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Ninth report on the Question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur - draft articles with commentaries (concluded)

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**QUESTION OF TREATIES CONCLUDED BETWEEN STATES
AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO
OR MORE INTERNATIONAL ORGANIZATIONS**

[Item 3 of the agenda]

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**Ninth report on the question of treaties concluded between States and international organizations
or between two or more international organizations
by Mr. Paul Reuter, Special Rapporteur**

Draft articles, with commentaries (concluded**)

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** For the preceding draft articles presented by the Special Rapporteur, see the third to eighth reports (*Yearbook . . . 1974*, vol II (Part One), p. 135, document A/CN.4/279; *Yearbook . . . 1975*, vol II, p. 25, document A/CN.4/285; *Yearbook . . . 1976*, vol. II (Part One), p. 137, document A/CN.4/290 and Add.1; *Yearbook . . . 1977*, vol. II (Part One), p. 119, document A/CN.4/298; *Yearbook . . . 1978*, vol. II (Part One), p. 247, document A/CN.4/312; *Yearbook . . . 1979*, vol. II (Part One), p. 125, document A/CN.1/319, respectively).

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ABBREVIATIONS

I.C.J.	International Court of Justice
<i>I.C.J. Reports</i>	<i>I.C.J. Reports of Judgments, Advisory Opinions and Orders</i>
ILO	International Labour Organisation
UNESCO	United Nations Educational, Scientific and Cultural Organization

Introduction

This report completes the submission in first reading of the draft articles adapting the articles of the Vienna Convention on the Law of Treaties¹ to the special case of treaties concluded between States and international organizations or between two or more international organizations. At its previous sessions,² the Commission adopted articles 1 to 60.³ This report concerns articles 61 to 80 and completes the first reading of the draft articles. The Special Rapporteur did not feel it necessary to provide draft articles corresponding to articles 81 to 85 of the Vienna Convention, which concern final provisions. It is not the custom for the Commission to make proposals concerning final provisions in the drafts it prepares; that task has always been left to the conferences responsible for preparing a draft convention. Moreover, the content of any eventual final clauses will depend entirely on the final form to be given to the draft and on the way in which international organizations will be associated with its entry into force, questions which will be settled at a later stage.

¹ For the text of the Convention (hereinafter referred to as "Vienna Convention"), see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.5), p. 287.

² For the earlier work of the Commission on this subject, see *Yearbook . . . 1974*, vol. II (Part One), pp. 290 *et seq.*, document A/9610/Rev.1, chap. IV; *Yearbook . . . 1975*, vol. II, pp. 169 *et seq.*, document A/10010/Rev.1, chap. V; *Yearbook . . . 1977*, vol. II (Part Two), pp. 95 *et seq.*, document A/32/10, chap. IV; *Yearbook . . . 1978*, vol. II (Part Two), pp. 123 *et seq.*, document A/33/10, chap. V; *Yearbook . . . 1979*, vol. II (Part Two), pp. 137 *et seq.*, document A/34/10, chap. IV.

³ For the text of the articles adopted so far by the Commission, see *Yearbook . . . 1979*, vol. II (Part Two), pp. 138 *et seq.*, document A/34/10, chap. IV, sect. B.1.

Draft articles with commentaries (*concluded*)

PART V. INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES (*concluded*)

General considerations

The articles which are the subject of this report relate to the end of part V of the Vienna Convention and to rules which concern procedure rather than substance. In these latest articles the Special Rapporteur had no difficulty in remaining faithful to the basic guideline laid down from the outset by the Commission: to depart as little as possible from the text of the Vienna Convention. Some of the proposed articles (61, 64, 68, 71, 72, 75 and 80) do not differ from the articles of the Vienna Convention relating to the same subject; most of the other articles (65, 69, 70, 74, 76, 77, 78 and 79) differ from the articles of the Vienna Convention only in respect of minor drafting that were

usually required because of the need to mention international organizations as well as States. Only a few articles (62, 63, 67 and 73) involve a question of principle that is either new or has already arisen in connection with other articles, and only article 66 required consideration in depth.

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES (*concluded*)

*Article 61. Supervening impossibility of performance*⁴

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or

⁴ The text is the same as that of the corresponding provision of the Vienna Convention.

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

Despite its title, article 61 of the Vienna Convention does not cover all cases of "*force majeure*", but only those resulting from "the permanent disappearance or destruction of an object indispensable for the execution of the treaty". The Commission, and subsequently the United Nations Conference on the Law of Treaties, considered that the question of *force majeure* was more closely related to the problem of international responsibility. The general definition of *force majeure* and its effects adopted by the Commission in 1979⁵ may be considered more satisfactory than that embodied in the Convention: there is no reason to limit the effects of *force majeure* on a treaty to the specific case of the disappearance or destruction of an object. However, in order to remain faithful to a line of conduct which involves abstaining from any effort to improve the text of a convention definitively adopted for treaties between States, the solution adopted in the Vienna Convention has been retained. Article 61 of that Convention required no drafting change in order to become applicable to the treaties covered by the present draft.

Article 62. Fundamental change of circumstances⁶

1. A fundamental change of circumstances which has occurred with regard to those existing at the time

⁵ Article 31 of the draft articles on State responsibility:

"Force majeure and fortuitous event"

"1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

"2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility." (*Yearbook . . . 1979*, vol. II (Part Two), p. 122, document A/34/10, chap. III, sect. B.2, art. 31.)

⁶ Corresponding provision of the Vienna Convention:

"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

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 concluded between several States and one or more international organizations and establishing 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 was one of those which required the greatest reflection and attention in the Commission in order to achieve in its wording a balance between two contradictory requirements; the need to ensure respect for the binding force of treaties and the need to permit the elimination of treaties which have become inapplicable as a result of a fundamental change in the circumstances existing at the time of their conclusion. The wording finally chosen by the Commission was not only adopted

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:

"(a) if the treaty establishes a boundary; or

"(b) 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.

"3. 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."

almost unanimously by the Commission itself⁷ but, after the insertion of paragraph 3 and a number of drafting changes, was adopted at the Conference on the Law of Treaties by a very large majority of States.⁸

(2) There is no reason to call this successful compromise in question again as regards the treaties of international organizations; these treaties, like treaties between States, are covered entirely by the rule *pacta sunt servanda* and by the need to take into account changes of circumstances that give rise to fundamental transformations. There is no need to change the substance of article 62 in order to adapt it to the treaties of international organizations. It would not even be necessary to make drafting changes in the article if paragraph 2(a) did not raise indirectly a problem calling in question the capacity of international organizations.

(3) The text of paragraph 2(a) of article 62 could have been left intact in draft article 62 without making any change, even a drafting change. However, that would have implied that a treaty between two or more organizations could “establish a boundary”. But can it be admitted that an international organization can modify the status of a territory in respect of the territorial sovereignty exercised therein?

(4) The question must be defined clearly. There is no doubt that paragraph 2(a) of article 62 covers not only delimitation treaties, but also so-called treaties of cession.⁹ We are concerned here with all the treaties relating to territorial status, and the term “territory” should be construed solely in the specific and traditional sense of “State territory”. This paragraph, which is based on judicial precedents, was introduced because of the great political importance of everything relating to State territory. It is not necessary to debate the point whether certain organizations possess, in an analogical sense, a “territory” (customs territory,

postal territory). What is certain is that the inclusion in draft article 62 of a paragraph 2(a) identical to that included in article 62 of the Vienna Convention would imply that organizations could dispose of the territory of certain States by means of treaties. Territory, however, is so closely linked to State sovereignty that it is inconceivable that States would abandon to an organization the right to dispose of their territorial rights without losing the status of State; the entity which would thus dispose of the territorial rights of States would have itself become a federal State. Of course, it could be observed that an international organization has in fact disposed of certain territories, as the General Assembly did in the case of the former Italian colonies by virtue of an explicit provision (Art. 23) of the Treaty of Peace with Italy of 10 February 1947.¹⁰ Furthermore, there is no doubt that States can make the future of part of their territories dependent on a decision of an international organization (or of a jurisdictional body), but it is quite a different thing to delegate to such entities the right to dispose of their territory *by treaty*. That is why the Special Rapporteur refrained from including a provision that, by reason of the general character of its wording, would imply that international organizations possessed such a power.

(5) Nevertheless, without straining the bounds of imagination too far, it is conceivable that several States (at least two) might settle a territorial problem by means of a treaty and that an international organization (or even several) might be party to such a treaty because the treaty would entrust certain functions to the organization or make the latter responsible for certain guarantees. In such a case the organization although a party to the treaty, would not have a status comparable to that of the States between which the territorial settlement occurred, but its presence as a party to the treaty should not prevent the States which had “established a boundary” from coming within the scope of the rule set forth in paragraph 2(a) of article 62. That solution is in keeping with article 3(c) of the Vienna Convention; it is important to set it out once again in order to leave no doubt about the scope of draft article 62, which does not apply to treaties establishing boundaries.

(6) Article 62, paragraph 2 of the Vienna Convention has therefore been reworded. Subparagraphs (a) and (b) have become separate paragraphs, paragraphs 2 and 3 respectively. As a result, paragraph 3 of article 62 has become, without change, paragraph 4 of draft article 62. The new paragraph 2 of the draft article has been reworded so as to cover only treaties concluded between several States and one or more international organizations; according to the preceding explanations, these are the only treaties falling within the scope of the present draft articles that could be considered as “establishing a boundary”.

⁷ *Yearbook ... 1966*, vol. I (Part One), p. 130, 842nd meeting, para. 53.

⁸ See *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* (United Nations publication, Sales No. E.70.V.6), p. 121 22nd plenary meeting, para. 47.

⁹ The expression “treaty *establishing* a boundary” was substituted for “treaty *fixing* a boundary” by the Commission, in response to comments of Governments, as being a broader expression which would embrace treaties of cession as well as delimitation treaties. (*Yearbook ... 1966*, vol. II, p. 259, document A/6309/Rev.I, part II, chap. II, draft articles on the law of treaties and commentaries, art. 59, para. (11) of the commentary.)

It will be noted, however, that articles 11 and 12 of the Vienna Convention on Succession of States in Respect of Treaties, of 23 August 1978, are much more precise as regards the definition of territorial questions (*Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), p. 185.

¹⁰ United Nations, *Treaty Series*, vol. 49, p. 3.

Article 63. Severance of diplomatic or consular relations¹¹

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

Commentary

Diplomatic and consular relations exist only between States. As is well known, the permanent representations of States to international organizations do not establish diplomatic relations, but relations that are not reciprocal. Consequently, for the treaties which are the subject of the present draft articles, a rule similar to that set forth in article 63 of the Vienna Convention could apply only to a special group of treaties: those to which at least two States and one or more organizations are parties. The wording of article 63 of the Vienna Convention has therefore been amended slightly so that the text of draft article 63 applies only to this case. As in the case of paragraph 2 of article 62, this provision is in keeping with article 3(c) of the Vienna Convention.

Article 64. Emergence of a new peremptory norm of general international law (jus cogens)¹²

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

This draft article requires no substantive or drafting changes in order to be applicable to the treaties of international organizations.

SECTION 4. PROCEDURE

Article 65. Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty¹³

1. A party which, under the provisions of the present articles, invokes either a defect in its consent to

¹¹ Corresponding provision of the Vienna Convention:

“Article 63: Severance of diplomatic or consular relations

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

¹² The text is the same as that of the corresponding provision of the Vienna Convention.

¹³ Corresponding provision of the Vienna Convention:

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

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. If, however, objection has been 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. 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.

5. 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) Article 65 of the Vienna Convention establishes for the settlement of disputes a procedure based on notification, moratorium and recourse to the means indicated in Article 33 of the Charter. Both in the Commission and at the Conference on the Law of Treaties it was emphasized that this protection was not sufficient, but as the Commission noted in its final report, the solution adopted gave “a substantial

“1. A party which, under the provisions of the present Convention, 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. If, however, objection has been 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. 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.

“5. Without prejudice to article 45, the fact that a State 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.”

measure of protection against purely arbitrary assertions of the nullity, termination or suspension of the operation of a treaty".¹⁴ Similar views were expressed at the Conference, which finally adopted this text by 106 votes to none with 2 abstentions.¹⁵ There is no reason in principle why the solution adopted for treaties between States should not be extended to treaties of international organizations.

(2) Two minor drafting changes have been made in article 65 of the Vienna Convention: the first concerns the words "the present Convention", which have been replaced by "the present articles"; the second consists in inserting the words "or an international organization" after the words "a State" in paragraph 5.

[Article 66. Procedures for judicial settlement, arbitration and conciliation¹⁶

1. When, in the case of a treaty between several States and one or more international organizations, the objection provided for in paragraphs 2 and 3 of article 65 is raised by one or more States with respect to another State and 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 State party to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration.

(b) Any State party 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 procedure specified in the annex (section I) to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

2. When the objection provided for in paragraphs 2 and 3 of article 65 is raised by one or more international organizations parties to the treaty or involves one or more international organizations parties to the treaty and 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 64 may ask one of the bodies competent under the terms of Article 96 of the Charter to request an advisory opinion from the International Court of Justice, unless the parties by common consent agree to submit the dispute to arbitration; the parties shall regard the advisory opinion of the Court as binding;

(b) Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles of part V of the present articles may set in motion the procedure specified in the annex (section II) to the present articles by submitting a request to that effect, as appropriate, to the Secretary-General of the United Nations or to the President of the International Court of Justice.]

Commentary

(1) Unlike article 65, article 66 was not drafted by the Commission, but is the result of action taken during the course of the United Nations Conference on the Law of Treaties which made it possible to avoid a serious crisis that was jeopardizing the outcome of the Conference; however, after various incidents and very lively discussion, article 66 failed to receive the same degree of support as article 65, since it was adopted by only 61 votes to 20, with 26 abstentions.¹⁷ In view of the political opposition to the text, the Special Rapporteur could have concluded that it was not up to the Commission to consider, at the current stage of its work, the problem of the settlement of disputes, which could, moreover, quite naturally be included in the final clauses usually reserved for direct consideration by Governments. In order to take account of this view, the value of which he fully appreciates, the Special Rapporteur has placed the whole of article 66 in square brackets so as to draw the attention of the Commission to the objections that may be raised to the very principle of the text.

(2) The Special Rapporteur has nevertheless prepared a draft article, for two main reasons. First, it is necessary to bear in mind a consideration already mentioned above in the commentary to draft article 65.

¹⁴ *Yearbook . . . 1966*, vol. II, p. 263, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties and commentaries, art. 62, para. (6) of the commentary.

¹⁵ See *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* (op. cit.), p. 136, 25th meeting, para. 43.

¹⁶ Corresponding provision of the Vienna Convention:

"Article 66: Procedures for judicial settlement, 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 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

"(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 Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations."

¹⁷ See *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* (op. cit.) p. 193, 34th meeting, para. 72.

In the case of treaties to which several States and one or more organizations are parties, disputes may occur involving the States only, the organizations parties to the treaty not being parties to the dispute. In such a case, it may be considered that the spirit of paragraph (c) of article 3 of the Vienna Convention, which contains a reservation regarding "the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties", should be respected. It seems natural that in this particular case the solutions contained in article 66 of the Vienna Convention should apply. To that end, the Special Rapporteur has included in draft article 66 a paragraph 1 which applies to that case the solutions contained in article 66 of the Vienna Convention. However, other cases remain, such as that of disputes concerning a treaty concluded only among international organizations, or cases involving a treaty concluded between one or more States and one or more international organizations but in which the dispute involves one State and one or more international organizations, several States and one or more international organizations, or several international organizations. The common feature of all these cases is that the objection is raised by or with respect to one or more organizations.

(3) Paragraph 2 covers this other group of cases. It is clear that the two procedures provided for in article 66 of the Vienna Convention cannot apply, at least in the terms set forth in that text, to the cases currently under consideration. The first procedure is based on the possibility of the dispute being unilaterally referred to the International Court of Justice by means of a written application. However, it is a well-known fact that only States can be parties in contentious cases before the Court; an organization cannot be summoned before the Court and cannot refer a dispute to the Court. The second procedure envisaged, conciliation, does not raise such basic objections, but it quickly appears that the machinery set up in article 66 and the annex to which it refers require adaptation in order to be applicable to the cases under consideration. Was it worthwhile to seek to modify those two procedures to make them applicable to proceedings instituted by or against international organizations?

(4) The Special Rapporteur believed that it was worthwhile. As regards recourse to the Court there are, as will be seen below, indirect channels already provided for in practice which make it possible to avoid the obstacle, at least partially. As regards conciliation, it is sufficient to amend the annex, and the Special Rapporteur attached more importance to conciliation than to recourse to the Court. First of all, the objections raised concerned primarily the latter, which was moreover limited to the application and the interpretation of only two articles. Secondly, the development of the codification of international law since the conclusion of the Vienna Convention has shown that Governments seem ready to favour

recourse to conciliation. That is the second main reason why the Special Rapporteur felt it necessary to prepare draft article 66.

(5) Indeed, two important Conventions based on the work of the International Law Commission place great emphasis on conciliation as a means of settling disputes concerning their application or interpretation. These are the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, of 14 March 1975¹⁸ (art. 85) and the Vienna Convention on Succession of States in Respect of Treaties, of 23 August 1978,¹⁹ (art. 42 and annex), which follow the Vienna Convention on the Law of Treaties quite closely. This seems to indicate a favourable attitude to recourse to conciliation. It is true that in these two conventions it is a question only of conciliation between States, and not between international organizations or between States and international organizations,²⁰ but that is because these texts are concerned only with disputes between States. It is also true that under these two conventions conciliation is much more general in scope than under the Vienna Convention, which provides for conciliation only in connection with the application and the interpretation of part V, and this could be regarded as a reason for abandoning the idea of transposing article 66 to the present draft and preparing instead an entirely new text bearing a closer resemblance to the solutions embodied in the 1975 and 1978 conventions. The Special Rapporteur does not reject the latter solution *a priori*, but in seeking to remain as faithful as possible to the text of the Vienna Convention, according to the general method adopted by the Commission, he thought it would be quite useful to transpose to the treaties of international organizations the solutions adopted for treaties between States, even if a broader and less restrictive solution with respect to conciliation were subsequently to be adopted.

(6) In addition to these general considerations concerning the structure of draft article 66, some explanation of the solutions proposed in paragraph 2 is called for. With regard to subparagraph (a), the solution envisaged is that of recourse, in so far as possible, to an advisory opinion of the Court. Solutions of this nature have been adopted with regard to the

¹⁸ *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations* vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207.

¹⁹ For reference, see footnote 9 above.

²⁰ It would have been necessary to cover such disputes in the first of these conventions, concerning the representation of States in their relations with international organizations, if the idea had been accepted that the organization cannot remain indifferent if a dispute arises between a member State and the host State and that it must therefore take sides in law concerning the dispute; but although the Convention gives some attention to this idea in the phase of the dispute preceding conciliation, it takes another course with regard to the latter.

Administrative Tribunals of the United Nations and the ILO, and have given rise to a well-known series of decisions by the International Court of Justice.²¹ Solutions of this kind are also to be found in certain treaties that are often referred to: the Convention on the Privileges and Immunities of the United Nations of 13 February 1946²² (sect. 30); the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations of 26 June 1947²³ (sect. 21), the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947²⁴ (sect. 32); and the Convention on the Representation of States in their Relations with International Organizations of an International Character of 14 March 1975²⁵ (art. 85, para. 6). In practice, it has become clear that all these provisions have drawbacks, or at least limitations. The first limitation consists in the fact that it is not easy to state in advance and in a general manner which organ of which organization will be called upon to request an opinion from the Court. If in a given case the organization concerned is one which has received from the General Assembly of the United Nations the right to request an opinion from the Court, it would normally be that organization which should bring the matter before the Court, but the case may involve organizations which have not received that right. If they belong to the "United Nations family", they could seek to arrange directly or indirectly through their member States a debate in a United Nations organ empowered to request an opinion; in the case of regional organizations, the outcome is even more doubtful. Furthermore, even supposing that an organ empowered to request an opinion from the Court agrees to debate the matter, it remains perfectly free to request the opinion or not to request it; any course which deprives that organ of the absolutely discretionary nature of its decision is inconceivable.

(7) That is the reason why the provision concerning the advisory opinion machinery in paragraph 2 of article 66 has been couched in very general terms: reference is made therein to Article 96 of the Charter, which opens up a wide range of possibilities without going into detail.²⁶ In order to emphasize that the

organ to which the dispute is referred is free to request an opinion from the Court or not to do so it is stated that the party to the dispute "may ask one of the bodies competent . . . to request an opinion"; it would also have been possible to use the term "may recommend to . . .".²⁷ Lastly, it is provided that the opinion of the Court will be binding upon the parties: some of the aforementioned texts adopt the same solution, while others say nothing about the effects of the opinion.²⁸

(8) With regard to the conciliation procedure, it will be necessary to introduce fairly substantial changes, notably by drawing a distinction between the two cases which are the subjects of paragraphs 1 and 2 of article 66 respectively. This question will be examined below in connection with the annex to the present articles. Provision has been made in paragraph 2 for intervention in certain cases by the President of the International Court of Justice instead of the Secretary-General of the United Nations, because it is not impossible that the United Nations might be a party to a conciliation procedure and that, in that case, some of the functions of the Secretary-General would have to be entrusted to someone having no connection with either of the parties involved.

Article 67. Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty²⁹

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

"2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

This is the solution adopted in section 30 of the Conventions of 1946 (sect. 30) and 1947 (sect. 32) mentioned above.

²⁷ According to para. 6 of art. 85 of the 1975 Vienna Convention, the Conciliation Commission "may recommend to the Organization, if the Organization is so authorized in accordance with the Charter of the United Nations, to request an advisory opinion . . .".

²⁸ The aforementioned Conventions of 1946 and 1947, and the 1947 agreement, state that the opinion is binding; the 1975 Convention does not so state.

²⁹ Corresponding provision of the Vienna Convention:
"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 and 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument 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."

²¹ Effects of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion (*I.C.J. Reports 1954*, p. 47); Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints made against the United Nations Educational, Scientific and Cultural Organization, Advisory Opinion (*I.C.J. Reports 1956*, p. 77); Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion (*I.C.J. Reports 1973*, p. 166).

²² United Nations, *Treaty Series*, vol. 1, p. 30.

²³ *Ibid.*, vol. 11, p. 11.

²⁴ *Ibid.*, vol. 33, p. 261.

²⁵ For reference, see footnote 18 above.

²⁶ Article 96:

"1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

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 an 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. An instrument emanating from an international organization shall be accompanied by the production of the powers of the representative of the organization communicating it.

Commentary

(1) Article 67 establishes procedural guarantees which must be extended to treaties of international organizations. To that end, the text of the Vienna Convention must be supplemented by a rule which defines, in a manner parallel to the last sentence, concerning representatives of States, the situation of representatives of an international organization making the envisaged communication. It is easy to define the content of this rule.

(2) In fact, the content of the communication in question carries the same weight as communications concerning consent to be bound by a treaty, but in the contrary sense, since this communication concerns the withdrawal, or at least the suspension, of that consent. As regards communications by representatives of States, article 67 is based on a strict rule, stricter than that embodied in article 7 of the Vienna Convention. Apart from the case of persons representing the State *ipso facto* in virtue of their functions, article 7 provides for two solutions: the production of appropriate powers or dispensation with the presentation of powers if it appears from practice or from other circumstances that such was the intention of States. On the other hand, in the case of the termination or suspension of a treaty, article 67 *does not mention this implicit dispensation with powers resulting from practice or from other circumstances*. Turning to the case of international organizations, we see that paragraph 4 of draft article 7 already adopted by the Commission³⁰ does not mention persons representing international organizations *ipso facto* in virtue of their functions; it mentions only persons producing appropriate powers or persons who, according to practice or other circumstances, must be considered as representing the organization. Since this latter category has

³⁰ Para. 4 of draft article 7 [see footnote 3 above] reads as follows:

“4. A person is considered as representing an international organization for the purpose of communicating the consent of that organization to be bound by 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 that purpose without having to produce powers.”

been eliminated in the case of States, it must also be eliminated in the case of organizations as regards the termination or suspension of a treaty.

(3) Such is the solution adopted in draft article 67 with regard to the representatives of international organizations: it deals with the representatives of organizations and those of States in a symmetrical manner and is logically sound. The conclusion of a treaty extends over a certain period of time, during which practices and circumstances bring the representatives of States into contact with one another and entail consent, tacit acceptance and recognition; the termination of the effects of a treaty, on the other hand, is brought about by a unilateral process and has more serious consequences: it is quite natural that the requirements concerning powers should be more stringent in this case. If international organizations seem to be treated more strictly than States, this is due simply to one undeniable fact: they have no Head of State, no Head of Government and no Minister for Foreign Affairs, and thus far their structures have not been sufficiently similar for it to be said that all of them, without exception, have, under various names, an agent who represents them in their relations with other entities in a uniform manner.

Article 68. Revocation of notifications and instruments provided for in articles 65 and 67³¹

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

Commentary

This article of the Vienna Convention resulted from the desire to facilitate the protection of treaties to the greatest possible extent, and did not give rise to much discussion either in the Commission or at the Conference. There is no reason why a similar article should not be adopted in the case of the treaties of international organizations; no drafting changes are required. Only one comment, relating to the commentary to article 67, is required. Article 68 does not state what form the “revocation” of an instrument communicated in application of paragraph 2 of article 67 should take, and the question is undoubtedly important in the case of the instruments of international organizations. Although there is no legal rule, let alone a general principle, relating to “contrary action” in the law of treaties, the Special Rapporteur believes that an instrument can be “revoked” only by another instrument of the same nature and character; in other words, the formal rules provided for in article 67 are also applicable to the “revocation” mentioned in article 68.

³¹ The text of this draft article is the same as that of the corresponding article of the Vienna Convention.

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

*Article 69. Consequences of the invalidity of a treaty*³²

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 State or an 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

Article 69 of the Vienna Convention was adopted without opposition at the Conference on the Law of Treaties. Its provisions are the logical outcome of earlier provisions, and its extension to cover the treaties of international organizations gives rise to no objection. Only two drafting changes have been introduced for the purposes of the present draft articles. The first, in paragraph 1, is purely transitory and provisional;

³² Corresponding provision of the Vienna Convention:

"Article 69: Consequences of the invalidity of a treaty"

"1. A treaty the invalidity of which is established under the present Convention 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 a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty."

the second, in paragraph 4, involves the insertion of a reference to an international organization in addition to the reference to a State.

*Article 70. Consequences of the termination of a treaty*³³

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, paragraph 1 applies in the relations between that State or that international 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 was adopted unanimously at the Conference and calls for the same comments as article 69. The only drafting changes made in the draft article are the replacement in paragraph 1 of the words "the present Convention" by "the present articles" and by the insertion in paragraph 2 of a reference to an international organization, in addition to the reference to a State.

*Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law*³⁴

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

³³ Corresponding provision of the Vienna Convention:

"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 Convention:

"(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 denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect."

³⁴ The text of this draft article is the same as that of the corresponding article of the Vienna Convention.

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

Article 71 of the Vienna Convention was adopted without difficulty in the Commission; at the Conference some voted against it and others abstained, mainly for the same reasons as were given for opposing articles 53 and 64. But once the two latter articles have been accepted, there is no reason for not extending article 71 to cover the treaties of international organizations.

Article 72. Consequences of the suspension of the operation of a treaty³⁵

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 the suspension;

(b) does not otherwise affect the 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.

³⁵ Corresponding provision of the Vienna Convention:
“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 Convention:

“(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

Article 72 of the Vienna Convention, which was adopted almost unanimously by the Commission and at the Conference on the Law of Treaties, should be extended to cover international organizations. All that is required for that purpose is a purely provisional drafting change in paragraph 1.

PART VI. MISCELLANEOUS PROVISIONS

Article 73. Cases of State succession, succession of international organizations, succession of a State to an international organization and succession of an international organization to a State, responsibility of a State or of an international organization and outbreak of hostilities³⁶

The provisions of the present articles shall not prejudice any question that may arise in regard to a treaty from a succession of States, from a succession of international organizations or from a succession of a State to an international organization or of an international organization to a State, or from the international responsibility of a State or of an international organization, or from the outbreak of hostilities between States.

Commentary

(1) The purpose of article 73 of the Vienna Convention is to define the limits of the codification it embodies by making a reservation relating to a number of fields which it does not cover. There was never any doubt that the reservation should apply to State succession and the international responsibility of States. But should the case of outbreak of hostilities be included? The Commission hesitated, and answered this question in the negative.³⁷ Of course, in traditional international law there is a problem concerning the effect of war upon treaties; that effect, the scope of which has been hotly debated, is linked to “the state of war” rather than to recourse to armed force, and the Commission considered that that case was “wholly outside the scope of the general law of treaties to be codified in the present articles; and that no account should be taken of that case or any mention made of it in the draft articles”.³⁸ In fact the Commission did not

³⁶ Corresponding provision of the Vienna Convention:
“Article 73: Cases of State succession, State responsibility and outbreak of hostilities”

“The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.”

³⁷ See *Yearbook . . . 1966*, vol. II, p. 267, document A/6309/Rev.1, part II, chap. II, draft articles on the law of treaties and commentaries, para. (2) of the commentary to art. 69.

³⁸ *Ibid.*, p. 268.

wish, by making a reservation of that kind, to lend credence to the idea that there was any place in the current system of international laws for a "state of war" or any similar situation. The United Nations Conference on the Law of Treaties, without criticizing the Commission for its discretion, considered that a problem existed that could not be studied in all its aspects within the limited framework of the codification with which the Conference was concerned, but that made it necessary to include a reservation.³⁹

(2) It was necessary to recall this incident at the Conference to show clearly that in introducing reservations such as those embodied in article 73 the Commission is merely recalling the existence of several sets of problems which the Convention does not cover and on which it takes no position. The three subjects covered by reservations in article 73 of the Vienna Convention must also be covered in the case of the treaties of international organizations, but with a modification that calls for some explanation.

(3) With regard to the subject of State responsibility, it must necessarily be extended to cover the responsibility of international organizations; the relevant problems have been mentioned in the course of the Commission's work, but thus far no effort has been made to codify them. With regard to the outbreak of "hostilities between States", it might be wondered whether the reference to "States" does not impose an unnecessary limitation. The Special Rapporteur did not think so. There is currently a definite tendency to admit that rules of international law (*jus in bello*) apply to armed conflicts that do not pit one State against another, as in the 1977 Additional Protocols⁴⁰ to the 1949 Geneva Conventions for the protection of war victims.⁴¹ But the current case does not involve *jus in bello*; neither does it involve determining—what seems for the moment highly debatable—whether an international organization could be a party to an armed conflict; rather, it involves defining the cases in which there might remain a trace of what was formerly called the effect of war on treaties, and from that standpoint it can be acknowledged that if any trace of

that effect remains it can only be in an armed conflict *between States*. That is why the formula used in the Vienna Convention can be retained.⁴²

(4) On the other hand, the formula relating to "succession of States" must be enlarged by mentioning other similar situations, namely the succession of international organizations, the succession of a State to an organization and the succession of an organization to a State. The use of the term "succession" is not intended to imply that the situations mentioned here raise problems identical to those of State succession, but only to stress that these problems relate to the transformation of a subject of law and the substitution of one subject of law for another with respect to a right or an obligation. These problems exist, as do those relating to State succession; the aim is not to solve them, or even to analyse them, but merely to recall that the present draft articles contain a reservation in regard to their solution and make no attempt to solve them. Certain examples will be cited, but not elaborated upon.

(5) The transitions from the League of Nations to the United Nations, from the Permanent Court of International Justice to the International Court of Justice, from the Permanent Central Opium Board to the International Narcotics Control Board and from the Organization for European Economic Co-operation to the Organization for Economic Co-operation and Development are classic cases, and there are others.⁴³ In the case of a customs union administered by an international organization, is the customs union bound by the tariff agreements concluded by its member States with third States? If the union is dissolved, do its member States remain bound by the tariff agreements it concluded with third States? This is not the place to review these problems and others of the same nature, but simply to justify the wording proposed for the title and the body of the present draft article. This is a problem which the Commission has already encountered in connection with succession of States in respect of treaties.⁴⁴ On that occasion, it provided a strict definition of "State succession" and excluded all other "successions" from its draft, but that position was based notably on the fact that it excluded from its draft

³⁹ See, for example, the statement by the representative of Poland at the Conference:

"Contemporary writers were very circumspect in dealing with the problem, but they did not ignore it. It would be difficult for the Conference to enter into all the aspects of the problem, but the convention on the law of treaties, which was to be a codifying instrument, could not ignore the existence of the problem. Article 69 should therefore . . . include a reservation . . .". (*Official Records of the United Nations Conference on the Law of Treaties, First session, Summary records of the plenary meetings of the Committee of the Whole* (United Nations Publication, Sales No. E.68.V.7), p. 452, 76th meeting of the Committee of the Whole, para. 17.)

⁴⁰ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts* (Geneva, 1974–1977) (Bern, Federal Political Department, 1978), vol. I, pp. 115–184. Text reproduced in A/32/144, annexes I and II.

⁴¹ United Nations, *Treaty Series*, vol. 75, p. 2.

⁴² The 1978 Vienna Convention on Succession of States in Respect of Treaties [see footnote 9 above] likewise contains a reservation in article 39 concerning the case of "outbreak of hostilities between States".

⁴³ Internal administrative agencies have become international organizations as a result of decolonization and the ensuing independence of the dependent territories that they grouped together. The question also arises as to whether closed international organizations with a few member States retain their legal identity after withdrawals that call in question the reason for their existence.

⁴⁴ See *Yearbook . . . 1974*, vol. II (Part One), pp. 11–13, document A/CN.4/278 and Add.1–6, paras. 42–48, and p. 66, paras. 369–372; also *ibid.*, pp. 253–254, document A/9610/Rev.1, chap. II, sect. D, paras. (3)–(5) of the commentary to arts. 30–32.

those international treaties not concluded between States. In the present draft articles it is necessary to include a reservation concerning all types of "succession".

Article 74. Diplomatic and consular relations and the conclusion of treaties⁴⁵

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

Commentary

This article of the Vienna Convention, which resulted from action initiated at the Conference, supplements article 63 and calls for the same comments. In order to adapt this article to the treaties of international organizations, it is necessary to insert words indicating that this draft article covers only the treaties concluded by States without diplomatic or consular relations *and one or more international organizations*.

Article 75. Case of an aggressor State⁴⁶

The provisions of the present articles are without prejudice to any obligation in relation to a treaty 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) The reasons that led the Commission to prepare the article which became article 75 of the Vienna Convention by a vote of 100 votes to none, with 4 abstentions⁴⁷ lead to the conclusion that it is necessary to extend it to cover the treaties of international

organizations. There is no doubt that article 75 was originally oriented towards the past and that there was no example of a treaty between several international organizations or between one or more States and one or more international organizations that could have been affected by measures taken against an aggressor State. But that will not necessarily be so in the future.

(2) Moreover, according to the Definition of Aggression adopted by the United Nations General Assembly in its resolution of 14 December 1974,⁴⁸ the term "aggressor State" can cover the case of an international organization that commits aggression.⁴⁹ In adapting article 75 to the case of treaties of international organizations it is therefore not necessary to amend the term "aggressor State", and although the proposed article would be more likely to affect treaties between an international organization and one or more States, it was not felt necessary to exclude the case in which it would affect a treaty between two or more organizations. The only change made in article 75 was to replace the words "of the present Convention" by the words "of the present articles".

**PART VII. DEPOSITARIES,
NOTIFICATIONS,
CORRECTIONS AND REGISTRATION**

Article 76. Depositaries of treaties⁵⁰

1. The designation of the depositary of a treaty may be made by the negotiating States and the international organizations having participated in the negotiations, either in the treaty itself or in some other manner. The depositary may be one or more States, one or more international organizations or the chief administrative officer of one or more international organizations.

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.

⁴⁵ Corresponding article of the Vienna Convention:
"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 those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations."

⁴⁶ Corresponding provision of the Vienna Convention:
"Article 75. Case of an aggressor State

"The provisions of the present Convention are without prejudice to any obligation in relation to a treaty 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."

⁴⁷ See *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 (op. cit.)*, p. 127, 23rd meeting, vote on article 70.

⁴⁸ Resolution 3314 (XXIX), annex.

⁴⁹ Explanatory note on article 1 of the Definition:

"In this Definition the term 'State':

"...

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

⁵⁰ Corresponding provision of the Vienna Convention:

"Article 76: Depositaries of treaties

"1 The designation of the depositary of a treaty may be made by the negotiating States, 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 and a depositary with regard to the performance of the latter's functions shall not affect that obligation."

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) Article 76 was adopted unanimously at the United Nations Conference on the Law of Treaties by 105 votes,⁵¹ and it can be adapted to the treaties of international organizations simply by making two changes involving the insertion of references to international organizations as well as States.

(2) The possibility of a treaty having more than one depositary was not foreseen in the draft articles prepared by the Commission. The idea of covering that eventuality was introduced at the first session of the Conference taking into consideration a practice which at that time was of recent origin (it had begun with the treaty banning nuclear weapon tests in the atmosphere, in outer space and under water, of 5 August 1963),⁵² the Conference adopted by 77 votes to none, with 5 abstentions, the principle that one or more States may be designated as depositaries of a treaty.⁵³ Although some objections were raised to this principle, the Special Rapporteur considers not only that it should be retained but that it could be extended to include more than one depositary international organization. The case of a multilateral treaty between international organizations is somewhat hypothetical; the possibility of more than one depositary being needed in a case of this kind is even more unlikely. From the standpoint of principle, however, there is no reason to ignore the possibility that there might be several depositary international organizations, and this possibility has therefore been provided for in article 76. Objections might be raised to this proposal, not only because of its rather theoretical nature but also because it was not provided for in the Vienna Convention, where it could have been mentioned in connection with treaties between States.

Article 77. Functions of depositaries⁵⁴

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting

⁵¹ *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 (op. cit.)*, p. 130, 24th meeting, vote on art. 71.

⁵² United Nations, *Treaties Series*, vol. 480, p. 43.

⁵³ See *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 (op. cit.)*, p. 468, 78th meeting of the Committee of the Whole, paras. 62-63.

⁵⁴ Corresponding provision of the Vienna Convention:

"Article 77: Functions of depositaries

"1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

States and international organizations or the contracting international organizations, as the case may be, comprise in particular:

(a) keeping custody of the original text of the treaty and of any full 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 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 entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(f) informing the States and international organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, formal confirmation, 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;

"(a) keeping custody of the original text of the treaty and of any full 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 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 in question;

"(e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

"(f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, 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 Convention.

"2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned."

(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, as the case may be, of the signatory States and organizations and of the contracting States and organizations, or of the signatory organizations and the contracting organizations, or, again, where appropriate, of the competent organ of the international organization which assumes the functions of depositary.

Commentary

(1) Article 77 of the Vienna Convention is made up of the technical provisions which the Conference on the Law of Treaties finally adopted unanimously.⁵⁵ It must be extended to cover treaties of international organizations. To that end, some of its provisions must be amended to include a reference to one or more international organizations as well as the reference to one or more States. The provisions in question are paragraph 1, subparagraphs 1(b), (d), (e) and (f), and paragraph 2. Other points call for a brief comment.

(2) Paragraph 1 and 2 of article 77 of the Vienna Convention refer to "contracting States"; paragraph 2 also refers to "signatory States". Draft article 77 refers to the "contracting States and international organizations or the contracting international organizations" so as to distinguish between the two categories of treaties: those between States and international organizations and treaties between two or more international organizations. If this solution is deemed insufficient, article 77 would have to be split, purely for a question of drafting, as was done in the case of article 16.⁵⁶ Alternatively, the Commission might consider at a later stage the possibility of introducing new terms: "contracting parties" and "signatory parties" to designate respectively "the contracting States and international organizations or the contracting international organizations" and "the signatory States and international organizations or the signatory international organizations"; the text would then be less cumbersome.

(3) The list of instruments in subparagraph 1(f) has been extended to include "formal confirmation". After a fairly lively debate, the Commission decided that the term "ratification" should be replaced so far as international organizations were concerned by that of "formal confirmation" (art. 2, para. 1(b) *bis*; art. 11; art. 14; art. 16; art. 19 *bis*; art. 23; art. 23 *bis*).⁵⁷

⁵⁵ See *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* (op. cit.), p. 130, 24th plenary meeting, vote on article 72.

⁵⁶ See footnote 3 above.

⁵⁷ *Idem*.

(4) Article 77 of the Vienna Convention states in subparagraph 1(g) that "registering the treaty with the Secretariat of the United Nations" is a function of a depositary. This provision is the result of an amendment of the United States of America, which was adopted without objections.⁵⁸ However, the wording used could be discussed, particularly in the light of article 80 of the Vienna Convention, which will be considered later. Indeed, as the Commission was to observe in its final report,⁵⁹ in United Nations practice the term "registration" cannot be used when no party to the agreement is a Member of the United Nations; the correct term in such cases is "filing and recording". The Commission nevertheless used the term "registering" in article 77. Article 80, on the other hand, is drafted more precisely since it distinguishes between "registration" and "filing and recording". Whatever the reason for this discrepancy between articles 77 and 80 of the Vienna Convention, the Special Rapporteur considered that it would be preferable to remain faithful to the text of the Vienna Convention, since that was the course the Commission had followed on other occasions.

(5) Article 77, paragraph 2, of the Vienna Convention concludes with the words "where appropriate, of the competent organ of the international organization concerned". This can only refer, within the context of the Vienna Convention, to the organization which is the *depositary* of the treaty. The same would not be true of draft article 77, which refers not only to depositary organizations but also to organizations which are parties, contracting parties or signatories to the treaty. It was therefore deemed advisable, in order to avoid possible ambiguity, to replace the term "international organization concerned" by "international organization which assumes the functions of depositary."

Article 78. Notifications and communications⁶⁰

Except as the treaty or the present articles otherwise provide, any notification or communication to be

⁵⁸ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (op. cit.), p. 202, document A/CONF.39/14, para. 657, sect. iv, (6), and *ibid.*, p. 203, para. 660, (k).

⁵⁹ *Yearbook . . . 1966*, vol. II, p. 273, document A/6309/Rev. I, part II, chap. II, draft articles on the law of treaties and commentaries, para. (1) of the commentary to art. 75:

"Under article 10 of the Regulations concerning the Registration and Publication of Treaties and International Agreements adopted by the General Assembly, the term used instead of 'registration' when no Member of the United Nations is party to the agreement is 'filing and recording', but in substance this is a form of voluntary registration."

⁶⁰ Corresponding provision of the Vienna Convention:

"Article 78: Notifications and communications

"Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

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 international 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 international organization in question only upon its receipt by the State or international 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 international 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 was adopted unanimously both in the Commission and at the Conference on the Law of Treaties;⁶¹ adapting it to the treaties which are the subject of the present draft articles requires only slight drafting changes in the introductory sentence and in subparagraphs (a), (b) and (c).

Article 79. Correction of errors in texts or in certified copies of treaties⁶²

1. Where, after the authentication of the text of a treaty, the signatory States and international organ-

(a) if there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter,

(b) be considered as having been made by the State in question only upon its receipt by the State 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 for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, para. 1(e)."

⁶¹ See *Yearbook ... 1966*, vol. I (Part Two), p. 291, 887th meeting, para. 43; *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 (op. cit.)*, p. 131, 24th plenary meeting, vote on article 73.

⁶² Corresponding provision of the Vienna Convention:

"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 the contracting States are agreed that it contains an error, the error shall, unless they 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.

izations and the contracting States and organizations or the signatory organizations and contracting organizations, as the case may be, are agreed that it contains an error, the error shall, unless the said States and organizations or, where appropriate, the said 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 organizations or the signatory organizations and contracting organizations, as the case may be, 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, shall execute a *procès-verbal* specifying the rectification, and shall 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

"2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States 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 entitled to become parties to the treaty;

"(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

"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 the contracting States agree should be corrected.

"4. The corrected text replaces the defective text *ab initio*, unless the signatory States and the contracting States 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 to the contracting States."

States and international organizations and to the contracting States and organizations or to the signatory organizations and contracting organizations, as the case may be.

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 organizations and the contracting States and organizations or the signatory organizations and contracting organizations, as the case may be, 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 organizations, or the signatory organizations and contracting organizations, as the case may be, 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 organizations, or to the signatory organizations and contracting organizations, as the case may be.

Commentary

Article 79 of the Vienna Convention, which is of a highly technical nature, was finally adopted unanimously at the Conference on the Law of Treaties by 105 votes;⁶³ a similar text embodying the necessary drafting changes should be included in the present draft articles. Paragraphs 1, 2(b), 3, 4 and 6 reveal the extremely cumbersome nature of the wording used to insert the appropriate references to international organizations, whether in association with States or on their own, depending upon whether a treaty between one or more States and one or more international organizations or a treaty between international organizations is involved. This problem has already been noted in the text of draft article 77;⁶⁴ its full extent becomes apparent in article 79. The neatest solution would be to introduce the new terms "signatory parties" and "contracting parties", and to define them in paragraph 1 of draft article 2. Another solution would be to divide article 79 in two, dealing separately with treaties between one or more States and one or more international organizations, on the one hand, and

treaties between international organizations, on the other, however, this would only partly correct the cumbersomeness and would entail the repetition, purely for drafting reasons of an article which is already lengthy and quite difficult for the reader. It is for the Commission to determine either now or at some later stage which solution is preferable; the Special Rapporteur has simply reproduced the solution which conforms most closely to the text of the Vienna Convention.

Article 80. Registration and publication of treaties⁶⁵

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.

Commentary

Article 80 of the Vienna Convention was finally adopted unanimously by 105 votes,⁶⁶ and an identical text should be included in the draft articles. As has been observed above in connection with article 77,⁶⁷ the text of article 80 is absolutely correct from the technical standpoint since it distinguishes between registration and filing and recording, the latter procedure being reserved for treaties concluded between States non-members of the United Nations. The case of treaties concluded between international organizations is, therefore, covered, and there is no need to amend the text of the Vienna Convention in any way.

ANNEX

Procedures established in application of article 66⁶⁸

1. A list of conciliators consisting of qualified jurists 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 party to the present articles and any international organization to which the present articles have become applicable shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following

⁶³ The text is the same as that of the corresponding provision of the Vienna Convention.

⁶⁴ See *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 (op. cit.)*, p. 132, 24th plenary meeting, vote on article 75.

⁶⁵ See para. (4) of the commentary to article 77, above.

⁶⁶ The annex to the Vienna Convention has no heading; it is suggested that a heading should be added in the draft articles for the sake of clarity.

⁶³ See *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 (op. cit.)*, p. 132, 24th meeting, vote on article 74.

⁶⁴ See para. (2) of the commentary to art. 77, above.

paragraph. A copy of the list shall be transmitted to the President of the International Court of Justice.⁶⁹

I. CASES IN WHICH, IN REFERENCE TO A TREATY BETWEEN SEVERAL STATES AND ONE OR MORE INTERNATIONAL ORGANIZATIONS, AN OBJECTION AS PROVIDED FOR IN PARAGRAPHS 2 AND 3 OF ARTICLE 65 IS RAISED BY ONE OR MORE STATES WITH RESPECT TO ANOTHER STATE⁷⁰

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a Conciliation Commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty 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.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. 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.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. 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.

6. The Commission shall report within twelve 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.

7. 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.

II. CASES IN WHICH AN OBJECTION AS PROVIDED FOR IN PARAGRAPHS 2 AND 3 OF ARTICLE 65 IS RAISED BY ONE OR MORE INTERNATIONAL ORGANIZATIONS OR WITH RESPECT TO AN INTERNATIONAL ORGANIZATION⁷¹

2 *bis*. The request referred to in article 66 shall be submitted to the Secretary-General. However, if the request is made by or directed against the United Nations, it shall be submitted to the President of the International Court of Justice. The Secretary-General or, as appropriate, the President of the International Court of Justice, shall bring the dispute before a Conciliation Commission constituted as follows:

If one or more States constitute one of the parties they shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

One or more international organizations constituting one of the parties or the international organizations constituting both of the parties shall appoint:

(a) one conciliator, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator included in the list on an initiative other than their own.

The four conciliators chosen by the parties shall be appointed within 60 days following the date on which the Secretary-General or, as appropriate, the President of the International Court of Justice, receives the request.

The four conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General or, as appropriate, by the President of the International Court of Justice within 60 days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General or, as appropriate, by the President of the International Court of Justice 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.

Any vacancy shall be filled in the manner prescribed for the initial appointment.⁷²

3 *bis*. 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

⁶⁹ Paragraph 1 of the annex to the Vienna Convention:

"A list of conciliators consisting of qualified jurists 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 party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph."

⁷⁰ This section heading does not appear in the annex to the Vienna Convention. The text of paragraphs 2 to 7 is identical to that of the corresponding paragraphs of the annex to the Vienna convention.

⁷¹ There are no provisions in the annex to the Vienna Convention corresponding to this heading or to paragraphs 2 *bis et seq.*

⁷² The corresponding provision of the annex to the Vienna Convention is contained above in para. 2 of sect. 1 of this annex.

Commission shall be made by a majority vote of the five members.⁷³

4 bis. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.⁷⁴

5 bis. 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.⁷⁵

6 bis. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General or, as appropriate, with the President of the International Court of Justice, 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 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.⁷⁶

7 bis. The Secretary-General shall provide the Commission either directly or, as appropriate, through the intermediary of the President of the International Court of Justice, with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.⁷⁷

Commentary

(1) The main purpose of the annex to the Vienna Convention is to set up the conciliation procedures instituted under article 66. The Special Rapporteur has prepared a draft annex for the same reasons and with the same reservations as those set forth in the commentary to draft article 66. The basic feature of the draft reflects the fact that, in many cases, it is necessary to settle disputes to which an international organization is a party; by enabling an international organization as such to become a party to a treaty, one thereby admits that it may become a party to disputes arising from the treaty, or at least to some of them. This inference is so logical that there is no need to dwell upon it at length. However, as was pointed out earlier, only in rare instances have procedures been set up to enable an organization as such to appear as a party to a dispute.

(2) With regard to the conciliation machinery, the only machinery envisaged for this case, it was necessary to distinguish between instances in which an organization is involved and those in which no organization is involved, because this affects some of the operating conditions of the bodies responsible for conciliation, although the conciliation process itself remains basically the same. If one considers separately the cases involving an international organization, one

finds certain cases in which the organization raises an objection to the claim of a State or of an organization, as provided for under article 65, as well as the opposite case in which the claim of an organization is contested by a State or by an organization. The distinction thus introduced does not coincide with the basic distinction, applicable to *treaties* but not to *disputes*, differentiating treaties concluded between one or more States and one or more organizations from treaties concluded between several organizations.

(3) As to the structure of the annex, there were several possible ways of solving the problems raised by the need for two types of provisions: those that are common to all disputes and those especially applicable to one category or the other. The structure adopted was chosen because it follows the text of the Vienna Convention as closely as possible, while clearly bringing out the new problems created by the emergence of international organizations as parties to a dispute. As in the Vienna Convention, the annex begins with a provision common to all disputes, namely that dealing with the constitution of a list of conciliators, which is contained in paragraph 1. All the other paragraphs are divided into two sections (I and II); those in section II follow the same pattern as those in section I and are numbered in the same manner, with the word *bis* following the paragraph number. Section I is devoted exclusively to disputes between States; it reproduces unchanged paragraphs 2 to 7 of the annex to the Vienna Convention. Section II is devoted to other cases, that is, to those in which the objection provided for under article 65 is raised by or with respect to an organization. Changes have been made in some paragraphs, compared to the annex to the Vienna Convention (and to sect. I of this annex), while no changes have been made in other paragraphs (3 *bis*, 4 *bis* and 5 *bis*). It is these changes that call for commentary.

(4) One of the first problems, which is apparent in the three amended paragraphs of section II (as well as in para. 1), stems from the fact that the United Nations may be a party to a dispute arising from a treaty to which it is a party. However, the key figure in the conciliation procedure envisaged in the annex to the Vienna Convention is the Secretary-General of the United Nations. This arrangement must be changed, at least in part, for cases in which the United Nations is a party to the dispute; one cannot be a party to a dispute and, at the same time, be an impartial participant in the conciliation machinery dealing with the dispute. An effort has been made in the draft annex to find a solution for this special case by having the President of the International Court of Justice replace the Secretary-General in all tasks that involve impartiality in conciliation—but only in these tasks—thus maintaining the uniformity of the conciliation machinery.

(5) Accordingly, the drawing up of the list of conciliators which constitutes the stage of the conciliation process preceding the emergence of any

⁷³ Text identical to that of the corresponding provision of the annex to the Vienna Convention and of para. 3 of sect. I above.

⁷⁴ Text identical to that of the corresponding provision of the annex to the Vienna Convention and of para. 4 of sect. I above.

⁷⁵ Text identical to that of the corresponding provision of the annex to the Vienna Convention and of para. 5 of sect. I above.

⁷⁶ The corresponding disposition of the annex to the Vienna Convention is contained in para. 6 of sect. I above.

⁷⁷ The corresponding disposition of the annex to the Vienna Convention is contained in para. 7 of sect. I above.

dispute is the same for all disputes, as was indicated earlier; it is set forth at the beginning of the draft annex, in paragraph 1. This paragraph contains a few drafting changes, compared to paragraph 1 of the annex of the Vienna Convention, in order to provide for international organizations "to which the present articles have become applicable".⁷⁸ As to the task of the Secretary-General of the United Nations, his role is not altered in any way, even in the event of a dispute to which the United Nations is a party. Provision has merely been made for the Secretary-General to transmit the list in question to the President of the International Court of Justice, who is thus in a position to play his role at any time, should it become necessary.

(6) However, as regards the referral of matters to the Conciliation Commission and even the constitution of the Commission itself (para. 2 *bis*), the President of the International Court of Justice will replace the Secretary-General if the United Nations is involved. By the same token, when a request for conciliation has been made to the President of the International Court of Justice, the relevant report of the Conciliation Commission will also be deposited with him (para. 6 *bis*).

(7) As to any assistance and facilities the Conciliation Commission may require, it did not seem very practical to ask the International Court of Justice to provide them when the President of that body is associated with the conciliation, since the means of the Court are limited from the standpoint both of finance and of equipment and staff. Accordingly, provision has been made, in this case as well, for the Secretary-General to furnish assistance and facilities to the Conciliation Commission; however, he will do so through the intermediary of the President of the Court (para. 7 *bis*). It was thought that the inclusion in the procedure of a distinguished individual of unquestionable impartiality would be sufficient guarantee, in the eyes of a party to a dispute with the United Nations, of the neutral nature of whatever services the Secretary-General might be requested to provide.

(8) Another practical problem, as regards international organizations, is created by the fact that it is not possible to refer to the nationality of the conciliators. When referring to States, the Vienna Conven-

tion and, consequently, the present articles, provide that one of the conciliators appointed by a State party to a dispute shall be of the nationality of that State and the other shall not. In the case of international organizations, the draft annex contains the following solution: an organization party to a specific dispute designates one conciliator, who may or may not be included in the list, and another conciliator who must necessarily be included in the list but who must have been appointed by a State or by a different organization, thus excluding conciliators appointed by the organization in question.

(9) In conclusion, if one subjects the draft annex to close scrutiny, it is possible to criticize certain aspects of the system thus established. In some respects, the system seems too limited: if, in fact, conciliation has all the merits attributed to it, why limit it to disputes involving part V of the draft articles? Is not the Vienna Convention thus being followed too slavishly? Was not the machinery of the Vienna Convention devised merely to resolve a political crisis that had arisen during the United Nations Conference on the Law of Treaties but that today is very much a thing of the past? Might it not be better to extend the field of application of conciliation and, at the same time, to establish it on different bases, as was done in other codification conventions concluded since 1969? Another cause for criticism may perhaps reside in the complexity of the proposed machinery: since one cannot rule out the possibility that the United Nations might become a party in a case of conciliation, would it not be preferable as a general rule to dissociate conciliation from the Secretary-General of the United Nations?

(10) Although the Special Rapporteur was aware of such criticism, it is not for him, nor perhaps for the Commission, to recommend that Governments should select one method of settling disputes in preference to another. However, the exercise of adapting the system of the Vienna Convention to disputes to which international organizations are parties is not futile. It is useful for Governments to have a clear and accurate picture of the different possibilities; moreover, since the Vienna Convention has already entered into force, and since these articles may become the subject of a convention, it is particularly important that the two conventions should differ from each other only in cases and for reasons that have been carefully examined. It is already quite presumptuous to imagine that the present effort could contribute anything new. In order to emphasize the "exploratory" nature of the present draft annex, the entire text has been placed within square brackets.

⁷⁸ This wording makes it possible to avoid prejudging the process whereby the present articles will eventually become applicable to organizations (through a convention or by unilateral declaration).