organization should be aware of a violation may arise in a number of situations, but one in particular warrants attention: that in

which an organization concludes a treaty with its own members.

(8) In such a case, the partners of the organization must be aware of the rules regarding the conclusion of treaties. In the first place, it is with them that the information originates; and, in the second, the partners (which, in this case are, for practical purposes, States) take part, through their representatives in the organs of the organization, in the adoption of the most important decisions and, indirectly, but most certainly, assume a share of the responsibility for the conclusion of irregular treaties. When a violation of the relevant rules of the organization is established, it is established in respect of the members of that organization, which can thus invoke it against them. In view of the many important treaties concluded by organizations of a universal character, the practical significance of a case of this kind need not be stressed.

(9) These comments call for an observation which goes beyond the framework of article 46. Several Governments drew the Commission's attention to the importance of making special provision for treaties concluded between an organization and its own members. There are two reasons why the Commission did not, generally speaking, adopt special rules for this category of treaties: first, when it conducted its inquiry among international organizations,¹²³ this problem elicited no comments, even in the case of the very specialized organizations whose rules constitute a valuable and well-ordered legal system.¹²⁴ Doubts were, however, expressed regarding the legal nature of agreements which are concluded not between an organization and its member States, but between organs and related bodies within an organization and which usually concern administrative matters.

(10) Secondly, the member States of an organization are third parties in respect of the treaties concluded by the organization; this principle is not open to dispute and derives from the legal personality of the organization. The member States of an organization are, however, not exactly third States like the rest; the problems to which some treaties concluded by the organization give rise in respect of its member States have already been discussed at length in the commentary to article 36 *bis*; problems of the same kind underlay article 27; and still others, which have been mentioned, arise in connection with article 46. The Commission therefore points out that it is these articles, more than any others, that it discussed. Although it may have been premature to try to deal systematically with such situations, the Commission did take them into consideration.

Article 47. Specific restrictions on authority to express the consent of a State or an international organization

If the authority of a representative to express the consent of a State or of an international organization to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States and negotiating organizations or, as the case may be, to the other

¹²³ See p 10, para. 15, above.

¹²⁴ Should such treaties, however, comply with the rules of the organization not only with regard to competence to conclude treaties, but also with regard to the substantive rules of the organization? This question, as stated above in the commentary to article 27, is of real practical interest.

negotiating organizations and negotiating States prior to his expressing such consent.

Commentary

(1) Article 47 of the Vienna Convention concerns the case in which the representative of a State has received every formal authority, including full powers if necessary, to express the consent of the State to be bound by a treaty, but in addition has had his powers restricted by *instructions* to express that consent only in certain circumstances, on certain conditions or with certain reservations. Although the representative is bound by these instructions, if they remain secret and he does not comply with them, his failure to do so cannot be invoked against the other negotiating States, and the State is bound. For the situation to be different, the other States must have been notified of the restrictions *before* the consent was expressed.

(2) This rule was maintained in article 47 for States and extended to cover international organizations. As a result of the use in the draft articles adopted in second reading of the words "to express" instead of the words "to communicate" for the consent of an organization (see art. 7, para. 4, above), the wording of the draft article has been greatly simplified and article 47 has been reduced from two paragraphs to one.

Article 48. Error

1. A State or an international organization may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State or that organization to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State or that organization to be bound by the treaty.

2. Paragraph 1 shall not apply if the State or international organization in question contributed by its own conduct to the error or if the circumstances were such as to put that State or that organization on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

Commentary

(1) With article 48 and the case of error, the Vienna Convention tackles what have sometimes been called cases of "vitiation of consent". It seemed to the Commission that this aspect of the general theory of treaties was also applicable to consent given by international organizations to be bound by a treaty. It therefore adopted draft article 48, which, apart from minor drafting changes in paragraphs 1 and 2, is identical with article 48 of the Vienna Convention.

(2) This does not mean, however, that the practical conditions in which it is possible to establish certain facts which bring the error regime of article 48 into operation will be exactly the same for organizations as for States. The Commission therefore considered the possible "conduct" of an organization and the conditions in which it should be "put . . . on notice of a possible error". Paragraph 2, in which these terms occur, is certainly based on the fundamental idea that an organization, like a State, is responsible for its conduct and hence for its negligence. In the case of an international organization, however, proof of negligence will have to take different and often more rigorous forms

than in that of State because—to revert once more to the same point—international organizations do not have an organ equivalent to the Head of State or Government or Minister for Foreign Affairs which can fully represent them in all their treaty commitments and determine the organization's "conduct" by its acts alone, thus constituting in itself a seat of decision to be "put on notice" of everything concerning the organization. On the contrary: in determining the negligence of an organization, it will be necessary to consider each organization in the light of its particular structure, to reconstitute all the circumstances that gave rise to the error and to decide, case-by-case, whether there has been error or negligent conduct on the part of the organization, not merely on the part of one of its agents or even of an organ. But after all, international jurisprudence on error by a State shows that the situation is not simple for States either, and that, as in all questions of responsibility, factual circumstances play a decisive role for States as they do for organizations.

Article 49. Fraud

A State or an international organization induced to conclude a treaty by the fraudulent conduct of a negotiating State or a negotiating organization may invoke the fraud as invalidating its consent to be bound by the treaty.

Commentary

(1) By making fraud (defined as fraudulent conduct by another negotiating State to induce a State to conclude a treaty) an element invalidating consent, article 49 of the Vienna Convention provides an even more severe sanction for a delictual act of the State than for error. Although international practice provides only rare examples of fraud, there is no difficulty with the principle, and the Commission recognized that an international organization could be both defrauded and defrauding. Draft article 49 departs from the Vienna Convention only in terms of its wording, which was amended and shortened in second reading.

(2) In itself, the idea of fraudulent conduct by an international organization undoubtedly calls for the same comments as were made on the subject of error. In the first place, there will probably be even fewer cases of fraudulent conduct by organizations than by States. It is perhaps in regard to economic and financial commitments that fraud is least difficult to imagine; for example, an organization aware of certain monetary decisions already taken but not made public, might by various manoeuvres misrepresent the world monetary situation to a State in urgent need of a loan, in order to secure its agreement to particularly disadvantageous financial commitments. But it must be added that the treaty instruments of organizations are usually decided upon and concluded at the level of collective organs, and it is difficult to commit a fraud by collective deliberation. Thus cases of fraud attributable to an organization will be rare, but it does not seem possible to exclude them in principle.

Article 50. Corruption of a representative of a State or of an international organization

A State or an international organization the expression of whose consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by a negotiating State or a negotiating organization may invoke such corruption as invalidating its consent to be bound by the treaty.

Commentary

(1) Corruption of the representative of a State by another negotiating State as an element vitiating consent to be bound by a treaty seemed to the Commission, early in its work, a necessary, if extraordinary, case to mention. Unfortunately, corruption has since proved less exceptional than was then believed. Draft article 50 therefore provides for the case where the organization is either the victim of corruption or guilty of it, making the necessary drafting changes to the text and title of article 50 of the Vienna Convention. The text was further refined and shortened in second reading.

(2) Here again, as in the case of articles 48 and 49, it must be recognized that active or passive corruption is not so easy for a collective organ as it is for an individual organ, and this should make the practice of corruption in international organizations more difficult. It must not be forgotten, however, that corruption within the scope of article 50 of the Vienna Convention (and draft article 50) can take many forms. A collective organ can never in fact negotiate; in technical matters, negotiation is always based on expertise or appraisals by specialists, whose opinions are sometimes decisive and may be influenced by corruption. Although States and organizations are unlikely to possess funds that do not have to be accounted for, they have other equally valued and effective assets, in particular, the power of nomination to high posts and missions. Although it is to be hoped that cases of corruption will prove extremely rare, there is no technical reason for excluding them, even where international organizations are concerned.

Article 51. Coercion of a representative of a State or of an international organization

The expression by a State or an international organization of consent to be bound by a treaty which has been procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.

Commentary

It can hardly be contested that coercion of an individual in his personal capacity may be employed against the representative of an organization as well as against the representative of a State; it should merely be pointed out that in general the representative of a State has wider powers than the representative of an organization, so that the use of coercion against him may have more extensive consequences. Drafting changes similar to those made in previous articles have been made to the text and title of article 51 of the Vienna Convention.

Article 52. Coercion by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Commentary

(1) The text of article 52 of the Vienna Convention has been used without change for draft article 52. The title adopted in first reading, which was based on that of the Vienna Convention, referred to coercion "of a State or of

an international organization"; in second reading, the title was shortened; it no longer refers to the entities coerced.

(2) The extension of article 52 to treaties to which one or more organizations are parties was nevertheless discussed at length by the Commission, which sought to assess the practical effect of such extension. Is it really conceivable that all, or at least many, international organizations may suffer, or even employ, the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations?

(3) In trying to answer that question, the Commission inevitably faced the question whether article 52 of the Vienna Convention covers only the threat or use of *armed* force or whether it covers coercion of every kind. This is a long-standing problem; it was formerly discussed by the Commission, which at that time confined itself to a cautious reference to the principles of the Charter. The question was taken up again at the United Nations Conference on the Law of Treaties, which considered amendments explicitly referring to political and economic pressure¹²⁵ and ultimately adopted a Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties as an annex to the Final Act. The Declaration solemnly condemns:

the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent.¹²⁶

The General Assembly had discussed the question before the Conference took place (see resolution 2131 (XX) of 21 December 1965)¹²⁷ and has reverted to it on a number of occasions since 1969. In particular texts, it has prohibited the use of armed force and has condemned aggression (notably in resolution 3314 (XXIX) of 14 December 1974 entitled "Definition of Aggression"), but it has repeatedly pointed out that this prohibition does not cover all forms of the illegal use of force, e.g. in the preamble to resolution 3314 (XXIX), in the preamble and the text of the annex to resolution 2625 (XXV) of 24 October 1970;¹²⁸ in resolution 2936 (XXVII) of 29 November 1972;¹²⁹ in resolution 3281

¹²⁵ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 172, document A/CONF.39/14, para. 449

¹²⁶ *Ibid.*, p. 285, document A/CONF.39/26, annex.

¹²⁷ Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, para. 2 of which reads:

"No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind . . ."

¹²⁸ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. See, in particular, the third principle:

"The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter:

" . . . armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

"No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind . . ."

¹²⁹ Non-use of force in international relations and permanent prohibition of the use of nuclear weapons.

(XXX) of 12 December 1974;¹³⁰ in resolutions 31/91 of 14 December 1976¹³¹ and 32/153 of 19 December 1977,¹³² etc.

(4) In the light of these numerous statements of position, the view can certainly be supported that the prohibition of coercion established by the principles of international law embodied in the Charter goes beyond armed force; and this view has been expressed in the Commission. Nevertheless, the Commission did not find it necessary to change the formulation of article 52, which is sufficiently general to cover all developments in international law. Moreover, even taking armed force alone, enough examples can be imagined to warrant extending the rule in article 52 of the Vienna Convention to international organizations.

(5) Any organization may be compelled to conclude a treaty under the pressure of armed force exerted against it in violation of the principles of international law. To mention only one example, the headquarters of an international organization might find itself in an environment of threats and armed violence, either during a civil war or in international hostilities; in those circumstances, it might be induced to consent by treaty to give up some of its rights, privileges and immunities, in order to avoid the worst. If the coercion was unlawful, for example in a case of aggression, the treaty would be void. Armed force can also be directed against the agents or representatives of any organization outside its headquarters, in which case an agreement concluded by the organization to free such persons from the effects of unlawful armed force would be void under draft article 52.

(6) It is obvious that the unlawful use of armed force by an organization is possible only if the organization has the necessary means at its disposal; hence only a few organizations are concerned. The problem is, nevertheless, sufficiently important to have been considered by the General Assembly on several occasions. In certain resolutions concerning the unlawful use of armed force it has avoided the term "international organization", preferring the even broader expression "group of States".¹³³ In 1970, in resolution 2625 (XXV), it set out the consequences of the "principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter" in the following terms: "No State or group of States has the right to intervene . . ." etc. Later, in resolution 3314 (XXIX) ("Definition of Aggression"), it reverted to this question in the explanatory note to article 1, as follows:

In this Definition the term 'State' . . .

(b) Includes the concept of a 'group of States' where appropriate.

However the expression "group of States" is defined, it covers an international organization, so it can be concluded that the General Assembly provides sufficient authority for recognizing that an international organization may in theory be regarded as making unlawful use of armed force.

(7) It was also pointed out that the United Nations Charter itself, in acknowledging the action of regional agencies for the maintenance of peace and in requiring their activities to

¹³⁰ Charter of Economic Rights and Duties of States—in particular, arts. 1 and 32.

¹³¹ Non-interference in the internal affairs of States.

¹³² *Idem.*

¹³³ In the Charter of Economic Rights and Duties of States (resolution 3281 (XXIX)), in article 12, the General Assembly used the term "groupings" of States

be in conformity with the Charter, had recognized that those activities could in fact violate the principles of international law embodied in the Charter.

(8) In the light of all these considerations, the Commission proposes a draft article 52 which extends to international organizations the rule laid down for States in the Vienna Convention. Certain members of the Commission, however, were of the view that the extension of the rule to international organizations was based on highly theoretical considerations which they felt need not be stressed.

Article 53. *Treaties conflicting with a peremptory norm of general international law (jus cogens)*

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Commentary

(1) Draft article 53 involves only a provisional and unimportant difference with respect to article 53 of the Vienna Convention, namely, a reference to "the present articles" instead of to "the present Convention".

(2) It is apparent from the draft articles that peremptory norms of international law apply to international organizations as well as to States, and this is not surprising. International organizations are created by treaties concluded between States, which are subject to the Vienna Convention by virtue of article 5 thereof; despite a personality which is in some respects different from that of the States parties to such treaties, they are none the less the creation of those States. And it can hardly be maintained that States can avoid compliance with peremptory norms by creating an organization. Moreover, the most reliable known example of a peremptory norm, the prohibition of the use of armed force in violation of the principles of international law embodied in the Charter, also applies to international organizations, as we have just seen in connection with draft article 52.

(3) The Commission considered the question whether draft article 53 should retain the expression "international community of States" used in article 53 of the Vienna Convention. That expression could conceivably have been supplemented by a reference to international organizations, which would result in the phrase "international community of States and international organizations". But in law, this wording adds nothing to the formula used in the Vienna Convention, since organizations necessarily consist of States, and it has, perhaps, the drawback of needlessly placing organizations on the same footing as States. Another possibility would have been to use the shorter phrase "international community as a whole". On reflection, and because the most important rules of international law are involved, the Commission thought it worthwhile to point out that, in the present state of international law, it is States that are called upon to establish or recognize peremptory norms. It is in the light of these considerations that the formula employed in the Vienna Convention has been retained.

SECTION 3. TERMINATION AND SUSPENSION
OF THE OPERATION OF TREATIES

Article 54. *Termination of or withdrawal from a treaty under its provisions or by consent of the parties*

The termination of a treaty or the withdrawal of a party may take place:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties, after consultation with the other contracting States and the other contracting organizations or, as the case may be, with the other contracting organizations.

Commentary

Consultation with contracting States that are not parties to a treaty was provided for in article 54 of the Vienna Convention for the following reasons explained at the Conference on the Law of Treaties by the Chairman of the Drafting Committee:

... that question had been raised in the Drafting Committee, where it had been pointed out that there were a few cases in which a treaty already in force was not in force in respect of certain contracting States, which had expressed their consent to be bound by the treaty but had postponed its entry into force pending the completion of certain procedures. In those rare cases, the States concerned could not participate in the decision on termination, but had the right to be consulted; nevertheless, those States were contracting States, not parties to the treaty, for the limited period in question.¹³⁴

In order to extend this provision to international organizations, the last part of paragraph (b) of the article has been amended to provide for the two cases: treaties between States and international organizations and treaties between international organizations. The wording was revised on second reading.

Article 55. *Reduction of the parties to a multilateral treaty below the number necessary for its entry into force*

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Commentary

This draft article reproduces the text of article 55 of the Vienna Convention without change, but it should be recognized that, for the time being, it can concern only very few cases. Its application is limited to multilateral treaties open to wide participation, and so far as treaties between international organizations are concerned, this case will be exceptional. As regard treaties between States and international organizations, there will be treaties between States which are open to wide participation by States and also to some international organizations on certain conditions. This practice is gaining ground in the economic sphere, particularly as regards commodity agreements. This possibility had been provided for in other articles of the draft, for example in article 9, paragraph 2.

¹³⁴ *Official Records of the United Nations Conference on the Law of Treaties, First session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole . . .*, p. 476, 81st meeting of the Committee of the Whole, para 6.

Article 56. Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Commentary

The text of article 56 of the Vienna Convention has been adopted without change for this draft article. It will be remembered that in the final draft articles on the law of treaties between States the Commission did not adopt the provision now in subparagraph 1 (b);¹³⁵ it was added at the Conference on the Law of Treaties.¹³⁶ This was the provision that gave rise to the greatest difficulties of application for treaties between States, and will probably do so for the treaties which are the subject of the present draft articles. Which treaties are in fact by their *nature* denounceable or subject to withdrawal? In the case of treaties between international organizations, should treaties relating to the exchange of information and documents be included in this category? Treaties between one or more States and one or more international organizations include a class of treaties which, although having no denunciation clause, seem to be denounceable: the headquarters agreements concluded between a State and an organization. For an international organization, the choice of its headquarters represents a right whose exercise is not normally immobilized; moreover, the smooth operation headquarters agreement pre-supposes relations of a special kind between the organization and the host State, which cannot be maintained by the will of one party only. These considerations, which were discussed in the Commission's 1979 report in connection with this article,¹³⁷ were referred to by the International Court of Justice in its advisory opinion of 20 December 1980 on the *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*.¹³⁸ Other examples of treaties which might by their nature be the subject of withdrawal or denunciation are more questionable, except of course that of the denunciation by an international organization of an agreement whose sole purpose is to implement a decision of the organization which it has reserved the right to modify.¹³⁹

Article 57. Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties, after consultation with the other contracting States and the other contracting organizations or, as the case may be, with the other contracting organizations.

Commentary

The same drafting changes made in the text of article 54 in first and second readings were made in the text of article 57 of the Vienna Convention.

Article 58. Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(a) the possibility of such a suspension is provided for by the treaty; or

(b) the suspension in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Commentary

(1) No change has been made to the text of article 58 of the Vienna Convention, not even to make the title of the article correspond more precisely to the wording of the text, which provides for suspension of the operation of "provisions of the treaty", not of "the treaty" as a whole. But it follows from article 59 of the Convention that the Convention does not exclude the case of suspension of all the provisions of a treaty.

(2) There is no reason for not extending the provisions of article 58 of the Vienna Convention to treaties to which international organizations are parties.

Article 59. Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

¹³⁵ *Yearbook* . . . 1966, vol II, pp. 250-251, document A/6309/Rev.1, part II, chap II, art. 53 and commentary thereto

¹³⁶ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* . . . , p 177, document A/CONF.39/14, paras. 485 *et seq.*

¹³⁷ *Yearbook* . . . 1979, vol. II (Part Two), pp. 156-157.

¹³⁸ *I.C.J. Reports 1980*, p 96, para. 49.

¹³⁹ See the commentary to article 27, above.

Commentary

There is no departure from the text or title of article 59 of the Vienna Convention. Article 59, like article 58, lays down rules which derive from a straightforward consensuality approach and may therefore be extended without difficulty to the treaties which are the subject of the present draft articles.

Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State or international organization, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State or international organization;

(c) any party other than the defaulting State or international organization to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present articles; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Commentary

Article 60 of the Vienna Convention governs the effects of the breach of a treaty on the provisions of that treaty, and lays down principles in this matter which there is no reason not to extend to treaties to which international organizations are parties. Hence only minor drafting changes were needed in the text of article 60.

Article 61. Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable

for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Commentary

(1) The text of draft article 61 does not differ from that of article 61 of the Vienna Convention, which was adopted at the Conference on the Law of Treaties without having given rise to particular difficulties. The principle set forth in article 61 of the Vienna Convention is so general and so well established that it can be extended without hesitation to the treaties which are the subject of the present draft articles. The title of the article is perhaps a little ambiguous because of its possible implication that the text of the article embraces all cases in which a treaty cannot be performed. But the substance of the article shows that it refers exclusively to the case of permanent or temporary impossibility of performance which results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. It is therefore evident that this provision of the Vienna Convention does not seek to deal with the general case of *force majeure*, which is a matter of international responsibility and, in regard to international responsibility among States, was the subject of draft article 31 adopted in first reading by the Commission at its thirty-first session.¹⁴⁰ Furthermore, article 73 of the Vienna Convention like article 73 of the present draft reserves all questions relating to international responsibility.

(2) Although it is not for the Commission to give a general interpretation of the provisions of the Vienna Convention, it feels it necessary to point out that the only situations contemplated in article 61 are those in which an object is affected, and not those in which the subject is in question. Article 73, to which the draft article 73 mentioned above corresponds, also reserves all questions that concern succession of States and certain situations concerning international organizations.

(3) As regards the nature of the object in question, article 61 of the Vienna Convention operates in the first place like draft article 61, where a physical object disappears; an example given was the disappearance of an island whose status is the subject of a treaty between two States. Article 61, however, like draft article 61, also envisages the disappearance of a legal situation governing the application of a treaty; for instance, a treaty between two States concerning aid to be given to a trust territory will cease to exist if the aid procedures show that the aid was linked to a trusteeship regime applicable to that territory and that the regime has ended. The same will apply if the treaty in question is concluded between two international organizations and the administering State.

(4) Whether treaties between States, treaties between international organizations, or treaties between one or more States and one or more organizations are concerned, the application of article 61 may cause some problems. There are cases in which it may be asked whether the article involved is article 61 or in fact article 62. Particular cases

¹⁴⁰ See *Yearbook* . . . 1979, vol. II (Part Two), p. 122.

mentioned were those in which financial resources are an object indispensable for the execution of a treaty and cease to exist or cannot be realized. Problems of this kind may in practice occur more often for international organizations than for States, because the former are less independent than the latter. It must be borne in mind in this connection that under draft article 27, although an organization may not withdraw from a validly concluded treaty by a unilateral measure not provided for in the treaty itself or in the present draft articles, it is not excluded that it may, where a treaty has been concluded for the sole purpose of implementing a decision taken by the organization, terminate all or part of the treaty if it amends the decision. In applying the article, account must be taken as regards international organizations not only of the other rules set forth in the present draft but also of the reservations established in article 73; these concern a number of important matters which the Commission felt it was not at present in a position to examine.

Article 62. Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty between two or more States and one or more international organizations, if the treaty establishes a boundary.

3. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Commentary

(1) Article 62 of the Vienna Convention is one of its fundamental articles, because of the delicate balance it achieves between respect for the binding force of treaties and the need to terminate or withdraw from treaties which have become inapplicable as a result of a radical change in the circumstances which existed when they were concluded and which determined the States' consent. Article 62 therefore engaged the attention of the Commission and the United Nations Conference on the Law of Treaties for a long while; it was adopted almost unanimously by the Commission itself and by a large majority at the Conference.¹⁴¹ The Commission had no hesitation in deciding that

provisions analogous to those of article 62 of the Vienna Convention should appear in the draft articles relating to treaties to which international organizations are parties. It nevertheless gave its attention to two questions, both of which concern the exceptions in paragraph 2 of the article of the Vienna Convention.

(2) To begin with the exception in subparagraph 2 (b) of article 62 of the Vienna Convention, concerning the invoking of a fundamental change of circumstances which is the result of a breach, by the party invoking it, of an international obligation, the question is whether the exception arises in such simple terms for an organization as it does for a State. The change of circumstances which a State invoking it faces through a breach of an international obligation is always, in regard to that State, the result of a wrongful act imputable to itself alone, and a State certainly cannot claim legal rights under such a wrongful act which is imputable to it. The question might arise in somewhat different terms for an organization, bearing in mind the hypotheses mentioned above in connection with article 61. For a number of fundamental changes can result from acts which take place inside and not outside the organization; these acts are not necessarily imputable to the organization as such (although in some cases they are), but to the States members of the organization. The following examples can be given. An organization has assumed substantial financial commitments; if the organs possessing budgetary authority refuse to adopt a resolution voting the necessary appropriations to meet those commitments, there is quite simply a breach of the treaty and the refusal cannot constitute a change of circumstances. But if several member States which are major contributors to the organization leave it and the organization subsequently finds its resources reduced when its commitments fall due, the question arises whether there is a change of circumstances producing the effects provided for in article 62. Other situations of this kind could be mentioned. Article 62, like article 61, therefore requires that account be taken of the stipulations or reservations made in other articles of the draft, including article 27 and especially article 73. The extent to which the organization's responsibility can be dissociated totally from that of its member States is a difficult subject and basically a matter of the responsibility of international organizations; article 62 reserves not only that question, but also certain issues involved in changes which, in the life of organizations, alter the relationship between the organization and its member States (termination of organizations, changes in membership of the organization).

(3) The first exception, that in article 62, subparagraph 2 (a), on treaties establishing boundaries, nevertheless took up more of the Commission's time both in first and second readings. It involves two basic questions: the first must be considered initially in the light of the Vienna Convention and relates to the notion of a treaty which "establishes a boundary"; the second concerns the capacity of international organizations to be parties to a treaty establishing a boundary. Since the answer to the first question will have some bearing on the answer to the second, the two issues must be looked at in turn.

(4) The Vienna Convention has now entered into force and the practice of the States bound by it will govern the meaning of the expression "treaties establishing a boundary". Subject to that proviso, a number of important observations can be made. First of all, the expression certainly means more than treaties of mere delimitation of land territory and include treaties of cession, or in more

¹⁴¹ *Yearbook . . . 1966*, vol. I (Part One), p. 130, 842nd meeting, para. 53; *Official Records of the United Nations Conference on the Law of Treaties, Second session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole . . .*, p. 121, 22nd plenary meeting, para. 47

general terms, treaties establishing or modifying the territory of States; this broad meaning emerges from the preparatory work, since the Commission altered its original wording to reflect the broader meaning in response to comments from Governments.¹⁴²

(5) The main problem, however, is to determine the meaning of the word "boundary". The scope of the question must be defined first of all. The term "boundary" customarily denotes the limit of the land territory of a State, but it could conceivably be taken more broadly to designate the various lines which fix the spatial limits of the exercise of different powers. Customs lines, the limits of the territorial sea, continental shelf and exclusive economic zone and also certain armistice lines could be considered as boundaries in this sense. But it is important to be quite clear about the effects attaching to the classification of a particular line as a "boundary"; some of the lines may be "boundaries" for one purpose (opposability to other States, for example) and not for others (totality of jurisdiction). In regard to article 62, the effect of the quality of "boundary" is a stabilizing one. To say that a line is a "boundary" within the meaning of article 62 means that it escapes the disabling effects of that article.

(6) In this connection, many questions were raised in the Commission concerning certain lines intended to effect maritime delimitations, particularly as a result of the work of the Third United Nations Conference on the Law of the Sea and of the Convention on the Law of the Sea.¹⁴³ It was noted that the outer limit of the territorial sea is a true limit of the territory of the State, which is not the case with other lines.¹⁴⁴ A distinction must, however, be made between the two questions at issue. First of all, it is, of course, possible to try to determine whether in general, a line delimiting a maritime area constitutes a boundary. Even if this first question is answered affirmatively, however, consideration must also be given to a question relating to the interpretation of article 62 of the Vienna Convention: is such a boundary covered by that article? Lines of maritime delimitation (not to mention the delimitation of air space) may in fact have special features and it is possible that the stabilizing effect of article 62 does not extend to certain lines of maritime delimitation, even if, to all intents and purposes, they constitute true boundaries. In any event, the Commission is not equipped to interpret either the Vienna Convention or the Convention on the Law of the Sea. That position was stated again in the Commission in second reading and, as will be seen in paragraph (12) below, it was reflected in still closer adherence to the wording of the Vienna Convention.

(7) The second question concerns the capacity of organizations to be parties to treaties establishing boundaries. An important preliminary remark is that international organizations do not have "territory" in the proper sense; it is simply analogical and incorrect to say that the Universal Postal Union set up a "postal territory" or that a particular

customs union had a "customs territory". Since an international organization has no territory, it has no "boundaries" in the traditional meaning of the word and cannot therefore "establish a boundary" for itself.

(8) But can an international organization be said to "establish a boundary" for a State by concluding a treaty? The question must be understood correctly. An international organization, by a treaty between States, can quite definitely be given power to settle the future of a territory or decide on a boundary line by a unilateral decision; one example of this is the decision on the future of the Italian colonies taken by the United Nations General Assembly under the 1947 Treaty of Peace. But the point at issue at present is not whether the organization can dispose of a territory where it is especially accorded that authority, but whether by negotiation and treaty it can dispose of a territory which *ex hypothesi* is not its own. Although this situation is conceivable theoretically, not a single example of it can yet be given.

(9) Indications that such a situation might occur were nevertheless mentioned. It could do so if an international organization administered a territory internationally, under international trusteeship, for example, or in some other way. Although the practice examined on behalf of the Commission¹⁴⁵ is not at present conclusive, the possibility remains that the United Nations might have to assume responsibility for the international administration of a territory in such broad terms that it was empowered to conclude treaties establishing a boundary on behalf of that territory.

(10) During the discussions in first reading, it had also been pointed out that the new law of the sea could demonstrate that an international organization (the International Sea-Bed Authority) might have to conclude agreements establishing lines, some of which might be treated as "boundaries".

(11) The Commission recognized the interest which might attach to the hypotheses of this kind, but felt that its task for the time being was simply to adapt article 62 of the Vienna Convention to provide for the treaties which are the subject of the present articles; the article has been worded from the traditional standpoint that only States possess territory and that only delimitations of territories of States constitute boundaries. The only treaties (in the meaning of the present articles) to which the rule in article 62, paragraph 2 (a), of the Vienna Convention will therefore have to apply are those establishing a boundary between at least two States to which one or more international organizations are parties. The organizations may be parties to such a treaty because the treaty contains provisions concerning functions which they have to perform; one instance of this is where an organization is required to guarantee a boundary or perform certain functions in boundary areas.

(12) In the circumstances, the Commission followed the Vienna Convention as closely as possible; in second reading, it even adopted drafting changes which brought the text of the draft article more into line with that of article 62 of the Vienna Convention.

(13) Of the three paragraphs of the Vienna Convention, the first and the third refer to the principle and effects of the rule enunciated, while the second states the exceptions of the application of the rule. Paragraphs 1 and 4 of draft article 62 are identical with paragraphs 1 and 3 of article 62 of the Vienna Convention. Article 62, paragraph 2, was

¹⁴² See *Yearbook* . . . 1966, vol. II, p. 259, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties, para. (11) of the commentary to article 59.

¹⁴³ Convention adopted on 30 April 1982 (A/CONF.62/122 and corrigenda).

¹⁴⁴ Mention might be made in this connection of the distinction drawn by the parties in regard to the competence of the arbitral tribunal constituted by the United Kingdom and France to make delimitations in the English Channel and the Mer d'Iroise, in respect of the delimitation of the continental shelf and the delimitation of the territorial sea (*Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, decision of 30 June 1977* (United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F 80.V.7), pp. 130 *et seq.*)).

¹⁴⁵ See the Secretariat study "Possibilities of participation by the United Nations in international agreements on behalf of a territory". *Yearbook* . . . 1974, vol. II (Part Two), p. 8, document A/CN.4/281.

divided into two separate paragraphs—paragraphs 2 and 3—in the draft article. Paragraph 3 of the draft article reproduces word for word the introductory sentence and subparagraph (b) of article 62, paragraph 2, of the Vienna Convention. Lastly, the only differences appear in paragraph 2 of the draft article. It was necessary to specify that reference was being made not to any treaty, but rather, solely to a “treaty between two or more States and one or more international organizations”; the first sentence and subparagraph (a) of article 62, paragraph 2, of the Vienna Convention were run together without change; two minor drafting changes were thus made in the text adopted in first reading.

Article 63. Severance of diplomatic or consular relations

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 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.

Commentary

(1) The severance of diplomatic or consular relations does not as such affect either existing treaties between the States concerned or the ability of those States to conclude treaties. Evident as they are, the rules to this effect have not always been fully appreciated or gone unchallenged in the past, and the Vienna Convention therefore embodied them in two articles, article 63 and article 74; the latter will be considered later. The only exception to the first rule, and one as evident as the rule itself, is that of treaties whose application calls for the existence of such relations. For instance, the effects of a treaty on immunities granted to consuls are suspended for as long as consular relations are interrupted. As diplomatic and consular relations exist between States alone, the general rule in article 63 of the Vienna Convention is solely applicable, as far as the treaties dealt with in the present articles are concerned, to treaties between two or more States and one or more international organizations. Draft article 63 therefore been limited to this specific case.

(2) The Commission observed that, in today's world, relations between international organizations and States have, like international organizations themselves, developed a great deal, particularly, but not exclusively, between organizations and their member States. Permanent missions to the most important international organizations have been established—delegations whose status is in many aspects akin to that of diplomatic agents, as shown by the Convention on the Representation of States. It is beyond question that the severance of relations between a State and an international organization does not affect the obligations incumbent on the State and on the organization. To take the simplest example, if the permanent delegation of a State to an international organization is recalled or if the representatives of a State do not participate in the organs of the organization as they should under its constituent instrument, the substance of the obligations established by that instrument remains unaffected.

(3) That situation, which was discussed in the Commission and in the comments of several Governments, was reconsidered in second reading. The Commission took the view that it was not necessary to burden the text of article 63 with a provision concerning that case. Even if that question

is considered to be of great importance, the legal source of the relations between an organization and its member States is, in the vast majority of cases, the constituent instrument of the organization, that is to say, a treaty between States governed by the Vienna Convention, and it is therefore in that Convention that such a provision should have been included. The draft articles would cover only the case in which one of the members of an organization was another international organization or specific cases in which a treaty between an organization and a State, whether or not a member of that organization, established such specific organic relations as the local appointment of delegations, commissions and other bodies of a permanent kind. If these permanent organic relations were severed, the principle of article 63, which is merely an application of the general principles of the law of treaties, would obviously apply.

Article 64. Emergence of a new peremptory norm of general international law (*jus cogens*)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Commentary

(1) The notion of peremptory norms of general international law, embodied in article 53 of the Vienna Convention, had been recognized in public international law before the Convention existed, but that instrument gave it both a precision and a substance which made the notion one of its essential provisions. The Commission therefore had no hesitation in adopting draft article 53, which extends article 53 of the Vienna Convention to treaties to which one or more international organizations are parties.

(2) As stated above in the commentary to article 53, what makes a rule of *jus cogens* peremptory is that it is “accepted and recognized by the international community of States as a whole” as having that effect.

(3) These remarks apply equally to article 64 of the Vienna Convention and to the identical draft article 64. The emergence of a norm which is peremptory as regards treaties cannot consist in anything other than recognition by the international community of States as a whole that the norm in question has that character. The precise effects of this occurrence are the subject of draft article 71, considered below.

SECTION 4. PROCEDURE

Article 65. Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present articles, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification

may carry out in the manner provided in article 67 the measure which it has proposed.

3. When an objection is raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. The notification or objection made by an international organization shall be governed by the relevant rules of that organization.

5. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

6. Without prejudice to article 45, the fact that a State or an international organization has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Commentary

(1) Both the Commission and the United Nations Conference on the Law of Treaties were keenly aware of the fact that the first three sections of part V of the Vienna Convention (like the corresponding articles of the draft), in giving a methodical and complete account of all the possible cases in which a treaty ceased to be applicable, might give rise to many disputes, and in the long run seriously weaken the *pacta sunt servanda* rule. There could be no question, however, of disregarding altogether the rule which enables States to make their own judgements of the legal situations which concern them. In its draft articles on the law of treaties the Commission, in what is now article 65 of the Convention, established certain safeguards concerning the procedure by which States should conduct their unilateral actions. The Conference on the Law of Treaties decided to supplement these safeguards by providing, in the case of persistent disputes, for recourse to third parties, that is to say the International Court of Justice, arbitration or a conciliation commission.

(2) The system established in article 65 was adopted without opposition at the Conference, and the Commission considers that, with certain slight drafting changes, it can easily be extended to the present draft articles. The purpose of the mechanism established under article 65 is to ensure a fair procedure for the States in dispute, based on notification, explanation, a moratorium, and the possibility of recourse to the means for settlement of disputes specified in Article 33 of the Charter. The significance of the various components of the mechanism is illuminated by the procedural details given in article 67.

(3) In addition to minor drafting changes, two amendments to article 65 of the Vienna Convention were made in draft article 65; the first, to which the Commission devoted a considerable amount of time and attention in both readings, resulted in the amendment of the text adopted in first reading. The first point concerns the three-month moratorium and the question whether it might not be too short to enable an organization to decide whether to raise an objection to another party's claim since some of the organs competent to take such a decision meet only infrequently. Some members of the Commission considered that the time-limit should either be extended or determined by flexible wording such as "within a reasonable period". In first reading, the Commission had retained the three-month

time-limit, noting that the permanent organs of the organization could always raise an objection and then subsequently withdraw it. Particular account also had to be taken of the fact that, during the prescribed period, the notifying party had to continue to apply the treaty and of the fact that it would be unreasonable to sacrifice its interests.

(4) The discussion in second reading took a new turn on the basis of a problem relating to the interpretation of the Vienna Convention. Does article 65, paragraph 2, of the Vienna Convention deprive the notifying party's treaty partners of the right to raise an objection after the expiry of the three-month period—in other words, does it establish an extinctive prescription of the right to object to the notification? It is pointed out that a party which makes a notification without receiving communication of an objection can *lawfully* take the measure contemplated and that, since its good faith is established, its conduct in no way engages its responsibility. It can be maintained that it is necessary to go further and say that its claim is validly and finally established, particularly in view of the wording of paragraph 3, which clearly links recourse to the means indicated in Article 33 of the Charter—and hence the very possibility of the existence of a dispute—to the mechanism of the paragraph: "If, however, objection has been raised by any other party . . .". The contrary can also be maintained by pointing out that the question of *prescription* of grounds for invalidity was discussed at length at the Conference on the Law of Treaties,¹⁴⁶ but that no prescription was established; the Conference merely referred in article 45 to the effects of acquiescence resulting from the conduct of the State concerned. That would, moreover, explain the reference to article 45 in the last paragraph of article 65. Whatever the interpretation of the Vienna Convention, which the Commission is not entitled to make, it was considered that, in the case of the treaties which are the subject of the draft articles, it would be advisable not to provide for loss of the right to raise an objection to a notification designed to suspend the operation of a treaty. Accordingly and whatever interpretation was given to the Vienna Convention, the Commission had to draft paragraph 3 in such a way as to make that choice clear. It therefore replaced the words "If, however, objection has been raised by any other party . . ." in paragraph 3 by the words "When an objection is raised by any other party". This new wording indicates that an objection may be raised at *any* time.

(5) A second substantive amendment was made in article 65. Invoking a ground for withdrawing from conventional obligations and making an objection to another party's claim are sufficiently important acts for the Commission to have considered it necessary, as in the case of other draft articles (art. 35, para. 2; art. 36, para. 2; art. 37, para. 5; art. 39, para. 2) to specify that, when these acts emanate from an international organization, they are governed by the relevant rules of the organization. The rules in question are, of course, the relevant rules regarding the competence of the organization and its organs. This provision forms a new paragraph 4. The paragraphs of the draft article corresponding to article 65, paragraphs 4 and 5, of the Vienna Convention have been renumbered as paragraphs 5 and 6, the sole addition being that of the words "international organization" in paragraph 6.

¹⁴⁶ See the amendments proposed by Guyana and the United States of America (A/CONF.39/C.1/L.267 and Add.1) and Australia (A/CONF.39/C.1/L.354), *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference . . .*, p. 164, para. 382, and the discussions at the 66th meeting of the Committee of the Whole, *ibid.*, First session, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole . . .*, p. 390, paras. 44 *et seq.*

Article 66. Procedures for arbitration and conciliation

If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or article 64 may, by written notification to the other party or parties to the dispute, submit it to arbitration in accordance with the provisions of the Annex to the present articles, unless the parties by common consent agree to submit the dispute to another arbitration procedure;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present articles may set in motion the conciliation procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations, unless the parties by common consent agree to submit the dispute to another conciliation procedure.

Commentary

(1) Article 66 and the Annex to the Vienna Convention were not drafted by the Commission, but by the United Nations Conference on the Law of Treaties itself. Many Governments considered that the provisions of article 65 failed to provide adequate safeguards for the application of part V of the Vienna Convention, and they feared that a detailed statement of all the rules that could lead to the non-application of a treaty might encourage unilateral action and thus be a threat to the binding force of treaties; other Governments did not share those fears and considered that article 65 already provided certain safeguards. The opposing arguments were only settled by a compromise, part of which consisted of article 66 of the Vienna Convention.¹⁴⁷

(2) This brief reminder will explain two peculiarities of article 66. The first is that an article which, as its title indicates, is devoted to settlement of disputes does not appear among the final clauses but in the body of the treaty; the second is that this article does not claim to cover all disputes relating to the interpretation or application of the Convention, but only those concerning part V. It will also be noted that, in regard to the latter disputes, it distinguishes between articles 53 and 64 on the one hand and any of the remaining articles in part V on the other; disputes in the former case may be submitted to the International Court of Justice by written application, while the remainder entail a conciliation procedure. This difference is justified purely by the fact that the notion of peremptory norms appeared to certain States to call for specially effective procedural safeguards owing to the radical nature of its consequences, the relative scarcity of fully conclusive precedents and the developments that article 64 appeared to foreshadow.

(3) The Commission decided to propose a draft article 66, even though the considerations which had led it fifteen years ago not to propose provisions for the settlement of disputes in the draft articles on treaties between States had lost none of their weight. The Commission took this decision for two reasons. Firstly, by inserting article 66 in the body of the Vienna Convention, immediately after

article 65, the Conference on the Law of Treaties had taken the position that substantive questions and procedural questions were linked as far as part V was concerned, and the Commission considered that it should abide by the positions taken by the Conference. Secondly, the Commission did not wish to shy away from an effort which might help the States concerned to decide which position they should adopt. In so doing, the Commission remains fully alive to the continuing differences among States on this question today. The solution which it adopted in second reading was rejected by some members; it establishes compulsory arbitration for disputes concerning the application or the interpretation of articles 53 or 64 and compulsory conciliation for disputes concerning the other articles in part V. Another solution providing only for compulsory conciliation for disputes concerning the interpretation and application of all the articles of part V was proposed by one of the members.¹⁴⁸ Before commenting on the text of article 66 adopted in second reading, it is necessary to recall the solution adopted in first reading and the reasons why it was subsequently rejected.

(4) The transposition of the solutions adopted at the Conference in 1969 concerning disputes to which international organizations are parties involves a major procedural difficulty: international organizations cannot be parties in cases before the International Court of Justice. Consequently, in the case of disputes concerning *jus cogens* to which an international organization is a party, recourse cannot be had to judicial proceedings before the Court. In 1980, the Commission studied various means of remedying the situation, including the establishment of the right of some organizations to request an advisory opinion from the Court.¹⁴⁹ In view of all the imperfections and uncertainties of such a procedure, however, the Commission decided not to include it in the text of article 66. It finally adopted a rather simple solution, while taking into account the difference between States and international organizations stemming from the Statute of the International Court of Justice: disputes concerning the interpretation or the application of articles 53 and 64 to which only States were parties would be submitted to the Court, while the conciliation procedure would be compulsory for all other disputes whatever the articles in part V concerned.

(5) In addition to providing for a difference in the treatment of States and international organizations, this solution might raise procedural difficulties by blurring the distinction between judicial settlement and conciliation. Such disputes, especially as they concern *jus cogens*, may involve more than two parties, and a shift from judicial settlement to conciliation might easily take place as a result of a decision of an international organization making common cause with one of the States parties to the dispute. It was perhaps impossible to resolve all the problems raised by disputes involving more than two parties; although the Vienna Convention related only to disputes between States, it did not deal with the problems arising in connection with

¹⁴⁸ In this case, the wording of article 66 would be as follows:

"If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedure shall be followed:

"Any one of the parties to a dispute concerning the application or the interpretation of any of the articles in Part V of the present articles may set in motion the conciliation procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations, unless the parties by common consent agree to submit the dispute to another conciliation procedure."

¹⁴⁹ *Yearbook . . . 1980*, vol. II (Part Two), p. 87, para. (9) of the commentary to article 66.

¹⁴⁷ The article was finally adopted by 61 votes to 20, with 26 abstentions (*ibid.*, Second session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole . . . , p. 193, 34th plenary meeting, para. 72).

disputes involving more than two parties. It was, however, difficult to overlook the practical difficulties which might result from the solution adopted by the majority of the members of the Commission in first reading.

(6) In these circumstances, the Commission drew on the solutions adopted in the Convention on the Law of the Sea¹⁵⁰ and proposed a draft article 66 whose general design is simple: judicial settlement is no longer explicitly provided for as the means of settling disputes concerning articles 53 and 64; it is replaced by arbitration, by means of machinery which guarantees that the Arbitral Tribunal may always be established and, for disputes concerning other articles in part V, the system of compulsory recourse to conciliation instituted by the Vienna Convention is retained. In any event, article 66 does not create any essential discrimination between States and organizations.

Article 67. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1, must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument emanating from a State is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. If the instrument emanates from an international organization, the representative of the organization communicating it may be called upon to produce powers.

Commentary

(1) In the commentary to draft article 65, it was shown how article 67 supplemented article 65 of the Vienna Convention. It must thus be extended to the treaties which are the subject of the present draft articles, and calls for adjustment only as far as the powers to be produced by the representative of an organization are concerned.

(2) The meaning of article 67 of the Vienna Convention needs to be clarified. In relation to acts leading a State to be bound by a treaty, article 7 of the Convention provides, firstly, that certain agents represent States in virtue of their functions, in such a way that they are dispensed from having to produce full powers (art. 7, para. 2); other agents can bind the State only if they produce appropriate powers or if "it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers. (subpara. 1 (b))". If these rules are compared with those established by article 67 of the Vienna Convention for the act whereby a State divests itself of its obligation, it can be seen that the Convention is stricter in the latter case; unless the instrument is signed by the Head of State, Head of Government or Minister for Foreign Affairs, "the representative of the State . . . may be called upon to produce full powers". This greater stringency, and particularly the elimination of dispensation from the production of full powers by virtue of practice or the presumption drawn from the circumstances, is readily

¹⁵⁰ Annexes V and VII of the Convention (A/CONF.62/122 and corrigenda).

understandable considering that one of the guarantees afforded by the procedure laid down in articles 65 and 67 is the use of an instrument characterized by a degree of formality. It was sought to avoid any ambiguity in a procedure designed to dissolve or suspend a treaty, and to set a definite time-limit for that procedure; no account can therefore be taken either of practice or of circumstances, which are invariably ambiguous factors taking firm shape only with the passage of time.

(3) It is necessary in draft article 67 to complete the text of the Convention by providing for the case of international organizations; as far as their consent is concerned, a distinction similar to that for States needs to be made between the procedure for the conclusion of a treaty and the procedure for its dissolution or suspension. As regards the expression of consent to be bound by a treaty, draft article 7 (para. 4) provides for only two cases: the production of appropriate powers and the tacit authorization resulting from the practice of the competent organs of the organization or from other circumstances. If the rules applying to the dissolution of a treaty are to be stricter than those applying to the expression of consent to be bound by a treaty, there are two possible solutions: either to require appropriate powers in all cases, without provision for the case of tacit authorization resulting from practice or other circumstances, or to provide, as in the case of States, that the representative of the organization may be called upon to produce powers. After adopting the first solution on first reading, the Commission adopted the second in second reading, finding that it was difficult to justify requiring production of powers where the agent making the communication was at the same time the agent authorized to issue powers.

Article 68. Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

Commentary

(1) Article 68 of the Vienna Convention is designed to help safeguard the security of treaties and did not raise any difficulties either in the Commission or at the United Nations Conference on the Law of Treaties. The essential effect of the instruments revocable under this provision is, in varying degrees, the non-application of the treaty. As long as these instruments have not taken effect, they can be revoked. There is no reason why such a natural provision should not be extended to the treaties which are the subject of the present draft articles; draft article 68 contains no departure from the corresponding text of the Vienna Convention.

(2) The Vienna Convention does not specify what form the "revocation" of the notifications and instruments provided for in article 67 (or for that matter the "objection") should take. The question is not important in the case of the "notification", which can only be made in writing, but it is important in the case of the "instrument". While recognizing that there is no general rule in international law establishing the "*acte contraire*" principle, the Commission considers that, in order to safeguard treaty relations, it would be logical for the "revocation" of an instrument to take the same form as the instrument itself, particularly as

regards the communication of the "full powers" and "powers" provided for in article 67.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69. Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present articles is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of the consent of a particular State or a particular international organization to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State or that organization and the parties to the treaty.

Commentary

(1) The text which became article 69 of the Vienna Convention met with no opposition either in the Commission or at the United Nations Conference on the Law of Treaties, since its object is to set out in a logical manner the consequences of the invalidity of a treaty. Its extension to the treaties which are the subject of the present articles is necessary, and merely entailed the inclusion of a reference to international organizations alongside the reference to States (para. 4).

(2) It may simply be pointed out that article 69, paragraph 3, of the Convention, like draft article 69, clearly establishes that, notwithstanding the general reservation made by article (and draft article) 73 on questions involving international responsibility, fraud, acts of corruption or coercion constitute wrongful acts in themselves. They are therefore not, or not solely, elements invalidating consent; that is why the Vienna Convention and, following it, the draft articles, establish rules for these cases which in themselves serve to penalize a wrongful act, particularly in regard to the separability of treaty provisions (art. 44 and draft art. 44, paras. 4 and 5).

Article 70. Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State or an international organization denounces or withdraws from a multilateral treaty, para-

graph 1 applies in the relations between that State or that organization and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Commentary

Article 70 of the Vienna Convention sets forth the logical consequences of the termination of a treaty in language which leaves no room for doubt. This is why the Commission extended the rules of article 70 to the treaties which are the subject of the present articles, adding only a reference to an international organization alongside the reference to a State.

Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Commentary

Three articles of the Vienna Convention (arts. 53, 64 and 71) deal with peremptory norms. The Commission considered it inappropriate to make any changes to the text of article 71, not only because of the need to be as faithful as possible to the wording of the Vienna Convention, but because the subject is so complicated that departures from a text which, even if not fully satisfactory, was carefully prepared may well raise more problems than they solve.

Article 72. Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

Commentary

Like all the articles in section 5 of part V of the Vienna Convention, article 72 gave rise to no objection, so necessary are the rules which it lays down. The rules in question have therefore been extended without change to the treaties which are the subject of the present articles.

PART VI

MISCELLANEOUS PROVISIONS

Article 73. Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization

1. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty between one or more States and one or more international organizations from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States parties to that treaty.

2. The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty from the international responsibility of an international organization, from the termination of the existence of the organization or from the termination of participation by a State in the membership of the organization.

Commentary

(1) When the Commission prepared the draft articles which were to become the Vienna Convention, it found it necessary to insert a reservation relating to two topics included in its general plan of codification which were to form the subject of separate sets of draft articles and which it had recently begun to study, namely State succession and the international responsibility of States. This first consideration was not only interpreted fairly flexibly but also coupled with a further justification for a reservation relating to responsibility, namely that, as pointed out earlier,¹⁵¹ some of the articles on the law of treaties necessarily raised questions of responsibility. The Commission went slightly further in asking itself whether it should not also include a reservation relating to a subject hotly debated in "traditional" international law, namely the effect of "war" upon treaties; that was not covered by its general plan of codification, and a reservation relating to it in the draft articles would therefore have the effect of drawing the attention of Governments to the importance of a matter which the Commission had deliberately left aside. Although the Commission decided after consideration to make no reference to it, the United Nations Conference on the Law of Treaties reopened the question and added a reservation thereon to the two already in article 73.¹⁵²

¹⁵¹ See para. (2) of the commentary to article 69, above.

¹⁵² In connection with the question of responsibility, see also draft articles 48 to 52 above, and commentaries thereto. In connection with the question of outbreak of hostilities, see *Yearbook . . . 1966*, vol. II, pp. 267-268, document A/6309/Rev.1, part II, chap. II, para. (2) of the commentary to art. 69; and *Official Records of the United Nations Conference on the Law of Treaties, First session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole . . .*, pp. 451-453, 76th meeting of the Committee of the Whole, paras. 9-33.

(2) This brief summary of the background to article 73 of the Vienna Convention clearly shows that the purpose of that article was not to provide an exhaustive list of the matters which treaties between States can involve and on which the Convention took no position. In the view of the Commission, article 73 is intended to draw the reader's attention to certain particularly important questions, without thereby ruling out others.

(3) In the light of this view of the scope of article 73 of the Vienna Convention, an examination of the situation with regard to the treaties which form the subject of the present articles illustrates the need for an article which is symmetrical to article 73 of the Vienna Convention and which contains reservations at least as broad as those in article 73. The twofold problem of substance and of drafting considered by the Commission in this connection was whether the reservations provided for in draft article 73 should be broadened to take account of the particular characteristics of international organizations.

(4) The easiest problem to solve relates to international responsibility. There is no doubt that cases exist in which the responsibility of an international organization can be engaged, as is shown by practice, and, in particular, treaty practice. In its work on the international responsibility of States, the Commission has had occasion to deal with this matter and has deliberately limited the draft articles in course of preparation to the responsibility of States.¹⁵³ It is logical and necessary, however, for draft article 73 to contain both a reservation relating to the international responsibility of international organizations and a reservation relating to the international responsibility of States.

(5) The question of the reservation relating to hostilities between States was less simple because it could be asked whether international organizations might not also be involved in hostilities; if so, draft article 73 would have to refer only to "hostilities" and avoid the more restrictive words "hostilities between States". Many members of the Commission considered that, as international practice now stood, international organizations could be involved in "hostilities"; others had doubts on the matter. In the end the Commission decided to retain the words "hostilities between States", for a reason unconnected with the question of principle whether international organizations could be involved in "hostilities". Article 73 deals only with the effect of "hostilities" on treaties and not with all the problems raised by involvement in hostilities, whereas "traditional" international law dealt with the effect of "war" on treaties, an effect which, in the practice of States and the case-law of national courts has, in the past hundred years, undergone considerable changes. In introducing this reservation in article 73, the Vienna Conference took no position on the problems as a whole which arise as a result of involvement in "hostilities"; it merely made a reservation, without taking any position, on the problems which might at present continue to exist during armed conflict between States as a result of rules applied in the past on the effect of war upon treaties. Since the reservation in article 73 of the Vienna Convention is of such limited scope, it was only appropriate for the Commission to include in draft article 73 a reservation having the same purpose as that provided for in the Convention.

(6) The main difficulties are encountered in regard to widening the reservation relating to State succession. Ref-

¹⁵³ *Yearbook . . . 1975*, vol. II, p. 54, document A/10010/Rev.1, chap. II, sect. A.2, para. 32, and *ibid.*, pp. 87-91, chap. II, sect. B.2, commentary to art. 13. See also *Yearbook . . . 1971*, vol. II (Part One), pp. 272-273, document A/CN.4/246 and Add.1-3, paras. 209-213.

erence might conceivably have been made to "succession of international organizations", if necessary by defining that term, which is sometimes found in learned studies. The Special Rapporteur had been prepared to follow that course, but members of the Commission pointed out not only that the term was vague but also that the word "succession" itself, which had been carefully defined in the Commission's work and in the Vienna Convention on Succession of States in Respect of Treaties (1978),¹⁵⁴ should not be used to describe situations which appeared radically different.

(7) Closer examination of the cases that may come to mind when the term "succession of international organizations" is used shows that they are quite far removed from cases of State succession. It is true that certain organizations have ceased to exist and that others have taken over some of their obligations and property, as the United Nations did after the dissolution of the League of Nations. In all such cases, however, the scope and modalities of the transfers were determined by conventions between States. It was pointed out that such transfers were entirely artificial and arbitrary, unlike the case of a succession of States, in which it is the change in sovereignty over a territory that, in some cases, constitutes the actual basis for a transfer of obligations and property. Thus, strictly speaking, there can never be a "succession" of organizations.

(8) What can happen, though, is that the member States, when they establish an international organization, transfer to it certain powers to deal with specific matters. The problem is then to determine whether the organization thus established is bound by the treaties concluded on the same subject by the member States before the establishment of the organization. This situation usually involves treaties between States, but it may also concern treaties to which other international organizations are already parties. One example is that of a multilateral treaty, the parties to which are not only many States but also an international organization representing a customs union. If three States parties to such a treaty also set up a customs union administered by an international organization, it may be necessary to determine what the relationship is between that new organization and the treaty. It might be asked whether, in such a case, "succession" takes place between the States and the international organization.

(9) Questions might also be asked about the effects of the dissolution of an international organization. Must it be considered that the States members of that organization "succeed" to its property and obligations? Are they, for example, bound by the treaties concluded by the organization? Bearing in mind the existence of organizations having operational functions and constituted by only a few States, such a case might be of considerable practical importance.

(10) Many other more or less hypothetical cases were referred to in the Commission. It was asked how the treaties concluded by an organization might be affected by an amendment to its constituent instrument that deprived it of legal capacity to honour obligations under an existing treaty which it had concluded properly. Since changes in the membership of an organization do not, formally at least, affect the identity of the organization, which continues to be bound by the treaties concluded before the changes took place, no problem of "succession" of international organizations arises in such a case; at most it might be asked, as the Commission has done in connection with other ar-

titles,¹⁵⁵ whether in some cases such changes in membership do not give rise to certain legal consequences. On the other hand, the fact that a member State which has concluded a treaty with the organization ceases to be a member of the organization might in some cases give rise to difficulties; these could be bound up with the fact that the conclusion or performance of such a treaty might depend on membership in the organization. Conversely, forfeiture of membership, if imposed as a sanction, might not release a State from treaty obligations which it had contracted under a specific treaty concluded with the organization. These are delicate issues which require detailed study and on which the Commission has taken no position. Such questions are not theoretical ones, but they lie outside the scope of a topic which might, even in the broadest sense, be characterized as "succession of international organizations".

(11) In view of all these considerations, the Commission decided not to use the term "succession of international organizations" nor to attempt to give an exhaustive list of cases that are subject to reservation, but simply to mention two examples, namely, termination of the existence of international organizations and termination of participation by a State in the membership of an international organization.

(12) Once the Commission had taken a position on the substance, it still has to solve a drafting problem. The easiest solution would have been to enumerate in a single paragraph all the different subjects governed by the reservation made in article 73 "in regard to a treaty". This approach was criticized because it would have required an enumeration of subjects to which the reservation would have been applicable only for certain treaties. The international responsibility of States, a succession of States and the outbreak of hostilities between States are extraneous to treaties concluded solely between international organizations. For the sake of accuracy, therefore, the Commission drafted two paragraphs, even though this makes the text more unwieldy.

(13) It included in paragraph 1, in regard to a treaty between one or more States and one or more international organizations, a reservation relating to a succession of States and to the international responsibility of a State; it added to those two a reservation relating to the outbreak of hostilities between States parties to such a treaty. It is observed that the text refers not only to the responsibility of a State towards another State but also to the responsibility of a State towards an international organization.

(14) The reservation in paragraph 2 relates to the responsibility of an international organization, either towards another organization or towards a State, and to the two cases selected from among many others, namely, the termination of the existence of an organization and the termination of participation by a State in the membership of an international organization.

Article 74. Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between two or more of those States and one or more international organizations. The conclusion of such a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

¹⁵⁴ Art. 2, subpara 1 (b), of the Convention.

¹⁵⁵ See article 61 above, para. (2) of the commentary, and article 62, para. (2) of the commentary.

Commentary

(1) There is no legal nexus as such between treaty relations and diplomatic and consular relations. The first consequence drawn from that fact in article 63 of the Vienna Convention and draft article 63 is that the severance of diplomatic and consular relations is not in itself of legal consequence for treaty relations, unless the application of the treaty *actually* requires the existence of such relations. Article 74 and draft article 74 express two further consequences of the independence of treaty relations and diplomatic or consular relations, namely, that the severance of diplomatic or consular relations does not prevent the conclusion of a treaty and that the conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

(2) The rules which article 74 of the Vienna Convention embodies cannot be extended to all the treaties which come within the scope of the present articles. For diplomatic and consular relations exist between States alone, and therefore draft article 74 can only apply to those treaties whose parties include at least two States between which diplomatic or consular relations are at issue. Draft article 74 was therefore worded so as to limit its effects to treaties concluded between two or more States and one or more international organizations. With regard to the current relevance of such matters in terms no longer of diplomatic or consular relations, but of the relations which international organizations need in some cases to maintain with States, reference should be made to what has been said on that point in connection with article 63 above.

Article 75. Case of an aggressor State

The provisions of the present articles are without prejudice to any obligation in relation to a treaty between one or more States and one or more international organizations which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

Commentary

(1) Article 75 of the Vienna Convention was adopted to take account of a situation created by the Second World War. States concluded certain treaties which imposed obligations on States considered as aggressors, but those obligations had not been accepted by treaty by all the latter States at the time the Vienna Convention was concluded. Article 75 prevents any provision whatsoever of the Vienna Convention from being invoked as a bar to the effects of those treaties. It nevertheless provides for the future in general terms.

(2) In these circumstances, the Commission discussed several awkward questions connected with the adaptation of the rule in article 75 to the case of the treaties forming the subject of the present draft articles. One such question was whether draft article 75 should not contemplate the case in which the aggressor was an international organization. It soon became clear that this matter had to be left aside, for several reasons. First, it was not at all certain that the term "aggressor State" might not apply to an international organization; it was noted that a text such as the Definition of Aggression adopted on 14 December 1974 by the General Assembly¹⁵⁶ provides that "the term 'State' . . . Includes the concept of a 'group of States' where appropri-

¹⁵⁶ General Assembly resolution 3314 (XXIX), annex.

ate". Such a definition indicates that, in relation to an armed attack, it is difficult to distinguish between States acting collectively and the organization which they may in certain cases constitute. Whatever position is taken on this question, which is a matter solely for the States parties to the Vienna Convention to settle, there is a second, more compelling reason for not dealing with it: if good reasons could be shown to place an aggressor organization on the same footing as a State, that should seemingly have been done by the Vienna Convention itself, because the problem is far more important for treaties between States than for treaties to which one or more international organizations are parties. In formulating the present draft articles, however, the Commission has consistently refused to adopt proposals which would draw attention to gaps or shortcomings in the Vienna Convention. It therefore decided that draft article 75 should simply speak of an "aggressor State" as article 75 of the Vienna Convention does.

(3) The second problem involves the transposition to draft article 75 of the expression "in relation to a treaty". Its inclusion in the draft article unchanged would mean that the treaty in question could either be a treaty between one or more States and one or more international organizations or a treaty between international organizations, in accordance with the definition in draft article 2, subparagraph 1 (a). Now, of all the possibilities that come to mind, one very unlikely to occur in international relations as they now stand is that of a number of international organizations, under a treaty concluded between them alone, taking measures that would give rise to obligations for an aggressor State. A less unlikely possibility is that of a treaty between a number of States and one or more international organizations. The Commission hesitated between a simple solution which would cover unlikely cases and a more restrictive one which would cover only the least unlikely case. In the end it decided to make no reference to the case in which such a treaty would be concluded solely between international organizations. It thus described the treaties to which the draft article may apply as treaties "between one or more States and one or more international organizations", in order to refer only to the least unlikely cases.

PART VII

DEPOSITARIES, NOTIFICATIONS, CORRECTIONS
AND REGISTRATION*Article 76. Depositaries of treaties*

1. The designation of the depositary of a treaty may be made by the negotiating States and the negotiating organizations or, as the case may be, the negotiating organizations, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Commentary

(1) Like the other articles of part VII of the Vienna Convention, article 76 is one containing technical provisions on which agreement was reached without difficulty both in the Commission and at the United Nations Conference on the Law of Treaties. These articles must be transposed to the present draft articles with the necessary changes.

(2) The only question with regard to article 76 which might have given rise to a problem is that of multiple depositaries. It will be recalled that in 1963, in order to overcome certain particularly sensitive political problems, international practice devised the solution, at least for treaties whose universality was highly desirable, of designating a number of States as the depositaries of the same treaty (multiple depositaries). Article 76 provides for the use of multiple depositaries, despite various criticisms to which that institution had given rise, but it does so only for States, and not for international organizations or the chief administrative officers of organizations.

(3) The Commission considered whether the provision should not be extended to cover organizations; in other words, whether the draft should not say that the depositary of a treaty could be "one or more organizations". In the end, the Commission decided not to make that change and to word draft article 76 in the same way as article 76 of the Vienna Convention. It wishes to point out that, while it has no objection in principle to the designation of a number of international organizations as the depositary of a treaty, it found that, in the period of over ten years that has elapsed since the signing of the Vienna Convention, no example of a depositary constituted by more than one international organization has occurred to testify to a practical need for that arrangement; indeed, it is difficult to see what need it might meet. Moreover—and this is a decisive point, already made a number of times, in particular in connection with article 75—if the possibility of designating more than one international organization as the depositary of a treaty had been of any interest it would have been so mainly for treaties between States, and should therefore have been embodied in the Vienna Convention itself. Save in exceptional cases, the Commission has always tried to avoid, even indirectly, improving on a situation if the improvement could already have been embodied in the Vienna Convention.

(4) The only change eventually made in draft article 76, by comparison with article 76 of the Vienna Convention, is in paragraph 1, and arises from the need to mention negotiating States and negotiating organizations as well as negotiating organizations and to cater for the two types of treaties governed by the present articles, namely, treaties between one or more States and one or more international organizations and treaties between international organizations.

Article 77. Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:

(a) keeping custody of the original text of the treaty, of any full powers and powers delivered to the depositary;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States and international organizations or, as the case may be, to the organizations entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or international organization in question;

(e) informing the parties and the States and international organizations or, as the case may be, the organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States and international organizations or, as the case may be, the organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, instruments relating to an act of formal confirmation, or instruments of acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) the signatory States and organizations and the contracting States and contracting organizations; or

(b) where appropriate, the competent organ of the organization concerned.

Commentary

(1) The lengthy article 77 of the Vienna Convention needs to be transposed to the present draft articles, but with certain amendments, some of them minor ones. The changes will be considered in paragraph and subparagraph order.

(2) Subparagraph 1 (a) must provide that the depositary should also assume custody of powers, an expression which, according to draft article 2, subparagraph 1 (c *bis*), means a document emanating from the competent organ of an international organization and having the same purpose as the full powers emanating from States.

(3) In certain cases (subpara. 1 (d) and para. 2) it was sufficient to mention the international organization as well as the State. In other cases (the introductory part of para. 1 and subparas. 1 (b), (e) and (f)), it appeared necessary, despite the resultant unwieldiness of the text, to cater for the distinction between treaties between one or more States and one or more international organizations and treaties between international organizations.

(4) In subparagraph 1 (f), the list of instruments enumerated in article 77 of the Convention has been extended to include "instruments relating to an act of formal confirmation" in order to take account of the fact that the Commission replaced the term "ratification" by "act of formal

confirmation", defined in draft article 2, subparagraph 1 (*b bis*), as "an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty".

(5) Subparagraph 1 (*g*) of article 77 was a source of some difficulty for the Commission both in first and second readings. The difficulty already existed in the Vienna Convention itself; it has become more acute now that this provision has had to be adapted to the treaties with which the present draft articles are concerned. Consideration will be given first to the difficulties inherent in the Vienna Convention as such and then to those arising out of the adaptation of the provision.

(6) The main problem concerns the meaning to be given to the term "registration", and it is complicated by the relationship between article 77 and article 80. The Commission had proposed in 1966 a draft article (art. 72) on the functions of the depositary, which contained no provision on the registration of treaties. Its draft article 75 (eventually article 80), on the other hand, laid down the obligation to register treaties with the Secretary-General but did not stipulate whose the obligation was; registration and publication were to be governed by the regulations adopted by the General Assembly and the term "registration" was to be taken in its broadest sense.¹⁵⁷ At the Conference on the Law of Treaties, a proposal submitted by the Byelorussian Soviet Socialist Republic in the Committee of the Whole amended the text of that article 75 to give it the present form of paragraph 1 of article 80, so that filing and recording were mentioned as well as registration.¹⁵⁸ However, an amendment by the United States of America to article 72 (the future article 77) making the depositary responsible for "registering the treaty with the Secretariat of the United Nations"¹⁵⁹ had been adopted a few days earlier, without detailed comment.

(7) What is the meaning of the word "register" in this text? In article 77, is this function merely stated—that is to say, should it be understood as a possibility which the Convention allows if the parties agree to it? Or does article 77 actually constitute the agreement? There are divergent indications on this point in the preparatory work.¹⁶⁰ What is certain, though, is that the Expert Consultant to the Conference made the following important statement:

¹⁵⁷ The commentary to the article which became article 80 shows that the Commission used the term "registration" in its general sense to cover both "registration" and "filing and recording" (see *Yearbook . . . 1966*, vol. II, pp. 273-274, document A/6309/Rev. I, part II, chap. II, para. (2) of the commentary to art. 75). The Commission added:

" . . . However, having regard to the administrative character of these regulations and to the fact that they are subject to amendment by the General Assembly, the Commission concluded that it should limit itself to incorporating the regulations in article 75 by reference to them in general terms." (*Ibid.*, para. (3))

¹⁵⁸ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference . . .*, p. 206, document A/CONF.39/14, para. 684 (b).

¹⁵⁹ *Ibid.*, p. 201-202, para. 657, sect. (iv), para. (6)

¹⁶⁰ In connection with the Commission's draft article 71 (now art. 76), which was discussed together with draft article 72 (now art. 77), the United Kingdom delegation drew attention to the purely expository character of the wording on functions of depositaries (*ibid.*, *First session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole . . .*, p. 462, 77th meeting of the Committee of the Whole, para. 53). Sir Humphrey Waldock, Expert Consultant to the Conference, confirmed this view (*ibid.*, p. 467, 78th meeting of the Committee of the Whole, para. 51). The United States representative, however, in explaining his delegation's amendment, stated: "the United Nations Secretariat had informally indicated its preference that registration of a treaty be effected by the depositary" (*ibid.*, p. 459, 77th meeting of the Committee of the Whole, para. 20).

It had been asked whether the registration of treaties should not be part of a depositary's functions. The International Law Commission had studied that problem, but had come to the conclusion that the function of registration might cause difficulties, in view of the rules applied by the General Assembly where the depositary was an international organization. There were very strict rules on the subject. The Commission had come to the conclusion that it would be unwise to mention registration as one of the functions of a depositary without making a more thorough study of the relationship between the provision and the rules on the registration of treaties applied by the United Nations.¹⁶¹

(8) In conclusion, doubts may be expressed as to both the scope and the usefulness of subparagraph (*g*) of paragraph 1; although using different terminology, it seems to duplicate article 80. Turning now to the question of its adaptation to the treaties to which the present draft articles relate, it may first be asked whether the subparagraph can be applied to all "treaties" as understood in the present draft. The reply to this question depends on the meaning of the term "registration"; since it has a narrow sense in article 80, it might be thought appropriate to give it a narrow meaning here as well. If so, subparagraph (*g*) could not apply to all treaties, since there are some treaties to which "registration" under the rules formulated by the United Nations does not apply. The Commission therefore considered inserting the proviso "where appropriate" in subparagraph (*g*). Another solution, since the subject is governed by the terminology, rules and practices of the United Nations, would have been to mention Article 102 of the Charter of the United Nations in subparagraph (*g*) in order to emphasize that the subparagraph was confined to stating what could or should be done according to the interpretation of the Charter given by the United Nations. The Commission finally adopted subparagraph (*g*) of the Vienna Convention unchanged. Subparagraph (*g*) is thus of a purely expository nature. The registration of treaties is *conditional* if it depends on rules applied by the United Nations. At present, registration does not, under the relevant rules of the United Nations, apply to treaties between international organizations.

(9) Article 77, paragraph 2, unfortunately gives rise to further difficulties. In its report, the Commission gave no details or explanation about the concluding phrase of paragraph 2 of the corresponding article of its draft on the law of treaties.¹⁶² What is the organization "concerned"? What is the meaning here of the conjunction "or"? If the organization concerned is the depositary organization (which would be the logical explanation under the Vienna Convention), a formula by which the depositary brings the question to the attention of the competent organ of the depositary might be wondered at. It is true that at the time the text was drafted considerable difficulties had arisen in the United Nations with regard to the precise role of the Secretary-General when the United Nations was the depositary and reservations were made; in the end, the Secretary-General was relieved of all responsibility in the matter,¹⁶³ and the concluding phrase of paragraph 2 simply reflects his concern to ensure that any difference arising on grounds which he considers do not engage his responsibility should be

¹⁶¹ *Ibid.*, pp. 467-468, 78th meeting of the Committee of the Whole, para. 59.

¹⁶² *Yearbook . . . 1966*, vol. II, pp. 269-270, document A/6309/Rev. I, part II, chap. II, art. 72 and commentary.

¹⁶³ See article 20, para. 3, of the Vienna Convention, which requires reservations to a constituent instrument of an international organization to be accepted by the competent organ of that organization, and the Commission's commentary to the corresponding draft article of 1966 (*ibid.*, p. 207, para. (20) of the commentary to art. 17).

settled by a political body.¹⁶⁴ If this is so, the conjunction "or" definitely establishes an alternative: if there is an organization "concerned" and if it has an organ competent to settle disputes between the depositary and a signatory State or contracting party, the dispute should be brought to the attention of that organ of the organization. Some members of the Commission nevertheless considered that the conjunction "or" was unsatisfactory and should either be replaced by the conjunction "and" or simply be deleted.

(10) Finally, although not entirely satisfied, the Commission decided to retain the text of paragraph 2 of the Vienna Convention. It included a reference to international organizations in addition to the reference to States and, for the sake of clarity, divided the paragraph into two subparagraphs.

Article 78. Notifications and communications

Except as the treaty or the present articles otherwise provide, any notification or communication to be made by any State or any international organization under the present articles shall:

(a) if there is no depositary, be transmitted direct to the States and organizations or, as the case may be, to the organizations for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State or organizations in question only upon its receipt by the State or the organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 77, paragraph 1 (e).

Commentary

Article 78 of the Vienna Convention, which is of a technical nature, gave rise to no difficulty either in the Commission or at the United Nations Conference on the Law of Treaties. Its adaptation to the treaties which are the subject of the present draft articles simply requires a reference to international organizations in the introductory wording and in subparagraphs (b) and (c), and a reference in subparagraph (a) to "the States and organizations or, as the case may be, to the organizations for which it is intended", in order to distinguish the case of treaties between one or more States and one or more international organizations from that of treaties between international organizations.

Article 79. Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and international organizations and the contracting States and contracting organizations are agreed that it contains an error, the error shall, unless the said States and organizations decide upon some other means of correction, be corrected:

(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and international organizations and the contracting States and contracting organizations of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text and communicate a copy of it to the parties and to the States and organizations entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and organizations and to the contracting States and contracting organizations.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and international organizations and the contracting States and contracting organizations agree should be corrected.

4. The corrected text replaces the defective text *ab initio*, unless the signatory States and international organizations and the contracting States and contracting organizations otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and international organizations and to the contracting States and contracting organizations.

Commentary

The comments made on article 78 also apply to draft article 79, whose wording was made less cumbersome in second reading and which differs from article 79 of the Vienna Convention only in that it refers both to international organizations and to States.

Article 80. Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

¹⁶⁴ See "Summary of the practice of the Secretary-General as depositary of multilateral agreements" (ST/LEG/7), para. 80. This is certainly the explanation given by the Special Rapporteur himself concerning para. 2 of article 29 (later art. 72, now art. 77):

"Reference to a competent organ of an international organization was needed in article 29, paragraph 2, because of the functions it might have to fulfil as a depositary." (*Yearbook . . . 1966*, vol. I (Part II), p. 295, 887th meeting, para. 95)

Commentary

(1) Article 80 of the Vienna Convention has already been commented on in connection with draft article 77. It will be observed that the text (particularly in its English version) establishes an obligation for the parties to the Vienna Convention, whereas it has been said that article 77 is purely expository. Article 80 can be applied to the treaties which are the subject of the present draft articles without altering the text at all, and would establish an obligation for those international organizations which might by one means or another become bound by the rules in the draft articles.

(2) This obligation can, however, only have conditional effects. Its fulfilment depends entirely on the rules in force in the United Nations. The United Nations is bound by Article 102 of the Charter, but how it applies Article 102 (as to form, terminology and method of publication) is exclusively a matter for the competent organs of that Organization. Thus the General Assembly has seen fit to amend the regulations on the application of Article 102¹⁶⁵ and in particular to restrict the extent of publication of treaties between States.¹⁶⁶ While the purpose of draft article 80 may be said to be that Article 102 of the Charter should be applied to new categories of treaty, it will be for the United Nations itself to amend the existing regulations if necessary, especially if draft article 80 becomes applicable to the Organization. One member of the Commission stated that, although he had no objection to the text of the draft article, he thought that it would have been appropriate to divide paragraph 1 into two paragraphs. The first, which would retain the substance of the present paragraph, would relate only to treaties to which one or more States were parties, while the second, which would deal with treaties between international organizations, would merely provide for the *possibility* of transmission to the Secretariat and thus take account of the fact that, at present, the existing rules usually do not apply to such treaties.

ANNEX

Arbitration and conciliation procedures established in application of article 66

1. ESTABLISHMENT OF THE ARBITRAL TRIBUNAL OR CONCILIATION COMMISSION

1. A list consisting of qualified jurists, from which the parties to a dispute may choose the persons who are to constitute an arbitral tribunal or, as the case may be, a conciliation commission, shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a State party to the present articles and any international organization to which the present articles have become applicable shall be invited to nominate two persons, and the names of the persons so nominated shall constitute the list, a copy of which shall be transmitted to the President of the International Court of Justice. The term of a person on the list, including that of any person nominated to fill a casual vacancy, shall be five years and may be renewed. A person whose term expires shall continue to fulfill any function for which he shall have been chosen under the following paragraphs.

2. When notification has been made under article 66, paragraph (a), the dispute shall be brought before an arbitral tribunal. When a request has been made to the Secretary-General under article 66, paragraph (b), the Secretary-General shall bring the dispute before a conciliation commission. Both the arbitral tribunal and the conciliation commission shall be constituted as follows:

The States and international organizations which constitute one of the parties to the dispute shall appoint by common consent:

¹⁶⁵ See *Yearbook* . . . 1963, vol. II, pp. 28-32, document A/CN.4/154, paras. 125-143.

¹⁶⁶ See General Assembly resolution 33/141 of 19 December 1978.

(a) one arbitrator or, as the case may be, one conciliator, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one arbitrator or, as the case may be, one conciliator, who shall be chosen from among those included in the list and shall not be of the nationality of any of the States or nominated by any of the organizations which constitute that party to the dispute.

The States and international organizations which constitute the other party to the dispute shall appoint two arbitrators or, as the case may be, two conciliators, in the same way. The four persons chosen by the parties shall be appointed within 60 days following the date on which the other party to the dispute receives notification under article 66, paragraph (a), or on which the Secretary-General receives the request for conciliation.

The four persons so chosen shall, within 60 days following the date of the last of their own appointments, appoint from the list a fifth arbitrator or, as the case may be, conciliator, who shall be chairman.

If the appointment of the chairman, or of any of the arbitrators or, as the case may be, conciliators, has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General of the United Nations within 60 days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute. If the United Nations is a party or is included in one of the parties to the dispute, the Secretary-General shall transmit the above-mentioned request to the President of the International Court of Justice, who shall perform the functions conferred upon the Secretary-General under this subparagraph.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

The appointment of arbitrators or conciliators by an international organization provided for in paragraphs 1 and 2 shall be governed by the relevant rules of that organization.

II. FUNCTIONING OF THE ARBITRAL TRIBUNAL

3. Unless the parties to the dispute otherwise agree, the Arbitral Tribunal shall decide its own procedure, assuring to each party to the dispute a full opportunity to be heard and to present its case.

4. The Arbitral Tribunal, with the consent of the parties to the dispute, may invite any interested State or international organization to submit to it its views orally or in writing.

5. Decisions of the Arbitral Tribunal shall be adopted by a majority vote of the members. In the event of an equality of votes, the Chairman shall have a casting vote.

6. When one of the parties to the dispute does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and to make its award. Before making its award, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

7. The award of the Arbitral Tribunal shall be confined to the subject-matter of the dispute and state the reasons on which it is based. Any member of the Tribunal may attach a separate or dissenting opinion to the award.

8. The award shall be final and without appeal. It shall be complied with by all parties to the dispute.

9. The Secretary-General shall provide the Tribunal with such assistance and facilities as it may require. The expenses of the Tribunal shall be borne by the United Nations.

III. FUNCTIONING OF THE CONCILIATION COMMISSION

10. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

11. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

12. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

13 The Commission shall report within 12 months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

14. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

Commentary

(1) The commentary to draft article 66 explains why the Commission decided to propose the inclusion in the draft articles of provisions on the settlement of disputes. It also explains the Commission's reasons for proposing a simple solution consisting of an arbitration procedure for the settlement of disputes concerning articles 53 and 64 a conciliation procedure for disputes concerning other articles in part V. The Commission considered that this was the best way of preserving as much parallelism as possible with the Vienna Convention.

(2) It was on the basis of that idea that the Commission also adopted the annex, which establishes the settlement procedures provided for in article 66 and is also modelled as closely as possible on the annex to the Vienna Convention, although certain changes and, above all, additions were necessary in view of the need for two settlement procedures, one relating to arbitration and the other to conciliation. The annex to the 1969 Vienna Convention refers to the conciliation procedure only, since recourse to the judicial settlement procedure does not call for any special provisions and that contained in article 66 of the Convention is sufficient, providing as it does that any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64 may, "by a written application, submit it to the International Court of Justice for a decision". In the present annex, however, it is necessary to introduce a specific rule to ensure the achievement of the desired objective, that is to say, the establishment of a compulsory arbitration procedure which can, when necessary, be set in motion by any one of the parties to the dispute.

(3) However, on this point as well, the Commission has drawn as much as possible on the annex to the Vienna Convention and proposes a text in which section I relates both to arbitration and to conciliation procedures and is followed by two other sections dealing respectively with the functioning of the Arbitral Tribunal (section II) and the functioning of the Conciliation Commission (section III). The only innovation vis-à-vis the text of the Convention is section II, while section I merely makes the provisions drawn up in the Convention for the establishment of a conciliation commission applicable equally to the establishment of an arbitral tribunal. Section III reproduces without change the rules of the Convention on the functioning of the Conciliation Commission.

(4) The decision to include in a single text provisions on the drawing up of a list of persons from which both arbitrators and conciliators may be chosen and the decision to place international organizations on an absolutely equal footing with States obviously made it necessary to introduce some changes in the text of the Convention and these decisions call for some explanation. The Commission discussed both questions and, in particular, the first at length, and several members were of the opinion that the qualifications required of a conciliator are not necessarily the same as those required of an arbitrator. Consequently, it

might be advisable to prepare separate lists from which one or the other could be chosen. Although they did not deny the fact that such a course of action might be justified, other members pointed out that, in this particular case, disputes in which both arbitrators and conciliators would be called upon to intervene would be of an essentially legal nature and that it would therefore also be desirable for conciliators to be qualified jurists. In particular, it was pointed out that, although the annex to the Vienna Convention deals with conciliation only, its paragraph 1 also requires the list of conciliators to consist of "qualified jurists"; it was asked whether this meant that higher qualifications should be required of persons included in the list of arbitrators. The Commission finally decided to maintain the single-list system and a single criterion for the nomination of all the persons included in the list.

(5) In view of the comments made by one of its members, the Commission considered the question of the equality of States and international organizations, not only in respect of their rights and obligations as parties to a dispute, but also in respect of the nomination of persons for inclusion in the list of arbitrators and conciliators and the appointment of persons to act as such in a particular dispute. The Commission took account of the view that only States should be entitled to nominate persons for inclusion in the list, but, in the end, the majority of its members decided that the text should reflect the consequences of the international legal personality of international organizations without any discrimination whatever vis-à-vis States. Of course, since international organizations have no population and, consequently, no nationals, a person cannot, for the purposes of section I, subparagraph 2 (b), be linked with an international organization through nationality. The Commission therefore used the criterion of "nomination" in that case.

(6) The Commission realizes that agreement on the appointment of arbitrators or conciliators, as the case may be, by the States and organizations which are parties to a dispute and which are required to nominate two persons, one of their own choice and the other from among the names included in the list, may be difficult to achieve, but it should not be more difficult than in the case where States alone are parties to a dispute. Moreover, the proposed text makes it quite clear that, if agreement is not reached and those persons cannot be appointed within the prescribed 60-day period, such appointment will be made by the Secretary-General of the United Nations or by the President of the International Court of Justice if the United Nations is a party to the dispute. As a result of that provision, the Commission believes that the proposed text guarantees not only the establishment of the Arbitral Tribunal or the Conciliation Commission in any circumstances, an indispensable prerequisite for any compulsory procedure for the settlement of disputes, but also maximum impartiality in appointments not made by the parties.

(7) The Commission draws attention to the fact that most of the proposed provisions of section II of the annex relating to the functioning of the Arbitral Tribunal are taken from annex VII to the Convention on the Law of the Sea,¹⁶⁷ which has been somewhat simplified and to which the provision contained in paragraph 4 and based on paragraph 3 of the annex to the Vienna Convention has been added. The Commission considers that this provision will be useful to the arbitration procedure because it provides for the

¹⁶⁷ A/CONF.62/122 and corrigenda.

possibility that, with the consent of the parties to the dispute, other interested parties—States or international organizations, in this case—may be invited to submit their views to the Tribunal. Since arbitration cases involve the interpretation and the application of rules of *jus cogens*, the Commission has, moreover, drafted that text in such a way as to ensure that such a possibility is open not only to the parties to the treaty to which the particular dispute relates, but also to any interested State or international organization.

(8) Annex VII to the Convention on the Law of the Sea was chosen by the Commission as a model for the provisions relating to the functioning of the Arbitral Tribunal for a variety of reasons. Above all, it is a very modern text and one which has been adopted by a large number of States. Secondly, it concerns an entirely analogous situation, that is to say, the functioning of an arbitral tribunal which is competent to act even if one of the parties to the dispute refuses to participate either in the appointment of arbitrators or in the actual proceedings before the Tribunal. Lastly, it affords the parties the greatest possible freedom in drawing up, by mutual agreement, the procedural provisions of their choice.

(9) The Commission will merely point out in this commentary that, apart from a few simplifications, paragraphs 3, 5, 6, 7 and 8 of the proposed annex correspond to articles 5, 8, 9, 10 and 11 of the above-mentioned annex VII, respectively. The origin of paragraph 4 has already been explained. To complete this commentary it should, however, be mentioned that paragraph 9 corresponds to paragraph 7 of the annex to the Vienna Convention. The Commission considers that, if a conciliation commission established in connection with a dispute is able to rely on the assistance of the Secretary-General of the United Nations and if its expenses are to be borne by the United Nations, there is no reason why such provisions should not apply in the case of a dispute which concerns rules of *jus cogens* and for which an arbitral tribunal is established.

(10) There does not seem to be any need to comment in detail on section III, paragraphs 10 to 14, of the annex, concerning the functioning of the Conciliation Commission, which are identical with the provisions of paragraphs 3 to 7 of the annex to the Vienna Convention (paras. 3-7).