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Part Two. Legal activities of the United Nations and related inter-governmental organizations

Chapter VI. Selected legal opinions of the Secretariats of the United Nations and related inter-governmental organizations

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Chapter VI

SELECTED LEGAL OPINIONS OF THE SECRETARIAT OF THE UNITED NATIONS AND RELATED INTER-GOVERNMENTAL ORGANIZATIONS

A. Legal opinions of the Secretariat of the United Nations
(Issued or prepared by the Office of Legal Affairs)

1. Question whether the powers entrusted to the United Nations Council for South West Africa by General Assembly resolution 2248 (S-V) of 19 May 1967 include the issuance of travel documents to the inhabitants or citizens of South West Africa [1]

Note submitted to the United Nations Council for South West Africa *

1. At its third meeting, [2] on 16 October 1967, the Council for South West Africa took note of a number of letters adressed to its President, to the Secretary-General and to other United Nations officials in which a number of persons claiming to be citizens of South West Africa applied for a United Nations Passport for travel purposes. The Council directed the Acting Commissioner for South West Africa to study the matter and report to the Council.

2. In accordance with General Assembly resolution 2248 (S-V) of 19 May 1967, the Council has been entrusted with certain powers and functions, "to be discharged in the Territory", including "to promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory until a legislative assembly is established following elections conducted on the basis of universal adult suffrage" (paragraph II, 1 (b)).

3. In connexion with the possible issuance of travel documents, the Council may first wish to address itself to the question of whether the phrase "to be discharged in the Territory" limits the exercise of the powers and functions entrusted to it. It must be assumed that in including this clause the General Assembly expected that the former Mandatory Power would readily co-operate in the implementation of part IV of the resolution. As has become clear, however, from the letter from the Foreign Minister of the Republic of South Africa dated 26 September addressed to the Secretary-General (A/AC.131/3), no such co-operation can be expected to be forthcoming. The Council, therefore, has to address itself to the question whether by adopting a literal interpretation of this clause, namely an interpretation to the effect that the powers conferred upon it in operative part II of resolution 2248 (S-V) only become operative when the Council enters the Territory, it will not in practice nullify that part of the resolution.

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* Subsequent to the submission of this note, the General Assembly, by resolution 2372 (XXII) of 12 June 1968, proclaimed that, in accordance with the desire of its people, South West Africa should henceforth be known as Namibia.

[1] Document A/AC.131/4.

[2] See A/AC.131/SR.3, p. 7.

4. While this is a decision of principle for the Council to take, the Commissioner submits the information given below on the assumption that the Council would decide that the implementation of resolution 2248 (S-V) must proceed to the extent possible, and that the powers entrusted to the Council include the issuance of travel documents to the inhabitants or citizens of South West Africa even prior to the entry of the Council into the Territory.

5. The issuing of travel documents is one of the functions under international law entrusted to national Governments (sometimes delegated to subordinate organs). Whether these Governments are in *de facto* authority over the country or territory they claim to represent is not always considered to be relevant. During the Second World War, Governments of continental European countries, occupied by enemy forces, established themselves outside the continent (London, Cairo, etc.), and notwithstanding the fact that in some cases their constitutions debarred them from any authority outside their own territory, continued to exercise executive authority to the extent possible, such authority being recognized by the host State and other Allied Powers. Among the function exercised was that of issuing passports to those of their nationals who applied for them. These passports were considered as valid travel documents by the members of the United Nations group as established on 1 January 1942. The decisive feature of a travel document is therefore not that it is issued by, or on behalf of, the authority that is in *de facto* control of the country or territory, but rather that it will be accepted as valid by other countries.

United Nations practice

6. The United Nations exercised executive functions in the territory of West New Guinea (West Irian) between 21 September 1962 and 31 March 1963 through a United Nations administrator appointed by the Secretary-General.

7. Among the functions entrusted by Indonesia and the Netherlands to the United Nations Temporary Executive Authority (UNTEA) was "the authority at its discretion to issue travel documents to Papuans (West Irianese) applying therefor without prejudice to their right to apply for Indonesian passports instead".[3] In addition, the Governments of Indonesia and the Netherlands agreed that they would, at the request of the Secretary-General "furnish consular assistance and protection abroad to Papuans (West Irianese) carrying these travel documents... it being for the person concerned to determine to which consular authority he should apply".[4]

8. On 21 September 1962, the Secretary-General sent a circular letter to all Member Governments in which, referring to the above agreement, he requested them to confirm that they would recognize and accept as valid the aforesaid travel documents, subject to compliance with national visa regulations, and would issue the necessary instructions to the competent immigration and consular authorities to this effect.

9. In the reply to this letter, a number of Governments, including those of Burma, Japan, Thailand, Tunisia, India, Norway and the Union of Soviet Socialist Republics signified that they would accept these documents as valid documents. It should be noted that authority to deliver these travel documents was also given to United Nations Headquarters in New York, under the authority of the Administrator.

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[3] See *Official Records of the General Assembly, Seventeenth Session, Annexes*, Agenda item 89, document A/5170, annex B, III.

[4] *Ibid.*

Conclusion

10. Assuming that the Council wishes to interpret General Assembly resolution 2248 (S-V) as indicated in paragraph 4 above, it would appear that there is sufficient precedent for the Council to consider making arrangements for the issue of travel documents to nationals of South West Africa. In this respect it may be of relevance to note that one of the South West African political groupings is already issuing its own form of travel document for South West Africans applying for it.

11. If the Council decides to proceed further with this matter, it may also wish to consider authorizing the Commissioner for South West Africa to issue travel documents to nationals of the Territory, as one of the "executive and administrative tasks" which the Council may entrust to the Commissioner under part II, paragraph 3, of resolution 2248 (S-V).

12. Should the Council authorize the Commissioner to proceed as just outlined, it is his view that, in the light of the UNTEA precedent, it might be preferable to call the documents issued "travel documents", rather than "passports". Their practical validity will depend on the acceptance by Member Governments and it would therefore be necessary for the Secretary-General, once the Council has taken a positive decision, to circularize the membership on this matter as he did in September 1962. Important procedural questions such as the determination of the *bona fide* of the applicant and the place where the travel document is to be delivered to him should, it is suggested, be left to the judgement of the Commissioner, who will have to issue appropriate rules and regulations, and who will also report to the Council on the various measures he undertakes in these respects.

27 October 1967

2. Question of privileges and immunities of the United Nations, of representatives of Member States and of officials of the Organization [5]

Statement made by the Legal Counsel at the 1016th meeting of the Sixth Committee of the General Assembly on 6 December 1967

1. I believe it is necessary and desirable that I make a statement for the record concerning some of the principles involved in the question of privileges and immunities of the United Nations, of representatives of the Members and of officials of the Organization. I do this, first in order to put the record straight so far as the Secretary-General is concerned and secondly to explain the role which the Secretary-General has played, and would intend to continue, with respect to these privileges and immunities.

2. May I first comment briefly on the 1961 Vienna Convention on Diplomatic Relations. [6] It may be noted that the Convention does not directly apply to representatives to international organizations and conferences but only to the exchange of permanent diplomatic missions between States. Material provisions of the Convention, however, are recognized as evidentiary of general or customary international law binding on all Members of the international community. In this perspective it would seem immaterial whether one or both parties to a dispute were also parties to the Convention. The Secretary-General, in interpreting diplomatic privileges and immunities, would look to provisions of the Vienna Convention so far as they would appear relevant *mutatis mutandis*

[5] Extract from document A/C.6/385, reproduced from *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 98.

[6] See *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, vol. II (United Nations publication, Sales No.: 62.X.1), p. 82.

to representatives to United Nations organs and conferences. It should of course be noted that some provisions such as those relating to *agrément*, nationality or reciprocity have no relevancy in the situation of representatives to the United Nations.

3. I should now like to turn to the Convention on the Privileges and Immunities of the United Nations, which was adopted by the General Assembly on 13 February 1946 and proposed for accession by each Member of the United Nations. [7] It must first be noted that this Convention is of a very special character—in fact, it is a Convention *sui generis*. Nearly all multilateral conventions refer to the ratifying and acceding States as parties and the rights and obligations created are between the parties.

4. The Convention on the Privileges and Immunities of the United Nations is different. Throughout, in referring to rights and obligations, it refers to Members of the United Nations. It does not refer to parties to the Convention at any point. The word "parties", in fact, is used only three times in the Convention and appears in lower case—twice in section 30 where it means parties to differences or disputes, and once in section 35 where the reference is to a party to a revised convention. The word "Member", on the other hand, appears with a capital "M" and is used in the three paragraphs of the preamble and in seventeen sections of the Convention, including section 11, which refers to "representatives of Members".

5. Section 35 makes clear the character of the Members' obligations, which run from each Member to the Organization. This section reads:

> "This convention shall continue in force as between the United Nations and every Member (I repeat, 'between the United Nations and every Member') which has deposited an instrument of accession for so long as that Member remains a Member of the United Nations, or until a revised general convention has been approved by the General Assembly and that Member has become a party to this revised convention."

6. Moreover, the fact that the obligations run from the Members to the United Nations is not a mere formality. It should be obvious that the Organization itself has a real interest in assuring the privileges and immunities necessary to enable the representatives of Members to attend and participate freely in all meetings and conferences. If the representatives of Members are prevented from performing their functions or from travelling to and from meetings, the Organizations cannot function properly. It therefore seems elementary that the rights of representatives should properly be protected by the Organization and not left entirely to bilateral action of the States immediately involved. The Secretary-General would therefore continue to feel obligated in the future, as he has done in the past, to assert the rights and interests of the Organization on behalf of representatives of Members as the occasion may arise. I would not understand from the discussion in this Committee that the Members of the Organization would wish him to act in any way different from that which I have just indicated. Likewise, since the Organization itself has an interest in protecting the rights of representatives, a difference with respect to such rights may arise between the United Nations and a Member and consequently be the subject of a request for an advisory opinion under section 30 of the Convention. It is thus clear that the United Nations may be one of the "parties", as that term is used in section 30.

7. There is another aspect relating to the nature of the Convention which I should like to develop on behalf of the Secretary-General. It may be observed that the preamble of the Convention refers to Articles 104 and 105 of the Charter of the United Nations. The preamble notes that Article 105 provides:

> "that the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes and that representatives of the

[7] United Nations, *Treaty Series*, vol. 1, p. 15.

Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization."

8. It will be recalled that the Covenant of the League of Nations itself provided that representatives of the Members and Officials of the League when engaged on the business of the League should enjoy diplomate privileges and immunities, a term which has a well-understood meaning in international law. Article 105 of the United Nations Charter on the other hand refers to "necessary" privileges and immunities rather than to "diplomatic" privileges and immunities. Some privileges and immunities are obviously necessary for the fulfilment of the purposes of the Organization and the exercise of the functions of representatives and officials and may therefore be derived without difficulty directly from the first two paragraphs of Article 105. The third paragraph of that Article envisaged that further content could be given to the term "necessary" by the General Assembly. This paragraph provided that the Assembly might make recommendations with a view to determining the details of the application of the first two paragraphs or might propose conventions to the Members of the United Nations for this purpose. The purpose of the Convention was therefore to determine the details of the application of the first two paragraphs of Article 105. In this connexion, article 34 of the Convention significantly states that it is understood that, when an instrument of accession is deposited, the Member will be in a position under its own law to give effect to the terms of the Convention.

9. There are three points which I believe should be made. In the first place, Article 105 itself accords such privileges and immunities as are necessary. This is an obligation on all Members of the United Nations, whether or not they have acceded to the Convention, whose purpose was to determine the details of application. If a privilege or immunity is necessary for the fulfilment of the purposes of the Organization or for the independent exercise of the functions of representatives and officials, then it must be accorded by all Members as a Charter obligation whether or not they have acceded to the Convention. It would, therefore, seem to the Secretary-General that Article 105 itself establishes an obligation for all Member States to accord these rights to the representatives of all other Members.

10. In the second place, the Convention defines certain privileges and immunities which the General Assembly considered to be necessary in all Member States. In effect, it provided the minimum privileges and immunities which the Organization required, wherever it might be or wherever representatives of Members or officials of the Organization might find themselves. I have said "minimum" since it has been recognized that in States where the United Nations has major offices or operations, such as its Headquarters in New York, and its peace-keeping and development Missions in various areas of the world, additional privileges and immunities have been necessary for the fulfilment of its purposes and the exercise of the functions of representatives and officials. Thus, the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations[8] provides that the provisions of that Agreement and of the Convention "shall be complementary" and so far as possible that the provisions of both "shall be applicable and neither shall narrow the effect of the other". Likewise, additional privileges and immunities have been determined to be essential for various missions. In general, therefore, it may be said that the privileges and immunities as defined in the Convention are the minimum privileges and immunities deemed necessary by the Assembly to be accorded by all Member States in implementation of Article 105 of the Charter.

[8] *Ibid.*, vol. 11 (1947), No. 147.

The Assembly in the past has not only called on all Member States to accede to the Convention, but also, in resolution 93 (I) of 11 December 1946, recommended that Members, pending their accession, should follow, so far as possible, the provisions of the Convention in their relations with the United Nations, its officials, the representatives of its Members and experts on missions for the Organization.

11. In the third place, it should be noted that there are now ninety-six States which have acceded to the Convention. Moreover, in most of the remaining Member States as well as in many non-member States, the provisions of the Convention have been applied by special agreement. While it may be true that in 1946 many of the provisions of the Convention had the character of *lege ferenda*, in the nearly twenty-two years since the adoption of the Convention by the Assembly its provisions have become the standard and norm for governing relations between States and the United Nations throughout the world. I doubt that I am being over-bold in suggesting that the standards and principles of the Convention have been so widely accepted that they have now become a part of the general international law governing the relations of States and the United Nations.

12. Under a narrower view than that which I have just outlined, every representative in this room, other than those who are at the same time members of a Permanent Mission, might be subject to arrest and detention, since the host country has not yet acceded to the Convention, and the Headquarters Agreement provides protection only for members of Permanent Missions. Yet I doubt whether many of the members of this Committee, or an international tribunal to which the issue might be submitted, would agree that representatives to the General Assembly lacked this fundamental protection under the Charter and under general international law.

13. I, therefore, in summary submit: first, that the obligations of Member States under the Convention, including those affecting representatives of other Members, are obligations to the Organization, and the Secretary-General has an interest and a role in their protection and observance; secondly, that the privileges and immunities which we have been discussing are obligatory for all Member States whether or not they have acceded to the Convention. Article 105 creates a direct obligation on all Members to accord the privileges and immunities necessary for the fulfilment of the purposes of the Organization and the exercise of the functions of representatives and officials. Certain of the privileges and immunities which the General Assembly has deemed to be necessary in all Member States are defined in the Convention, whose standards and principles have been so widely accepted as to become a part of the general international law governing the relations between States and the United Nations.

14. I hasten to add that this should not be a reason for any State's delaying further its accession to the Convention, since the Convention, with such implementing legislation as may be necessary, provides the best method for the fulfilment and implementation on the domestic level of the international obligations of Members under the Charter and ander general international law.

6 December 1967

3. EXEMPTION OF THE UNITED NATIONS FROM CERTAIN CATEGORIES OF TAXES—QUESTION WHETHER A TAX IS A DIRECT OR AN INDIRECT TAX FOR THE PURPOSE OF SECTION 7 (*a*) OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS [9]—REMISSION OR RETURN, UNDER SECTION 8 (*a*) OF THE SAID CONVENTION, OF THE AMOUNT CHARGED OR CHARGEABLE TO THE UNITED NATIONS WITH REGARD TO IMPORTANT PURCHASES

Memorandum to the Chief of the Field Operations Service, Office of General Services

1. You have referred to us the question whether the United Nations may claim exemption of certain categories of taxes on the territory of a Member State. So far as the United Nations, including, of course, the Information Centres, UNICEF, UNDP, etc., is concerned, questions of exemption from or refund of taxes are governed by sections 7 and 8 of the Convention on the Privileges and Immunities of the United Nations. These sections are as follows:

"Section 7. The United Nations, its assets, income and other property shall be:

(*a*) Exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services;

(*b*) Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use. It is understood, however, that articles imported under such exemption will not be sold in the country into which they were imported except under conditions agreed with the Government of that country;

(*c*) Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of its publications.

"Section 8. While the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax."

2. The test of whether a tax is a "direct tax" within the meaning of section 7 (*a*) of the Convention as uniformly applied in United Nations practice is whether or not the burden of payment falls directly upon the Organization. For example, the Office of Legal Affairs, in advising the Special Fund concerning taxes on gasoline, stated as follows:

"If the amount of the tax figures on the invoice separately from the price, it is a 'direct tax' on the Special Fund within the meaning of section 7 (*a*) of the Convention. If, on the other hand, the tax forms a part of the price to be paid, the Special Fund would be entitled to claim remission or return (or exemption) in virtue of section 8 of the Convention."

3. In view of the fact that the Convention on the Privileges and Immunities of the United Nations was drawn up for uniform application in all Member States, the meaning to be given to the term "direct taxes" cannot depend on the particular meaning given to that expression by the fiscal laws of a particular State. In a previous legal opinion, [10] this position is explained as follows:

"5. The difference of opinion in this matter appears to hinge on the meaning of the expression 'direct taxes' as used in section 7 (*a*) of the Convention on the Privileges and Immunities of the United Nations. It is true that the terms 'direct' and 'indirect' taxes, etc.,

[9] United Nations, *Treaty Series*, vol. 1, p. 15.

[10] See *Juridical Yearbook, 1964*, pp. 221-222.

are interpreted differently in the various national legal systems of Member States, varying according to tradition, usage or tax system or administration. It should be pointed out to the tax authorities, however, that the above-mentioned Convention was drawn up for application in all Member States of the United Nations and its terms were conceived and have to be applied uniformly in all countries in accordance with their generally-understood meaning. Whether a tax is direct or indirect has to be determined by reference to its nature and to its incidence, that is to say, according to upon whom the burden of payment directly falls. You will understand that in respect to a Convention intended for application in all Member States, its interpretation cannot be made to depend upon the technical meaning of a term in varying tax systems of each Member. Since the tax on circulation is levied directly upon the United Nations, it is, within the meaning of the Convention, a 'direct tax' and the United Nations should be accorded exemption from it. This is the consistent position and practice of the United Nations in asserting its immunity in all States to which the provisions of the Convention apply.

"6. Moreover, in interpreting the Convention, the United Nations and its Members must be guided by the overlying principle of the United Nations Charter, and in particular Article 105, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes. The report of the Committee of the San Francisco Conference responsible for the drafting of Article 105 pointed out that 'if there is one principle certain it is that no Member State may hinder in any way the working of the Organization or *take any measure the effect of which might be to increase its burdens, financial or otherwise*' [11] (italics added). With this principle in view, the economy of the Convention, which was adopted by the General Assembly in implementation of Article 105 of the Charter, is quite clear. The Organization was to be relieved of the burden of all taxes—article 7 providing an exemption for those taxes to be paid directly by the United Nations and article 8 providing for remission or return of indirect taxes where the amount involved is important enough to make it administratively possible."

4. Since an exemption has been granted in the past by the Member State concerned, it would appear *prima facie* that the taxes must have been directly payable by the United Nations and consequently are direct taxes within the meaning of section 7 of the Convention. The United Nations would, therefore, be intitled to a full exemption from all such taxes and the requirement of a minimum amount would not be in accordance with the Convention.

5. With respect to taxes included within the price of goods covered by section 8 of the Convention, the criteria of "important purchases" is relevant. The requirement that the taxes amount to the equivalent of $50 is unreasonably high even with respect to taxes under section 8 of the Convention.

6. In a legal opinion given by the Office of Legal Affairs in 1953, the following criteria were laid down:

"... Purchases may be said to be important when they are made on a recurring basis or involve considerable quantities of goods, commodities or materials. Moreover, any item in question may well constitue an 'important' purchase where the expenditure to be made is considerable. Further, in all such cases weight is to be attached to the intent of the General Assembly in unanimously adopting the section, together with the rest of the Convention. Thus it was felt on the one hand, that the Organization should not seek exemption with regard to purchases which were both irregular and of minor importance. On the other hand, it was intended that section 8 should protect the assets of the Organization from such taxes whose incidence would be specially heavy and constitute an undue burden upon it."

7. In Switzerland, a purchase is regarded as important if the total purchase price is over 100 Swiss francs. Comparable minimums have been applied in other countries.

27 March 1967

[11] *Documents of the United Nations Conference on International Organization*, San Francisco, 1945, vol. XIII, p. 780.

4. Question of dual or multiple representation in United Nations organs [12]

Memorandum to the Secretary-General, United Nations Conference on Trade and Development

1. It is the purpose of the present memorandum to review the question of dual and multiple representation, both in its aspect of representation of a State and of an intergovernmental organization by one person and of representation of two or more States by a single individual. These two aspects, while superficially similar, also involve important differing considerations, in that the latter, unlike the former, may raise the question of multiple voting.

2. After summarizing some past instances in which the question of dual or multiple representation has arisen, this memorandum analyses the various issues involved and concludes with some suggested future courses of action.

Some past instances involving the question of dual or multiple representation

3. The following are some previous cases in which the question of dual or multiple representation has been raised:

(*a*) In August 1945, at the third session of the UNRRA Council, Haiti was represented by the United States delegate. The Committee on Credentials, according to its report:

> "gave careful attention to the credentials of Haiti. . . [In response to the request received from the Republic of Haiti that the United States delegate should be their representative] the Committee resolved that this request be accepted, but hoped that such procedure would not be accepted as a precedent for future meetings. . . The Committee understood that this form of representation would not give the United States a dual vote." [13]

(*b*) In 1954, advice was given by the Office of Legal Affairs that there was no objection to Luxembourg being represented by the Belgian Government provided that the representation of Belgium and Luxembourg was exercised by two different individuals.

(*c*) In 1960, the French delegation was advised by the Legal Counsel to avoid a situation in which the French delegate would be appointed to represent the Cameroons in addition to France.

(*d*) In 1961, the Executive Secretary of the Economic Commission for Africa in Addis Ababa was advised by the Office of Legal Affairs, with reference to an inquiry made by the Government of Malagasy, that in United Nations practice representation of two or more governments by a single delegate was not permitted but that there was no objection to a State being represented by a national of another State or by a member of another delegation, provided he did not simultaneously serve as representative of another State.

(*e*) In 1962, at the United Nations Coffee Conference, one individual was accredited as a member of three different delegations—Madagascar, United Kingdom Exporting Territories, and Tanganyika. On being informed by the Legal Adviser to the Conference that it was contrary to long-standing United Nations practice for one person to serve on more than one delegation to a conference, Madagascar and

[12] See also *Juridical Yearbook, 1955*, p. 223.

[13] United Nations Relief and Rehabilitation Administration, Third session of the Council, Document 29 *Ad Hoc*/CI, 7 August 1945.

Tanganyika withdrew their accreditation of the individual concerned. The accreditation of the chief delegate of Guatemala as alternate delegate of Peru to Committee II of the Conference was also withdrawn.

(*f*) At the Olive Oil Conference in 1963, the Office of Legal Affairs advised against the representation of Belgium and Luxembourg by a single person.

(*g*) In April 1965, in regard to a meeting of the Economic Commission for Africa, the Legal Counsel informed the officer in charge of Economic and Social Affairs that "We also do not consider it proper to have a single delegate represent two governments at a meeting", but observed that "it would have been possible to have one of the members of the delegation of the Central African Republic designated as the representative of Gabon."

Analysis of the issues involved in dual or multiple representation

4. The examples listed in the preceding section of this memorandum indicate a consistent policy of advice and practice against permitting dual or multiple representation in United Nations bodies. The reasons for such advice may be summarized as follows:

(*a*) The practice of one delegate representing two or more countries, if allowed to develop generally, would be inconsistent with one of the basic concepts underlying deliberations in United Nations organs, namely that the various members of those organs should be represented by different delegates who reach conclusions on the issues discussed only after considering the arguments advanced in debate as they affect the interests of their own respective countries. One person representing two States would be unlikely to weigh differently the arguments advanced in his capacity as representative of State A and representative of State B. Furthermore, confusion might arise as to whether a particular statement or argument was made by a single representative on behalf of State A or State B.

(*b*) Dual or multiple representation of States has serious implications with regard to voting rights, particularly in an organization based on the concept of "one member, one vote". If one representative were permitted to cast votes on behalf of more than one State, various abuses might develop. Thus, for instance, the practice might be utilized to swell voting strengths or to obtain one or more crucial extra votes on which the fate of a decision may depend.

(*c*) The rules of procedure of most United Nations organs specifically provide that "each member shall have one vote", and that voting shall normally be by show of hands. Dual or multiple representation, insofar as it might affect voting rights, would not be consistent with, or practicable under such rules and would result in confusion and abuse.

5. The first of the foregoing arguments against dual or multiple representation, which relates to the concept of the parliamentary process, has its main application in the political sphere. While it is still applicable in a technical or expert organ, it is perhaps not of the same importance. The other two arguments relate to voting, and thus apply primarily to the case of one individual representing two or more States which are members of a particular organ. They do not necessarily apply to dual representation of a State and of an inter-governmental organization, as such organizations normally have only observer status at United Nations meetings, which does not entitle them to a vote. Nor do they necessarily apply when one individual is accredited by a State which is a member of an organ and by another State which has only observer status on that organ. However, dual representation of a State and of an organization or of a member and an observer State has

been resisted in the past, because it can give rise to confusion regarding the capacity in which a representative speaks and because it might be taken as a precedent for arguing that one individual can represent two member States and can thus cast more than one vote. It also appeared to run contrary to the purpose of the provisions permitting participation by observers from non-members of the organ and from international organizations. The intention of allowing such wider representation was presumably to afford an opportunity for the presentation of views and interests not already represented on the organ and dual representation would tend to defeat this purpose.

Future courses of action

6. Ideally, the best solution, from the point of view of the United Nations, is to preserve unchanged the principle that dual or multiple representation is not allowed. However, as the arguments against such representation do not apply with the same force to the situation of dual representation of a State and of an organization or of a member and an observer State, as they do to representation of two or more member States, some flexibility may be permitted in the former situations where strong reasons are advanced to justify it in technical rather than purely political organs. Such exceptions should preferably be based either upon a rule of procedure or an express decision of the organ concerned. Such a rule or decision will both justify the departure from the normal principle and will also provide a basis for maintaining the principle in the case of other organs which have not adopted a similar rule or decision.

7. In view of the fact that cases of dual representation appear to have been accepted in the past on the Trade and Development Board, at least with respect to representation of a State and of an inter-governmental organization, and in view of the particular case of the European Economic Community insofar as representation of its Council of Ministers is concerned, we agreed that in the UNCTAD situation one representative may be accredited both by a State and by an inter-governmental organization. In view of this, it will also be necessary to allow one representative to be accredited by two States, provided that only one of these States is a member of the UNCTAD organ involved.

8. It was also agreed that a representative accredited by two entities should be required to speak from separate places when speaking in his separate capacities so as to avoid confusion over the role in which he is acting. Alternatively, if this is not considered desirable by reason of the eminence and rank of the representative concerned (e.g. a Foreign Minister), he may speak from one place, but the conference officer will be required to change the name plate when he speaks in different capacities.

9. As indicated in paragraph 6 above, we think it would be desirable, if the opportunity presents itself, for the Trade and Development Board to take formal note in a rule or decision of the exceptions suggested in paragraph 7 of this memorandum. Furthermore, these exceptions should be limited to representation by a single individual of one State and one organization, or one member and one observer State, or two observer States. It should not be extended to representation of more than two entities by one person. Representation of more than two entities by a single individual would undoubtedly give such an individual the opportunity to wield disproportionate influence and power.

10. To summarize the foregoing points:

(*a*) In no event may one individual be permitted to represent two States *members* of a United Nations organ, as multiple voting is contrary to the concepts underlying United Nations proceedings and to the rules of procedure of United Nations organs;

(*b*) Exceptionally, one individual may be accredited to a technical United Nations organ by (i) one State and one observer organization, or (ii) one member State and

one observer State, or (iii) by two observer States. These exceptions will not, however, be extended to representation of more than two entities by a single person. Furthermore, they should be embodied in a rule of procedure or express decision of any United Nations organ permitting such exceptions;

(*c*) In cases of the nature outlined in (*b*) above, in order to distinguish the capacity in which a representative of two entities is speaking, he should either speak from separate places or the name plate in front of him should be changed in order to identify the particular entity he is representing at a given moment.

16 May 1967

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5. Eligibility of the West Indies Associated States for associate membership in the Economic Commission for Latin America (ECLA)

Memorandum to the Chief of the Regional Commissions Section of the Department of Economic and Social Affairs

1. A question has been raised as to the procedure for admission of the West Indies Associated States as associate members of ECLA, including the question of a single associate membership for the Associated States as a group.

2. The islands of Antigua, Dominica, Granada, St. Kitts-Nevis-Anguilla and St. Lucia are Associated States which have received *Dispatches* containing certain specified delegations of authority from the United Kingdom in the field of external relations. The delegates authority includes the following:

> "Authority to apply for full or associate membership, as may be provided for in the Constitution of the organization concerned, of those United Nations specialized agencies or similar international organization of which the United Kingdom is itself a member and for membership of which the Territory is eligible".

The United Kingdom Mission, in reply to our inquiry, has informed us that the *Dispatches* have come into force. Accordingly, the five Associated States can themselves apply for associate membership in ECLA under paragraph 3 (*a*), third sentence, of ECLA's terms of reference, which reads as follows:

> "If it has become responsible for its own international relations, such territory, part or group of territories may be admitted as an associate member of the Commission on itself presenting its application to the Commission."

Although the territories cannot be said to be empowered to conduct their international relations *in toto*, the fact that they have been specifically authorized by the United Kingdom to apply for membership in the organizations within the United Nations family is sufficient in our opinion to meet the requirements in this provision of the terms of reference. It will be noted that the five territories are eligible only for associate membership insofar as only Members of the United Nations are qualified for full membership under the first sentence of paragraph 3 (*a*). On the other hand, contrary to previous plans, St. Vincent has not become an Associated State, and the United Kingdom retains fully the power to submit an application on behalf of St. Vincent.

3. As a matter of procedure, in order to avoid any ambiguity in the situation, we think it appropriate for the Associated States to refer to the entry into force of the *Dispatches* in their application. Alternatively, it would also be appropriate for the United Kingdom to inform ECLA of the delegation of authority granted under the respective *Dispatches* to each of the five territories to apply for membership in certain international

organizations. In the latter case, the five Associated States may at the same time proceed to present the application by themselves.

4. A single associate membership of the five Associated States is possible under the above-mentioned provision in the terms of reference (paragraph 3 (*a*), third sentence) which provides for the admission of a "group of territories" as "an associate member". If it is the wish of the Associated States to apply for a single associate membership, the application should be presented by their Governments jointly. We assume that there is no question of a joint application by both independent sovereign States and Associated States or other territories in the area, which in any event would not be permissible under the terms of reference of ECLA.

5. It would be equally objectionable if one of the fully sovereign States in the West Indies were to assume the representation of one or more of the Associated States. Rule 12 of ECLA's rules of procedure provides that "each member shall be represented on the Commission by an accredited representative", thus clearly excluding double representation. This provision in rule 12 is, moreover, fully consonant with the practice in other United Nations bodies which have consistently discouraged representation of one country by another. [14]

18 October 1967

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6. Question whether, in the event a regular session of the General Assembly is convened before the end of a special or emergency special session, the two sessions should be held simultaneously or the items before the special or emergency special session be transferred onto the provisional agenda of the regular session

Internal memorandum

I. Introduction

1. On 21 July 1967, the fifth emergency special session of the General Assembly adopted resolution 2256 (ES-V), whereby the Assembly decided, pursuant to rule 6 of its rules of procedure:

> ". . . to adjourn the fifth emergency special session temporarily and to authorize the President of the General Assembly to reconvene the session as and when necessary."

With the approach of the opening date of the twenty-second session of the General Assembly, the question now arises whether a further meeting of the fifth emergency special session should be convened to close that session and to transfer the item on its agenda onto the provisional agenda of the twenty-second regular session of the Assembly, or whether the fifth emergency special session should be considered as continuing simultaneously with the twenty-second regular session. The present note describes the circumstances surrounding the termination of previous special and emergency special sessions and concludes with some suggestions on procedures which might be followed in the instant case.

II. Termination of special sessions and emergency special sessions of the General Assembly

(A) *Sessions which have terminated upon completion of their business*

2. The practice with respect to the closing of special and emergency special sessions of the General Assembly has not been uniform, although most have been ended with the

[14] See also p. 317 of this *Yearbook*.

completion of their business, followed by a declaration by the President that the session was closed. This was the case with respect to the following sessions:

(*a*) First special session, 1947 (Item Palestine) [15]
(*b*) Second special session, 1948 (Item: Palestine) [16]
(*c*) Third emergency special session, 1958 (Item: Lebanon) [17]
(*d*) Fourth emergency special session, 1960 (Item: Congo) [18]
(*e*) Third special session, 1961 (Item: Tunisia) [19]
(*f*) Fourth special session, 1963 (Item: Financial situation) [20]
(*g*) Fifth special session, 1967 (Item: South-West Africa) [21]

3. It is perhaps worthy of note that the fourth emergency special session held its closing the night before the opening of the fifteenth regular session. It adopted on 20 September 1960, at its closing meeting, a substantive resolution [Resolution 1474 (ES-IV)] giving certain directives to the Secretary-General and making appeals to Member States not to intervene in the situation in the Republic of the Congo. The resolution, however, did not refer the matter before the fourth emergency special session to the General Assembly's fifteenth regular session.

(B) *Sessions which have transferred the items before them to the agenda of regular sessions*

4. At the first and second emergency special sessions in 1956, dealing respectively with the Middle East and Hungary, draft resolutions seeking to transfer these items to the eleventh regular session of the Assembly provoked lengthy procedural debates on the authority of an emergency special session to transfer the item for which it was summoned to a regular session and on the appropriateness of closing an emergency special session in advance of the completion of its task. A summary of some of the arguments advanced is given separately below.

(*a*) *First emergency special session*

5. At the final meeting of the first emergency special session, on 10 November 1956, the representative of the United States submitted a draft resolution (A/3329) [22] which provided for the transfer of the item on the Middle East to the provisional agenda of the eleventh regular session, with a request for early consideration of two draft proposals submitted earlier in the session by the United States (A/3272 and A/3273). [23]

6. The representative of the Philippines questioned on constitutional grounds whether an emergency special session could validly transfer to a regular session the item for which

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[15] See *Official Records of the First Special Session of the General Assembly, vol. I, Plenary Meeting*, 79th plenary meeting, p. 181.

[16] See *Official Records of the Second Special Session of the General Assembly, vol. I, Plenary Meetings*, 135th plenary meeting, p. 46.

[17] See *Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes*, 746th plenary meeting, para. 275.

[18] *Ibid., Fourth Emergency Special Session, Plenary Meetings and Annexes*, 863rd plenary meeting, para. 333.

[19] *Ibid., Third Special Session, Plenary Meetings and Annexes*, 1006th plenary meeting, para. 161.

[20] *Ibid., Fourth Special Session, Plenary Meetings*, 1205th plenary meeting, para. 147.

[21] *Ibid., Fifth Special Session, Plenary Meetings*, 1524th plenary meeting.

[22] *Ibid., First Emergency Special Session, Plenary Meetings and Annexes*, agenda item 5, p. 32.

[23] *Ibid.*, p. 60.

it was summoned. The emergency special session had as its sole purpose the consideration of the item, not its transfer, he stated. The two sessions were distinct entities which could co-exist legally. Further, under rule 15 of the General Assembly's rules of procedure, additional items placed on the provisional agenda of the regular session might not be considered before the expiration of seven days and, in the absence of a two-thirds majority vote to the contrary, had to be referred first to a committee. This would, in his view, preclude the immediate consideration of the item which the emergency special session could give. Next, he saw a psychological value in letting the world see that the emergency special session stood available to handle the item. Finally, he felt that since, by its resolution 997 (ES-I) of 2 November 1956, the Assembly had decided to remain in session pending completion of the terms of the cease-fire in the Middle East which had not yet been achieved, the transfer would nullify the earlier decision. [24]

7. An objection to the transfer of the draft resolutions, as proposed by the United States, was made by the representative of Egypt on substantive grounds. [25] The representative of the United States thereupon withdrew the paragraph in his resolution referring to the two drafts (see para. 5 above). [26]

8. The President then summed up the situation as he saw it:

(i) The transfer of the item was valid under rule 13 of the rules of procedure, which provides that the provisional agenda of a regular session shall include, *inter alia*, all items the inclusion of which has been ordered by the Assembly at a previous session;

(ii) Holding simultaneous sessions would be contrary to the provisions for the convening of emergency special sessions, which are held solely because the General Assembly is not in regular session at the time. The drafters of the rules relating to emergency meetings had not intended such meetings to be held when the Assembly was in regular session and thus fully capable of dealing with items before it. [27]

9. The representative of India argued that the emergency special session could only recommend inclusion of the item in the provisional agenda of the regular session. Draft resolutions could not be transferred, though they could be reintroduced by their sponsors. The emergency special session could also recommend that the regular session consider the records of the emergency session. He also suggested, in view of rule 15, that the proposal of the United States be amended to provide that if the regular session could not consider the item at all, or at a sufficiently early date, the emergency session might continue. [28]

10. The representative of El Salvador disagreed with the President's interpretation of rule 13, in that he felt it did not apply to referrals by special or emergency special sessions. [29]

11. The draft resolution, as amended, was adopted by 66 votes to none, with 2 abstentions, [30] becoming General Assembly resolution 1003 (ES-I). By that resolution, the Assembly decided to place the item before it on the provisional agenda of the eleventh regular session as a matter of priority, and to refer to the regular session the records and

[24] *Ibid.*, *Plenary Meetings and Annexes* 572nd plenary meeting, paras. 5-12.
[25] *Ibid.*, paras. 13-16.
[26] *Ibid.*, para. 26.
[27] *Ibid.*, paras. 27-28.
[28] *Ibid.*, paras. 31-32.
[29] *Ibid.*, paras. 62-66.
[30] *Ibid.*, para. 74.

documents of the emergency special session. It also decided that "the first emergency special session may continue to consider the question, if necessary, prior to the eleventh regular session of the General Assembly." This latter proviso was not invoked, as the eleventh regular session convened two days later on 12 November 1956.

12. The representative of Guatemala, speaking in explanation of vote, based his abstention on procedural difficulties under rule 15 which would make it difficult to get early consideration of the item at the regular session. [31] The representative of Greece stated that his delegation had abstained because it was not clear that a simple majority of the regular session would be sufficient for the consideration of the item at any time. [32]

13. There was no declaration that the session was closed although the record of the meeting bears the indication "closing meeting".

(b) Second emergency special session

14. At the final meeting of the second emergency special session, also held on 10 November 1956, the representative of the United States introduced a draft resolution (A/3330) [33] almost identical to General Assembly resolution 1003 (ES-I), which would transfer the item on Hungary to the eleventh regular session. It was supported by Italy, Australia, and India. [34] It was opposed by Hungary, the USSR, Romania, Bulgaria and Czechoslovakia [35] on the ground that the United Nations consideration of the item was precluded by Article 2, paragraph 7, of the Charter.

15. The representative of Guatemala explained that he would abstain on procedural grounds linked with rule 15 of the rules of procedure.

16. The draft resolution of the United States was adopted by 53 votes to 9, with 8 abstentions, becoming General Assembly resolution 1008 (ES-II). [36] It is virtually identical with resolution 1003 (ES-I) described in paragraph 11 above.

17. There was no declaration that the session was closed, although there was a statement by the President assessing the work of the session. [37]

III. Concluding observations

18. In the light of the foregoing, it will be seen that there have been no instances where special sessions or emergency special sessions have overlapped with regular sessions. Furthermore, there are two precedents for emergency special sessions winding up immediately before a regular session and transferring the items before them to the regular session. Finally, there would seem to be considerable merit in the argument advanced by the President of the first emergency special session, as summarized in paragraph 8 above, that holding simultaneous sessions would be contrary to the basic purpose of emergency special sessions, as a device for speedily convening the Assembly when it is not already in session.

19. The procedural arguments raised against the transfer of items from the first and second emergency special sessions to the eleventh regular session, which are referred to

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[31] *Ibid.*, paras. 75-77.

[32] *Ibid.*, para. 82.

[33] *Ibid., Second Emergency Special Session, Plenary Meetings and Annex*, agenda item 5, p. 5.

[34] *Ibid.*, 573rd meeting, paras. 3-6, 16-17, 37-48.

[35] *Ibid.*, paras. 7-15, 18-21, 22-28, 32-36.

[36] *Ibid.*, para. 60.

[37] *Ibid.*, paras. 73-83.

above, did not, in fact, materialize. There was no delay in the consideration of these items. As already mentioned, the eleventh regular session convened on 12 November 1956. The morning of the following day, 13 November, the General Committee unanimously recommended the inclusion of the item considered by the first emergency session on the agenda of the regular session, to be considered as a matter of priority in plenary meeting. [38] On the same occasion, by 11 votes to 2 with 1 abstention, it made an identical recommendation concerning the item considered at the second emergency special session. [39] Such opposition as was advanced to this recommendation resulted from the position of the Eastern European States, described in paragraph 14 above, that discussion of the Hungarian situation violated Article 2, paragraph 7, of the Charter. On the afternoon of the same day the Assembly, at its 576th plenary meeting, approved the General Committee's recommendations regarding the inclusion of the items in the agenda, the first unanimously, [40] and the second by a roll-call vote of 62 to 9, with 8 abstentions. [41] The Assembly also approved the General Committee's recommendation that the items be considered directly in plenary, as a matter of priority, by 51 votes to none, with 19 abstentions. [42] The substantive discussion of the Hungarian question started at the 582nd plenary meeting of the General Assembly, on 19 November 1956, and that of the Middle East item at the 591st plenary meeting, on 23 November 1956.

20. Taking into account the existing precedents, the points of principle involved, and the fact that practical difficulties which were foreseen in transferring items from emergency special sessions to regular sessions did not materialize, it would seem desirable for the current fifth emergency special session to hold a meeting a day or two before the twenty-second regular session convenes on 19 September in order to wind up its proceedings and to transfer the item before it to the regular session. For this purpose a resolution could be adopted along the lines of General Assembly resolutions 1003 (ES-I) and 1008 (ES-II). It would even be possible, if no difficulties are anticipated, for the fifth emergency special session to wind up immediately before the twenty-second regular session is called to order, particularly since the presiding officer of the one would be temporary president of the other.

25 August 1967

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7. Financing of the activities of the United Nations Industrial Development Organization (UNIDO)—Explanation of rule 31, paragraph 2, of the draft rules of procedure [43] in the light of General Assembly resolution 2152 (XXI) of 17 November 1966 establishing UNIDO

Statement made by the Director of the General Legal Division of the Office of Legal Affairs at the 5th meeting of the Sessional Committee of the Industrial Development Board on 20 April 1967

1. It is understood that the Committee has asked the Office of Legal Affairs for an explanation of paragraph 2 of rule 31 of the draft rules of procedure of the Industrial

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[38] *Official Records of the General Assembly, Eleventh Session, General Committee*, 106th meeting, paras. 3 and 32.

[39] *Ibid.*, paras. 23 and 32.

[40] *Ibid., Plenary Meetings*, vol. I, 576th plenary meeting, para. 131.

[41] *Ibid.*, paras. 204-205

[42] *Ibid.*, para. 206.

[43] Document ID/B/2, reproduced in *Official Records of the General Assembly, Twenty-second Session, Supplement No. 15* (A/6715/Rev.1), p. 56.

Development Board and particularly whether this paragraph may be considered consistent with the pertinent General Assembly resolutions.

2. Paragraph 2 of draft rule 31 provides:

> "Whenever the Board wishes to recommend, in cases of exceptional urgency, that work for which no financial provision exists be started before the next regular session of the General Assembly, it shall include a specific indication to that effect to the Executive Director in the resolution including the proposal."

3. This paragraph is taken verbatim from paragraph 4 of rule 34 of the rules of procedure of the Economic and Social Council, with the exception that reference is made to the Executive Director rather than to the Secretary-General. This provision was originally adopted by the Economic and Social Council in 1948 and incorporated in its rules of procedure in 1952.

Scope of application

4. With respect to the scope of application of this paragraph it would appear that it relates exclusively to work to be financed under the regular United Nations budget. The reference in paragraph 2 of draft rule 31 to the possibility of starting work "before the next regular session of the General Assembly" implies that the expenses involved in such work are to be met from the regular budget of the United Nations. It should be noted that this is the scope of the application of rule 34 of the rules of procedure of the Economic and Social Council where expenses are financed exclusively from the regular budget.

5. As you know, the United Nations Industrial Development Organization (UNIDO) has alternate sources for meeting expenses. Under General Assembly resolution 2152 (XXI) establishing UNIDO, there are two categories of expenditure, namely, expenses for administrative and research activities and expenses for operational activities (paragraph 20). Expenses for administrative and research activities are to be borne by the regular budget of the United Nations (paragraph 21), while expenses for operational activities are to be met from voluntary contributions or through participation in the United Nations Development Programme, or the utilization of the resources of the United Nations regular programme of technical assistance (paragraph 22). Paragraph 24 of the same resolution states that "the voluntary contributions shall be governed by the Financial Regulations of the United Nations, except for such modifications as may be approved by the General Assembly on the recommendation of the Board". The method for handling projects financed from voluntary contributions must therefore be dealt with in accordance with paragraph 24 of General Assembly resolution 2152 (XXI), and it remains for the Board to make recommendations to the General Assembly if the Board wishes to introduce any modifications to the United Nations Financial Regulations for that purpose. It would not therefore be appropriate to deal with this aspect through the rules of procedure of the Board.

6. Where the expenses for operational activities are met through participation in the United Nations Development Programme (UNDP), the relevant decision required is to be taken by the Governing Council of UNDP rather than by the General Assembly. In so far as expenses are met by utilization of resources of the regular programme of technical assistance, it should be recalled that the review of the provisional estimates relating to technical assistance is now undertaken by the Governing Council of UNDP although final approval rests with the General Assembly.

7. From the foregoing it may be concluded that paragraph 2 of rule 31 of the draft rules of procedure of the Industrial Development Board in referring specifically to "the

next regular session of the General Assembly" is intended to provide for an emergency situation involving expenses to be borne by the regular budget of the United Nations, and the work referred to therefore relates only to the administrative and research activities of UNIDO. This may be made more immediately apparent by adding after the word "work" in the second line of the paragraph, the following: "involving expenditures under paragraph 21 of General Assembly resolution 2152 (XXI)".

Effect of paragraph 2 of rule 31

8. It will be noted that the proposed paragraph 2 refers to *recommendations* by the Board. Financing of such urgent work would have to be in accordance with applicable resolutions of the General Assembly and the Financial Regulations of the United Nations. In this connexion, it will be recalled that the resolution on unforeseen and extraordinary expenses for the financial year 1967 (2243 (XXI)) "authorizes the Secretary-General, with the prior concurrence of the Advisory Committee on Administrative and Budgetary Questions and subject to the Financial Regulations of the United Nations . . . to enter into commitments to meet unforeseen and extraordinary expenses in the financial year 1967". Similar authority has been given in resolutions of preceding sessions of the General Assembly. As the resolution on unforeseen and extraordinary expenses authorizes action by the Secretary-General, reference in paragraph 2 of rule 31 to the Executive Director must be understood to be to the Secretary-General through the Executive Director.

9. Recommendations of the *Ad Hoc* Committee of Experts to Examine the Finances of the United Nations and the Specialized Agencies should also be noted. In this connexion I would refer particularly to paragraphs 39 to 46 of the report [44] of the Committee:

"39. The heads of the organizations should calculate the budget estimates and control obligations in such a way as to ensure that appropriations are not exceeded.

"40. Unavoidable increases in expenditure in certain sectors should, as far as possible, be financed in the first instance by savings in other sectors. This applies in particular to increases due to rises in prices (including in this term salaries and wages) which should so far as possible be absorbed by reassessment of priorities, redeployment of resources, and, where necessary, by adjustments within the budget.

"41. In order to provide the heads of the organizations with a small amount of funds to meet contingencies which may arise and which cannot be met by savings or postponed until the adoption of the next budget, a special appropriation line might, where necessary, be included in the budget for these minor contingent expenses.

"42. Drawings on the working capital fund to finance supplementary expenses without prior appropriation should, as a general rule, be discontinued as from the time when the organizations adopt the procedures suggested above.

"43. Drawings on the working capital fund without prior appropriation should be made only in clearly exceptional cases involving emergencies within the limits laid down by legislative bodies, and to the extent that they cannot be financed out of the measures mentioned in paragraphs 40 and 41 above.

"44. When drawings on the working capital fund without appropriation have been made, the heads of the organizations should report at the first opportunity to the competent organs vested with financial responsibility and submit the appropriate requests for supplementary appropriations to their organizations' legislative body.

"45. Adherence to the above procedure should ensure that recourse to supplementary appropriations would be kept to a minimum.

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[44] *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 80 document, A/6343.

"46. In every case the heads of the organizations should include as part of their annual financial reports the requisite explanation of the supplementary expenses incurred and the financing procedure used to meet them."

In approving those recommendations in its resolution 2150 (XXI), the General Assembly further urged that they be given the most attentive consideration by Member States and by United Nations organs and related bodies with a view to their earliest implementation. The Secretary-General was requested to take the appropriate measures to give effect to those recommendations requiring his action including the submission of proposals to the competent United Nations organs and related bodies. The implementation of paragraph 2 of rule 31 of the draft rules of procedure of the Industrial Development Board should therefore be considered in the light of those recommendations of the *Ad Hoc* Committee, especially the above-quoted recommendation concerning clearly exceptional cases involving emergencies.

10. As to the meaning of the phrase "cases of exceptional urgency", it will be recalled as previously pointed out that this is taken from rule 34, paragraph 4, of the rules of procedure of the Economic and Social Council. It would necessarily be for the Board to determine whether a particular case was of such exceptional urgency as to justify a recommendation under this paragraph.

Proposed addition to paragraph 2 of rule 31

11. It has been proposed adding to paragraph 2 of rule 31 the following:

". . . with explicit reference to the already approved project at the expense of which such work is to be financed".

12. This would, of course, be an addition to the text in the rules of procedure of the Economic and Social Council from which this paragraph has been taken, although paragraph 3 of rule 34 of these rules of procedure did provide that the Council should indicate whenever appropriate the priority or degree of urgency which it attaches to projects and, as the case may be, which current projects may be deferred, modified or eliminated.

13. Having in mind the recommendations of the *Ad Hoc* Committee of Experts which I have quoted, the Office of the Controller would see an advantage in adding to the present text of paragraph 2 a provision which might read as follows:

". . . and shall also indicate the possibility of financing the work within the level of the approved budget by eliminating or deferring other work of lesser urgency and priority".

Conclusion

14. In conclusion, it will be noted that this paragraph is not an innovation but is taken from existing rules of procedure of the Economic and Social Council. Its application would necessarily be subject to all applicable decisions of the General Assembly. It would therefore appear that it would not purport to give to the Board powers which would be inconsistent with pertinent General Assembly resolutions.

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8. Question of the contributions of San Marino for international control of narcotic drugs

Memorandum to the Controller

1. By your memorandum of 8 November 1967 you have informed us that the Directing External Auditor has suggested that a legal opinion be obtained as a preliminary step to informing the General Assembly, in order to enable it to take a decision in the matter, of the fact that San Marino has never paid the assessments made in accordance with General Assembly resolution 455 (V) of 16 November 1950, in respect of expenses resulting from obligations placed on the United Nations by instruments relating to the control of narcotic drugs.

2. We maintain that San Marino is correct in its contention that the International Opium Convention of 19 February 1925 [45] and the Convention for limiting the Manufacture and regulating the Distribution of Narcotic Drugs of 13 July 1931, [46] to which it is a party, do not provide for an obligation to contribute. The 1925 Conference adopted a resolution, incoporated in its Final Act, which envisages contributions by non-members of the League of Nations, but the resolution did not have binding force and San Marino, which did not sign the Final Act, has not accepted it. In resolution 455 (V), the General Assembly recorded its view that non-members of the United Nations should contribute their fair share of the expenses in question, but that resolution does not constitute a legal obligation for San Marino.

3. The Single Convention on Narcotic Drugs, 1961, [47] in article 6, expressly provides for contributions from non-members of the United Nations. San Marino, however, has not yet become a party to the Single Convention, has not even signed it, and did not participate in the 1961 Conference. That country is therefore not bound by the obligation provided in the Single Convention.

4. The assessments have been made, and the Secretary-General has pursued the matter, in accordance with General Assembly resolution 455 (V), operative paragraph 3 of which reads:

> "*Directs* the Secretary-General to seek payment of such amounts as are determined by the method established above in respect of the 1950 expenses and those of future years."

If the General Assembly changes this directive, it will no longer be necessary to make the assessment or to seek payment. Until it does so, it would be necessary to continue in accordance with present procedures.

13 November 1967

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9. Question whether the Office of Technical Co-operation has an obligation to disclose to Governments the cost of fellowships awarded to their nationals

Memorandum to the Deputy Director for Programming, Office of Technical Co-operation, Department of Economic and Social Affairs

1. You have requested our advice on whether the Office of Technical Co-operation has an obligation to disclose the actual cost of fellowships to a government whose nationals

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[45] League of Nations, *Treaty Series*, vol. LXXXI, p. 317.

[46] *Ibid.*, vol. CXXXIX, p. 301.

[47] United Nations, *Treaty Series*, vol. 520, p. 151.

have been awarded fellowships. The request for such information from the Government of a Member State refers to laws of that Member State which provide that a fellowship holder is liable for the entire cost of a fellowship, regardless of the source of funds, if he does not fulfil his obligation to serve with the government for double the duration of the fellowship. The Government concerned appears to imply that it will be entitled to retrieve and retain the amounts spent by both the United Nations and the Government.

2. The primary purpose of the Fellowship Programme is to assist governments in the training abroad of their nationals for specific functions connected with the country's social and economic development. Whether or not the fellowship holder is a civil servant, it falls upon him to return home to assume the functions which his government has reserved or has arranged to reserve for him. This purpose is reflected in the fellowship application form in which the applicant is required to undertake to "return to my home country at the end of the fellowship" (Undertaking No. 5 at the bottom of the application form). Similarly, in the fellowship nomination forms, the governments must certify the title, duties and responsibilities of the post in which it is proposed to employ the fellow upon his return from the fellowship.

3. Return of the fellow to his home country to assume the functions arranged in advance for him by the Government constitutes, therefore, a requirement of the Fellowship Programme in the fulfilment of which the recipient governments and the United Nations have an equal interest. Accordingly, in our view, where a government has passed legislation requiring a fellow to reimburse the fellowship expenditures to the government in the event of his failing to meet this requirement, the United Nations cannot refuse to provide the Government with information concerning the United Nations cost towards the fellowship. However, while the enforcement of such legislation would be entirely consistent with the purposes of the Fellowship Programme, no right to retain the United Nations portion of the funds would devolve upon the Government, since once a fellowship is awarded the Government concerned has an entitlement to a service by the United Nations but not to the cash value of the fellowship. For this reason we agree that if the amount spent by the United Nations is retrieved by the government from the fellow, it should be reimbursed to the United Nations Technical Assistance Programme.

7 November 1967

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10. Requirement of parity between administering and non-administering Powers within the Trusteeship Council under sub-paragraph 1 c. of Article 86 of the Charter—Question raised by Nauru's accession to independence

Note submitted to the Trusteeship Council[48]

1. In the light of a letter dated 7 November 1967 from the Permanent Representative of Australia to the United Nations (A/6903) advising the Secretary-General of the Administering Authorities' intention to seek the temination of the Trusteeship Agreement on Nauru on 31 January 1968, the Secretary-General wishes to draw attention to the future composition of the Trusteeship Council.

2. The Trust Territory of Nauru is at present administered by Australia on behalf of itself, New Zealand and the United Kingdom of Great Britain and Northern Ireland.

[48] Document T/1674.

Under the provisions of Article 86 of the Charter, with Nauru's gaining independence, New Zealand will no longer be a member of the Trusteeship Council since it will not have any other Trust Territories under administration. The United Kingdom will change its status from that of an administering member (under sub-paragraph 1 a. of Article 86) to that of a non-administering member (under sub-paragraph 1 b. of Article 86). Australia will remain in the Council (under sub-paragraph 1 a. of Article 86) as a member administering the Trust Territory of New Guinea, and Liberia elected for a three-year term (under sub-paragraph 1 c. of Article 86) will, in accordance with past practice, continue as a member until 31 December 1968.

3. The composition of the Council on 1 February 1968 will be as follows:

Administering Powers	
Australia	Automatically under sub-paragraph 1 a. of Article 86
United States of America	
Non-administering Powers	
Republic of China	Automatically under sub-paragraph 1 b. of Article 86
France	
Union of Soviet Socialist Republics	Elected under sub-paragraph 1 c. of Article 86
United Kingdom	
Liberia	

4. It will be noted that the number of Administering Authorities will be reduced from four to two, while the number of non-administering Member States which will remain permanently as members of the Trusteeship Council will be increased from three to four.

5. Members of the Council may wish to take into account the following considerations.

(*a*) Article 7 of the Charter of the United Nations establishes the Trusteeship Council as a principal organ of the United Nations. By virtue of Article 85, paragraph 2, it functions under the authority of the General Assembly in assisting the latter in the discharge of its responsibilities for Trust Territories. Pursuant to Articles 87 and 88 of the Charter, the Trusteeship Council, under the authority of the General Assembly, is vested with certain specific functions, including consideration of reports submitted by the Administering Authority, acceptance and examination of petitions, and provision for periodic visits to Trust Territories. In terms of the Trusteeship Agreements, the Administering Authority undertakes to co-operate with the Trusteeship Council in the discharge of these functions, this undertaking not expressly extending to any other organ to which the General Assembly might entrust similar functions.

(*b*) Continuance of a permanent majority of non-administering members on the Council will render inoperative sub-paragraph 1 c. of Article 86, as the conditions it was designed to meet, namely an excess of administering Powers over non-administering Powers in the Council, is unlikely to recur. The practical result will be that supervision of the administration of Trust Territories based on a equal balance on the Council between administering and non-administering members will disappear and will be replaced by supervision effected under a permanent majority of non-administering members.

(*c*) It is to be noted that the Charter provided for parity between administering and non-administering Powers only at the Trusteeship Council stage and did not seek to apply the concept either in the Fourth Committee or in the General Assembly under whose authority the Council operates. The purpose of Article 86, 1 c. was to provide a composition of the Council which would permit adequate outside supervision by non-administering members of the conduct of the administering Powers in order to ensure the paramountcy of the interests and wel-being of the inhabitants of Trust Territories. These vital objectives

may be equally well achieved with administering members forming a permanent minority in the Council, as it would not seem that a lack of parity in the form of a permanent majority of non-administering members on the Council could prejudice the interests of the Territories as reflected in the provisions of the Charter. Should the administering Powers consider that their loss of parity would be prejudicial to their interests, it would be open to them to raise the matter for consideration through appropriate procedures.

(*d*) In any event, it will be recalled that the Trusteeship Council has functioned with a majority of non-administering members over administering members on several occasions. For example, during the twenty-sixth session of the Trusteeship Council from 28 April 1960 to 30 June 1960, the Council functioned with a majority of eight non-administering members to six administering members. During the eleventh special session of the Trusteeship Council, which met on 10 April 1961 and the twenty-seventh regular session which met from 1 June to 19 July 1961, the Council functioned with a majority of eight non-administering members to five administering members. During the second part of the twenty-ninth session of the Trusteeship Council, which met from 2 July to 20 July 1962, the Council functioned with a majority of five non-administering members to four administering members.

(*e*) No amendment of the Charter could restore parity between administering and non-administering Powers while retaining all the permanent members of the Security Council in the Trusteeship Council.

6. In view of the foregoing, it may be concluded that, on Nauru's obtaining independence on 31 January 1968, the membership of the Trusteeship Council (see para. 3 above) may continue until the normal expiration of the three-year term of the member previously elected under sub-paragraph 1 c. of Article 86 on 31 December 1968, and that thereafter the Council be composed of members automatically appointed under sub-paragraphs 1 a. and 1 b. of Article 86 until all Trusteeship Agreements have been terminated or, in the case of an amendment to the Charter, until the amendment comes into force.

22 November 1967

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11. Obligation under Article 102 of the Charter to register with the Secretariat treaties and international agreements entered into after the coming into force of the Charter—Question whether Article 102 also covers extensions of treaties inherited from a former colonial Power

Letter to the Permanent Representative of a Member State

1. You raise the question whether there are certain general classes of international understandings that are usually not registered. Under Article 102 of the Charter, every treaty and every international agreement entered into by a Member of the United Nations after the coming into force of the Charter must be registered with the Secretariat and published by it. However, the exact meaning of the terms "treaty" and "international agreement" have not been set forth in the Charter.

2. An attempt to define more specifically the categories of treaties and international agreements requiring registration was made at the second part of the first session of the General Assembly by Sub-Committee 1 of the Sixth Committee, when drawing up the Regulations to give effect to Article 102 of the Charter, hereinafter referred to as the Regulations. However, the discussion on the subject proved inconclusive and, as a result,

it was decided to retain in article 1 of the Regulations the general terms of Article 102 of the Charter, with the addition, after the words "Every treaty and international agreement" of the phrase "whatever its form and descriptive name". In its report to the General Assembly recommending the adoption of the Regulations, the Sixth Committee noted that, in drawing up the terms of the Regulations, Sub-Committee 1 had had regard to the "undesirability of attempting at this time to define in detail the kind of treaty or agreement requiring registration under the Charter, it being recognized that experience and practice will in themselves aid in giving definition to the terms of the Charter".

3. The question of the scope of application of Article 102 of the Charter was again considered in the Sixth Committee at the second, third and fifth sessions of the General Assembly. Various views were expressed on the subject and a suggestion was made that a sub-committee be established to provide a definition of the exact meaning of the term "treaty and international agreement", but a general consensus appeared to prevail that the matter should be left to gradual development through practice.

4. In the circumstances, the Secretariat, which under Article 102 of the Charter and the Regulations is generally responsible for the operation of the system of registration and publication of treaties, has been faced on numerous occasions with inquiries from various Governments as to whether a given agreement or type of agreements was subject to registration. Moreover, in some instances in which there was doubt as to whether an agreement transmitted for registration could be registered, the Secretariat has felt obliged to initiate consultations with the registering party with a view to clarifying the matter. As a result, a considerable body of practice has developed in this regard. You may refer in that respect to the *Repertory of Practice of United Nations Organs*, Volume V, [49] describing in more detail the discussion in the Sixth Committee referred to above and the position taken by the Secretariat in particular instances. Also of interest are two supplements to this publication, namely, Supplement No. 1, volume II [50] and Supplement No. 2, volume III [51].

5. As to the question whether Article 102 of the Charter also covers extensions of treaties inherited by a developing country from a former colonial power, we assume that the term "extensions" is used in this context to mean the acts by which such a country has consented under the succession practice to continue to be bound by treaties which had been applied to it, prior to the independence, by a State then responsible for its foreign relations. Such "extensions" are subject to registration but, as a matter of procedure, it is relevant whether a bilateral or a multilateral treaty is involved in succession. A succession to a bilateral treaty is usually confirmed in the form of an agreement between the successor State and the State with which the treaty concerned was originally concluded by the predecessor State. In such a case, it is the new agreement confirming the continuance in force of an old treaty which is subject to registration under Article 102 of the Charter and article 1 of the Regulations.

6. Where a multilateral treaty is involved, the consent of a successor State to be bound by a treaty is established on the international plane by a formal notification to this effect communicated by that State to the depositary of the treaty concerned. Such notifications fall within the category of subsequent actions which are subject to registration under article 2 of the Regulations. The said article provides that "when a treaty or international agreement has been registered with the Secretariat, a certified statement

[49] United Nations publication, Sales No.: 1955.V.2.

[50] United Nations publication, Sales No.: 1957.V.4.

[51] United Nations publication, Sales No.: 63.V.7.

regarding any subsequent action which effects a change in the parties thereto, or the terms, scope or application thereof, shall also be registered with the Secretariat".

7. We also wish to inform you that under article 1 (3) of the Regulations, the registration may be effected by any party to the agreement or in accordance with article 4 of the Regulations. Once the registration of an agreement has been effected by one of the parties or in accordance with article 4, all other parties, pursuant to article 3 of the Regulations, are relieved from the obligation to register it.

8. No evidence is required by the Secretariat of an understanding between the parties that the treaty or international agreement should be registered. Indeed, no such understanding appears to be necessary at all for a party to proceed with the registration of a treaty or international agreement.

9. For the convenience of reference, you may wish to note that the text of the Regulations to give effect to Article 102 of the Charter of the United Nations, established by the General Assembly in resolution 97 (I) of 14 December 1946, as modified by resolution 364B (IV) of 1 December 1949 and 482 (V) of 12 December 1950, may be found in Volume 76 of the United Nations *Treaty Series* and also, with appropriate annotations, in Volume V, p. 283, of the *Repertory of Practice of United Nations Organs* referred to earlier in this letter.

14 November 1967

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12. Question whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 [52] has been designed to supersede the International Convention on the Execution of Foreign Arbitral Awards of 26 September 1927 [53]

Letter to the Permanent Representative of a Member State

1. As regards your question whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, hereafter referred to as the 1958 Convention, has been designed to supersede the International Convention on the Execution of Foreign Arbitral Awards, done at Geneva on 26 September 1927, hereafter referred to as the 1927 Convention, we wish to invite your attention to article VII of the 1958 Convention which reads as follows:

> "1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.
>
> "2. The Geneva Protocol on Arbitration Clauses of 1923 [54] and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention."

2. You will note that, although the effect of paragraph 2 of article VII is to supersede the 1927 Convention by the 1958 Convention, this paragraph operates only in relations

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[52] United Nations, *Treaty Series*, vol. 330, p. 3.

[53] League of Nations, *Treaty Series*, vol. XCII, p. 301.

[54] *Ibid.*, vol. XVII, p. 157.

between the parties to the latter Convention. Furthermore, paragraph 1 of the same article expressly provides that the 1958 Convention shall not affect the validity of multilateral and bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States.

3. Accordingly, while the 1927 Convention has ceased to have effect between States parties thereto which have become parties to the 1958 Convention, it still remains in force in relations between the latter States and any of the States parties to the 1927 Convention which is not a party to the 1958 Convention.

4. In this regard, it may be of interest to note that 12 out of 23 States parties to the 1927 Convention are not parties to the 1958 Convention, two of them, Malta and Yugoslavia, having become parties after the conclusion of the 1958 Convention. In addition, the 1927 Convention was signed on behalf of Uganda on 5 May 1965 and acceded to by the United Kingdom on behalf of Hong-Kong on 10 February 1965.

13 April 1967

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13. Question whether the Single Convention on Narcotic Drugs, 1961 [55] replaced as between parties to it the earlier narcotics treaties enumerated in paragraph 1 of article 44 of the said Convention—Question whether the obligations of these earlier treaties continue as between parties to them who are not parties to the Single Convention and parties who are also parties to the Single Convention

Letter to the Director of the Division of Narcotic Drugs

1. In accordance with a recommendation of the United Nations Consultative Group on Opium Problems, you have addressed a formal request to the Secretary-General for a legal opinion on two questions concerning the effect of article 44 of the Single Convention on Narcotic Drugs, 1961, on prior narcotics treaties referred to in that article.

2. *Question 1.* Question 1, as formulated by the Consultative Group, reads as follows:

> "Does article 44 of the Single Convention by itself replace as between parties to it the provisions of the instruments which it replaces?"

Article 44 of the Single Convention contains two paragraphs, the first containing provisions relating to most of the previous narcotics treaties, and the second containing a special provision regarding article 9 of the Geneva Convention of 26 June 1936. [56] It is understood that the question relates to the interpretation of paragraph 1, particularly as regards the Protocol of 23 June 1953, [57] and not to the special provision in paragraph 2.

3. Paragraph 1 of article 44 provides:

> "1. The provisions of this Convention, upon its coming into force, shall, as between Parties hereto, terminate and replace the provisions of the following treaties: [There follows a list of treaties, including the 1953 Protocol.]"

This provision means that, as soon as the Single Convention came into force between its parties, the earlier narcotics treaties were immediately terminated and replaced as

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[55] United Nations, *Treaty Series*, vol. 520, p. 151.

[56] League of Nations, *Treaty Series*, vol. CXCVIII, p. 299.

[57] United Nations, *Treaty Series*, vol. 456, p. 56.

between parties to the Single Convention which were also parties to the earlier treaties. The wording of article 44 is of a broad character, and makes no exception for obligations of earlier treaties which would be compatible with the obligations of the Single Convention; all obligations of the earlier treaties are terminated as between the parties, without regard to the question of compatibility.

4. This interpretation finds support in the preparatory work of the Single Convention. The 1961 Conference was called pursuant to Economic and Social Council resolution 689J (XXVI) of 28 July 1958, which stated that one of the objects of the Conference was "to replace by a single instrument the existing multilateral treaties relating to the control of narcotic drugs". This resolution was borne in mind by the Conference, which cited it and referred to the above-quoted passage in paragraph 1 of the Final Act of the Conference. Moreover, in the discussion at the thirty-sixth plenary meeting of the Conference on 21 March 1961 of article 51 of the draft convention, which later became article 44, it was generally assumed by the speakers that the new convention would completely replace the old ones, regardless of any question of compatibility. That was the reason why certain delegations that wished to preserve the option of keeping in force article 9 of the 1936 Convention—a provision more stringent than paragraph 2 of article 36 of the Single Convention but not inconsistent therewith—successfully opposed the inclusion of a reference to the 1936 Convention in the general list. The Drafting Committee was thereupon requested to prepare the special provision regarding the 1936 Convention which became paragraph 2 of article 44 of the Single Convention.

5. It therefore results from the text of paragraph 1 of article 44 and from the preparatory work that as soon as the Single Convention becomes binding upon its parties, those parties cease to be bound in their mutual relations by the earlier narcotics treaties. This effect is automatic, and there is no need for the parties concerned to take any additional action to bring it about. No such action is provided for in the text of the Single Convention, and none is required under the customary law of treaties. The draft articles on the law of treaties adopted by the International Law Commission in 1966 [58] do not require any action by the parties in such circumstances.

6. *Question 2.* Question 2 was worded as follows by the United Nations Consultative Group on Opium Problems:

> "Do the obligations of those instruments [the old narcotics treaties] respectively continue as between parties to them who are not parties to the Single Convention and parties who are also parties to the Single Convention?"

The answer to this question is in the affirmative. Article 26 of the draft articles on the law of treaties adopted by the International Law Commission provides:

> "1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
>
> ...
>
> "4. When the parties to the later treaty do not include all the parties of the earlier one:
>
> ...
>
> "(*b*) as between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty governs their mutual rights and obligations;
>
> "(*c*) as between a State party to both treaties and a State party only to the later treaty the later treaty governs their mutual rights and obligations.

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[58] See *Official Records of the General Assembly, Twenty-first Session, Supplement No. 9* (A/6309/Rev. 1), p. 14.

"5. Paragraph 4 is without prejudice . . . to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty."

The rule thus stated by the International Law Commission seems to have been generally accepted by Governments, and can be taken as representing existing law.

7. It follows that the old treaties apply as between States which are parties to them but not parties to the Single Convention, and that they also apply in the relations between States parties only to them and States parties both to them and to the Single Convention.

4 December 1967

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14. Date of entry into force of the Convention on Facilitation of International Maritime Traffic of 9 April 1965[59] with respect to States having deposited their instrument of acceptance or accession between the date of deposit of the last instrument of accession required for the entry into force of the said Convention and the date of entry into force—Interpretation of article XI of the Convention

1. You have asked for our views regarding the application of article XI of the Convention on Facilitation of International Maritime Traffic, done at London on 9 April 1965. The said article reads as follows:

"The present Convention shall enter into force sixty days after the date upon which the Governments of at least ten States have either signed it without reservation as to acceptance or have deposited instruments of acceptance or accession. It shall enter into force for a Government which subsequently accepts it or acceeds to it sixty days after the deposit of the instrument of accession."

2. Referring to the fact that the tenth instrument of acceptance or accession was received on 4 January 1967, thus bringing into force the Convention on 5 March 1967, you ask whether the word "subsequently" may be read in apposition to the date of entry into force, rather than the date of deposit of the tenth instrument of acceptance or accession, so that the three States, namely Nigeria, Iceland and Ivory Coast, whose instruments were deposited between those two dates could also be included among the States in respect of which the Convention entered into force on 5 March 1967.

3. The entry into force provision similar to the one contained in the Convention in question may be found in a number of Conventions and, although its wording is not entirely free from ambiguity, there seems to be a generally recognized practice to relate the word "subsequently" or a similar expression to the date on which the number of instruments required to bring into force the Convention has been reached, in other words, to count a full delay provided in the Convention in calculating the effective date of each instrument deposited "subsequently". We draw your attention, for instance, to the pertinent provisions and the respective footnotes relating to the entry into force of the four Geneva Conventions of 12 August 1949 for the protection of war victims[60] or the same for the Universal Copyright Convention.[61]

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[59] United Nations, *Treaty Series*, vol. 591.

[60] *Ibid.*, vol. 75, p. 3.

[61] *Ibid.*, vol. 216, p. 132.

4. On the other hand, article XV, paragraph 2 of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, [62] which is deposited with IMCO, provides that for each Government which signs the Convention without reservation as to acceptance or accepts the Convention before the date of its entry into force, it shall come into force on that date; and for each Government which accepts the Convention on or after that date, it shall come into force three months after the date of the deposit of that Government's acceptance.

5. In our view, therefore, the instruments deposited by Nigeria, Iceland and the Ivory Coast should be considered as having become effective sixty days after their deposit, that is to say on 25 March 1967, in respect of the first two States and on 17 April 1967 in respect of the Ivory Coast.

17 April 1967

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15. Procedures for amending the Convention of the World Meteorological Organization [63]—Article 27 of the Convention

Opinion addressed to the Secretary-General of the World Meteorological Organization

Section I. Introduction

1. By resolution 3 (Cg-IV), adopted on 27 April 1963, the Fourth Congress of the World Meteorological Organization (WMO) established a Working Group to study certain problems which had arisen regarding the Convention of the Organization. The Working Group, having met between 14 and 18 December 1964, prepared a draft report [64] which was examined by the WMO Executive Committee during its seventeenth session, held between 27 May and 11 June 1965. Having considered the summary of the discussions in the Working Group regarding Article 27 of the Convention, relating to amendments, the Executive Committee adopted the following decision:

> "The Executive Committee considered that in view of the complicated nature of the problems connected with Article 27, it would be useful to ask for a legal opinion regarding it, and directed the Secretary-General to do so. Such a legal opinion should be forwarded to all Members well before the Fifth Congress for their consideration." [65]

2. In pursuance of this decision the Secretary-General of WMO wrote to the Legal Counsel of the United Nations on 15 April 1966, requesting him to undertak an examination of the English and French texts of Article 27 of the WMO Convention and to provide a legal opinion regarding the procedures for amending the Convention contained in that article in the light of the difficulties experienced by the Working Group. The present opinion has been prepared in response to that request.

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[62] *Ibid.*, vol. 327, p. 3.

[63] *Ibid.*, vol. 77, p. 143.

[64] WG/CONV/Conference room paper 3.

[65] Paragraph 2.2.7(f), General Summary, *Seventeenth Session of the Executive Committee*, WMO—No. 173.RC.26.

Section II. Provisions of the WMO Convention [66]

3. Article 27 reads as follows:

English version

"(*a*) The text of any proposed amendment to the present Convention shall be communicated by the Secretary-General to Members of the Organization at least six months in advance of its consideration by the Congress.

"(*b*) Amendments to the present Convention involving new obligations for Members shall require approval by the Congress, in accordance with the provisions of Article 10 of the present Convention, by a two-thirds majority vote, and shall come into force on acceptance by two-thirds of the Members which are States for each such Member accepting the amendment and thereafter for each remaining such Member on acceptance by it. Such amendments shall come into force for any Member not responsible for its own international relations upon the acceptance on behalf of such a Member by the Member responsible for the conduct of its international relations.

"(*c*) Other amendments shall come into force upon approval by two-thirds of the Members which are States."

French version

"(*a*) Tout projet d'amendement à la présente Convention sera communiqué par le Secrétaire général aux Membres de l'Organisation, six mois au moins avant d'être soumis à l'examen du Congrès.

"(*b*) Tout amendement à la présente Convention comportant dè nouvelles obligations pour les Membres de l'Organisation sera approuvé par le Congrès, conformément aux dispositions de l'article 10 de la présente Convention, à la majorité des deux tiers, et entrera en vigueur, sur acceptation par les deux tiers des Membres qui sont des Etats, pour chacun de ces Membres qui accepte ledit amendement et, par la suite, pour chaque Membre restant, sur acceptation par celui-ci. De tels amendements entreront en vigueur, pour tout Membre qui n'est pas responsable de ses propres relations internationales, après acceptation en son nom par le Membre responsable de la conduite de ses relations internationales.

"(*c*) Les autres amendements entreront en vigueur après avoir été approuvés par les deux tiers des Membres qui sont des Etats."

4. Article 10, which is referred to in Article 27, provides that:

"(*a*) In a vote in Congress each Member shall have one vote. However, only Members of the Organization which are States (hereinafter referred to as 'Members which are States'), shall be entitled to vote or to take a decision on the following subjects:

(i) Amendment or interpretation of the Convention or proposals for a new Convention;

(ii) Requests for Membership of the Organization;

(iii) Relations with the United Nations and other inter-governmental organizations;

(iv) Election of the President and Vice Presidents of the Organization and of the members of the Executive Committee other than the Presidents of the Regional Associations.

(*b*) Decisions shall be by a two-thirds majority of the votes cast for and against, except that elections of individuals to serve in any capacity in the Organization shall be by simple majority of the votes cast. The provisions of this paragraph, however, shall not apply to decisions taken in accordance with Articles 3, 24, 25 and 27 of the Convention."

Article 28 of the Convention, relating to interpretation and disputes, provides as follows:

"Any question or dispute concerning the interpretation or application of the present Convention which is not settled by negotiation or by the Congress shall be referred to an independent

[66] The text cited takes into account the amendments to the Convention adopted by the Fourth Congress of WMO.

arbitrator appointed by the President of the International Court of Justice. unless the parties concerned agree on another mode of settlement."

Section III. Discussion in the Working Group

5. At its session in December 1964, the Working Group on the Convention distinguished four issues in relation to the interpretation of Article 27. One of these, concerning paragraph (*a*) of Article 27, the Group effectively disposed of. Of the remainder, which concerned the interpretation of paragraphs (*b*) and (*c*) of Article 27, the Group agreed that two required interpretation by the WMO Congress; in the fourth case the Group was unable to reach any final conclusions. The four questions are summarized below.

(i) *Whether a proposed amendment submitted in accordance with paragraph (a) of Article 27 can be modified by Congress*

6. The Working Group concluded:

"that Congress itself had interpreted this paragraph of Article 27 in the past as enabling it to discuss and modify proposals of amendments submitted to it by Members. Indeed all amendments adopted by Third and Fourth Congress had been in a form and wording different from that in which the original draft amendment had been submitted." [67]

It is considered that this issue requires no further comment.

(ii) *Definition of the two-thirds majority required in Congress for amendments under paragraph (b) of Article 27*

7. It was pointed out with reference to this question:

"that Article 10(*b*), which defined the majority required for decisions in Congress, explicitly excluded decisions taken in accordance with Article 27. At the same time, Article 10(*a*) (1) stated that only Members of the Organization which are States shall be entitled to vote or to take a decision regarding amendment or interpretation of the Convention."

The Working Group agreed that "on this point the provisions of the Convention were not clear and should be interpreted by Congress."

(iii) *Whether the approval of amendments under paragraph (c) of Article 27 can be obtained outside Congress*

8. On this issue the draft report of the Working Group stated as follows:

"It was pointed out that similar provisions concerning approval by two thirds of the Members which are States and contained in Articles 3 and 25(*a*) had been implemented through postal ballot. The members holding this view also emphasized that if postal ballots were excluded as regards the implementation of Article 27(*c*) it would become more and more difficult, with the increasing number of Members of the Organization, to reach within Congress the necessary approval of two thirds of the Members which are States. This would mean that amendments involving new obligations would in fact be easier to adopt than amendments which did not involve new obligations, since the acceptance procedure under Article 27(*b*) permitted a decision by correspondence. Therefore these members felt that a decision by correspondence should be possible for amendments involving no new obligations for Members.

"Other members were of the view that matters relating to the amendments of a convention should not be decided upon by correspondence. These were matters of importance and should be discussed in detail and decided upon during the session of Congress. The fact that a number of such amendments had been adopted by Congress under Article 27(*c*) showed that

[67] Para. 17.2 WG/CONV/Conference room paper 3. The quotations in paras. 7, 8 and 10 below are from the same source.

this was by no means impossible. Further, the Working Group itself, by deciding that the proposed Articles 4 *, 10 * and 18 * could not be submitted to a vote by correspondence, had also adopted that view.

"The other group of members, however, considered that the decision regarding the procedure taken by the Working Group to be applied in the particular case of proposed Articles 4 *, 10 * and 18 *, should under no circumstances be considered as a decision regarding the application of postal ballots under Article 27(*c*) in general. This decision had been taken as a compromise solution in the light of particular circumstances under which the proposed Articles 4 *, 10 * and 18 * had been voted upon during Fourth Congress.

"It was agreed that this point required interpretation by Congress."

(iv) *Who determines whether or not a proposed amendment involves a new obligation for Members and according to what criteria this determination is made*

9. Although there was agreement on the two preceeding issues in so far as it was decided that the problems involved required interpretation by Congress, even this measure of consensus was not reached with regard to the remaining question.

10. Two points of view were expressed in the Working Group:

"Some members considered that Congress itself, in accordance with Article 28, was empowered to interpret Article 27 and therefore to decide whether an amendment fell under the provisions of paragraph (*b*) or (*c*) of that article. The Convention contained no guidance regarding the criteria to be followed.

"Other members held the view that since no State could be bound without its consent, each Member was entirely free to decide whether an amendment involved new obligations for it or not, and therefore whether it wished to adopt the amendment under the provisions of paragraphs (*b*) or (*c*).

"It was pointed out that this latter interpretation would result in a multiplicity of conventions and would make the normal functioning of the Organization impossible. This method could be applied to a convention concerning subjects other than the constitution of an international organization. In the case of an organization it was an unworkable procedure. An example was given to illustrate this point. If Congress amended, according to the procedure of Article 27(*b*), the provisions regarding majorities given in Article 10(*b*) and some Members did not accept this amendment, whilst the majority accepted it, different majorities would be recognized by different Members. This would paralyse the Organization to a very large extent.

"It was further emphasized that when the various governments acceded to the Convention or ratified it, they accepted Articles 27 and 28 as they stood, thus enabling Congress to decide which amendments involved new obligations. Article 28—Interpretation and Disputes—safeguarded the right of any State to ask for the interpretation of Congress to be referred to an independent arbitrator.

"The Working Group reached no final conclusions in this connexion."

Section IV. Question to be examined

11. Although the main problem raised concerns that referred to in sub-section (iv) above, this issue is related to those distinguished under sub-sections (ii) and (iii). Having regard to this fact the question, or questions, with which this opinion deals have been reformulated as follows:

(i) Who determines whether or not a proposed amendment involves a new obligation for Members?

(ii) According to what procedure is this determination made?

(iii) According to what criteria is this determination made?

Section V. Analysis of the terms of Article 27

12. In its draft articles on the law of treaties, [68] the International Law Commission has set out the broad principles to be applied in the interpretation of treaties and other international agreements. Article 27 of these draft articles, entitled "General rule of interpretation", provides as follows in its opening paragraph:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." [69]

Before considering the interpretation to be given to Article 27 of the WMO Convention in the light of subsequent practice, the legislative history of the article, and the interpretation by other specialized agencies of similar provisions, it is proposed to examine the terms of Article 27 on the basis of the general rule formulated by the International Law Commission.

(i) *Who determines whether or not a proposed amendment involves a new obligation for Members*

13. The text of Article 27 of the WMO Convention distinguishes between two classes of amendments, namely those which involve new obligations and those which do not, and provides a different procedure of adoption in each case. This fact of itself requires that a determination must be made as to which procedure is to be, or is being, followed, even

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[68] See *Official Records of the General Assembly, Twenty-first Session, Supplement No. 9* (A/6309/Rev.1).

Although the draft articles concerned have not yet been approved by the community of States, the work of the Commission in this field represents the consensus of opinion among international law specialists elected by the General Assembly and representing the various legal systems of the world.

[69] The full text of draft articles 27 and 28 prepared by the International Law Commission is as follows:

"Article 27

"*General rule of interpretation*

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

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

"(*a*) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

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

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

"(*a*) Any subsequent agreement between the parties regarding the interpretation of the treaty;

"(*b*) Any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation;

"(*c*) Any relevant rules of international law applicable in the relations between the parties.

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

"Article 28

"*Supplementary means of interpretation*

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 27, or to determine the meaning when the interpretation according to article 27:

"(*a*) Leaves the meaning ambiguous or obscure; or

"(*b*) Leads to a result which is manifestly absurd or unreasonable."

though the question of how this determination is to be made is not explicitly regulated in the article. There are two alternative means by which such a determination could be made in the context of the Convention: either by Members which are States acting collectively, that is to say normally through Congress, or by such Members acting individually.

14. Since Article 27 provides that Congress, the plenary body on which all Members are represented, is to consider all amendments, [70] and its approval is expressly stated to be necessary for amendments adopted under one of the two procedures, [71] the conclusion is reached on at least *prima facie* grounds that, when an amendment is proposed, Members which are States are intended to take a decision through Congress as to which of the two procedures is to be followed. This conclusion is supported by the fact that, if this determination were not to be made collectively, the "object and purpose" of the article would be defeated, for there would then be no certain means of adopting any amendments effectively. If individual Members were allowed to decide for themselves whether an amendment fell under paragraph (*b*) or (*c*), and these individual assessments were to be binding, the result would be that, unless unanimity was achieved on every occasion, two Conventions, or two sets of provisions, would come into operation whenever an amendment was approved. Thus to give an illustration: if there were a membership of one hundred States, of which eighty wished to treat an amendment under paragraph (*c*) and twenty considered that it fell under paragraph (*b*), if the view of the latter were to be given equal effect, those States would not be bound by the decision taken under (*c*); if, in the reverse case, eighty were prepared to accept the amendment under (*b*) and twenty considered it fell under (*c*), the consequences might not be so serious in practice in so far as those prepared to regard the proposal as coming under (*c*) might presumably be more prepared to change their position and to accept the amendment as coming under (*b*), but this presumption might not necessarily be borne out in a given case. It would be a manifestly unsatisfactory solution, however, if those advocating that the amendment fell under (*c*) maintained their attitude to the extent of declaring that, since two thirds of the total number of Members which were States had approved the proposal [although eighty of them on the ground that it fell under (*b*)], it therefore became effective under paragraph (*c*) and was binding on all Members, even before the other eighty had accepted the proposal as required under paragraph (*b*) of Article 27.

15. This example shows the impractical results which might follow if the right of individual assessment were to be granted. The assertion of this right, moreover, should be distinguished from the situation permitted under Article 27 (*b*), whereby a situation may come into existence in which although some Members accept a new obligation, others do not. This issue, however, is distinct from that of whether a given amendment is to be considered as involving a new obligation or not [and therefore falling either under paragraph (*b*) or (*c*)]. For the reasons indicated, this logically prior question must be collectively determined in order to achieve a uniform result.

16. It has so far been assumed that this collective decision will be taken through Congress. Having regard to the wording of the article and its interpretation in practice,

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[70] The opening paragraph of Article 27 of the WMO Convention reads "(*a*) The text of *any proposed amendment* to the present Convention shall be communicated by the Secretary-General to Members of the Organization at least six months in advance of *its consideration by the Congress*." (Emphasis added).

In the absence of any express provision in the remainder of the article declaring that, in specified circumstances, amendments do not have to be discussed by Congress, it is submitted that the effect of paragraph (*a*) is to require all draft amendments to be placed before Congress for its consideration.

[71] Those adopted in accordance with paragraph (*b*) of Article 27.

whereby all amendments implemented have followed a decision in Congress, [72] it may be assumed that this will normally be the case. There are two qualifications which should be noted however. The first concerns the nature of the decision taken in Congress. It is conceivable that Congress may decide to ask the Members which are States to express an opinion outside Congress as to whether a particular amendment voted on within Congress is to be considered as constituting a new obligation and therefore falling under paragraph (*b*), or, on the contrary, as not constituting a new obligation and therefore falling under (*c*). Even in this instance, however, the effect of the decision would not be to confer a right of individual assessment, binding *erga omnes*; the views of Members would still need to be collated so as to produce a single collective result, in favour of either (*b*) or (*c*). Secondly it would be possible, on a literal interpretation of the wording of Article 27, for this logically prior determination, namely whether a given amendment is to fall under paragraph (*b*) or (*c*), itself to be conducted outside Congress before the latter has begun its consideration. This process, whilst not in conflict with the terms of the article, would be of relatively little utility, however, since if, on the one hand, it were decided that a given amendment came under paragraph (*b*), it would still be necessary to obtain the approval of Congress and, on the other, if the proposal were deemed to fall under paragraph (*c*), the amendment could not come into force even if it were to be approved by two-thirds of the Members which are States before it had been considered by Congress. This last fact supports the general conclusion reached above, that the determination as to whether an amendment is to be adopted under paragraph (*b*) or (*c*) is intended to be made by Members which are States during their meetings in Congress.

(ii) *The procedure to be followed in determining whether or not a proposed amendment involves a new obligation for Members*

17. That two different methods are envisaged in Article 27 for the adoption of amendments results from the wording of its paragraphs (*b*) and (*c*).

> (*b*) "Amendments . . . involving new obligations for Members shall require approval by Congress, . . . by a two thirds majority vote . . ."
>
> (*c*) "Other amendments shall come into force upon approval by two thirds of the Members which are States".

The French version is equally clear:

> (*b*) "Tout amendement . . . comportant de nouvelles obligations pour les Membres de l'Organisation sera approuvé par le Congrès, . . . à la majorité des deux-tiers . . . "
>
> (*c*) "Les autres amendements entreront en vigueur après avoir été approuvés par les deux-tiers des Membres qui sont des Etats".

When an amendment is presented, Members which are States are required, in accordance with the reasoning advanced above, to make a collective decision through Congress as to whether the proposal involves a new obligation or not. Members may advance different opinions on this question, according to their assessment of the proposed change. However, either as a result of a vote in Congress specifically on this issue or, more commonly, on the basis of the vote taken on the amendment itself, one or other procedure will eventually be followed. The fact that the vote taken as to whether or not the draft amendment should be adopted may in practice coincide with the assessment by Congress as to whether it is proceeding under paragraph (*b*) or (*c*) of Article 27, may make it hard to distinguish the decision as to characterisation from that as to whether the amendment is to be accepted or rejected, although a logical and functional difference exists between them.

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[72] See paras. 28-59 below.

18. To recapitulate the conclusions so far reached, it is submitted that: (i) Congress is the appropriate organ to determine whether an amendment involves a new obligation or not; (ii) this determination may be made by a separate vote on the specific issue of whether a given amendment falls under paragraph (*b*) or (*c*) of Article 27; and (iii), alternatively, the process of making this determination may be fused with that of the actual adoption of a given amendment, carried out in accordance with the provisions of either paragraph (*b*) or paragraph (*c*) of Article 27. Since all amendments which have so far come into force have been adopted in accordance with (iii), it is proposed to consider the procedure prescribed in the text of paragraphs (*b*) and (*c*) before dealing with the question of the procedure which should be observed in the event that a separate vote were to be taken in accordance with (ii) above.

Procedure under Article 27 (b)

19. In the case of amendments falling under Article 27(*b*), Congress is required to approve the draft amendment by a two-thirds majority vote, in accordance with the provisions of Article 10. After this approval has been obtained, two-thirds of the Members which are States must indicate their acceptance of the amendment in order that it may come into force, for each such Member so doing.

20. Taking first the requirement of approval by Congress, as the Working Group noted, [73] a problem arises here in so far as paragraph (*b*) declares that this approval is to be given "in accordance with the provisions of Article 10". However, whereas Article 10(*a*) declares that only Members which are States may vote or take a decision on amendments to the Convention, Article 10(*b*) (which provides that "decisions shall be by a two-thirds majority of the votes cast for and against, except that elections of individuals to serve in any capacity in the Organization shall be by simple majority of the votes cast"), declares that this paragraph shall not apply to decisions taken in accordance with Article 27. There is thus an inconsistency between the texts of Articles 10 and 27 that cannot be removed solely on a basis of textual examination. However, it is submitted that Article 10 is intended to deal with voting generally: it expressly provides for a number of exceptions (including Article 27), which are, to this extent, to be regarded as self-sufficient. Thus as regards Article 27(*b*), it is suggested that although only Members which are States are allowed to vote, the express inclusion of the words "in accordance with the provisions of Article 10 of the present Convention, by a two-thirds majority vote" overrides the exclusion contained in Article 10(*b*), so that the majority required is only two-thirds of the Members which are States present and voting, and not two-thirds of the total number of such Members. It is to be noted that this interpretation has been that followed in practice.

21. After amendments falling under paragraph (*b*) have been approved by Congress they must be accepted by two-thirds of the Members which are States in order to come into force, in this case acceptance is required from two-thirds of the total number of Members which are States. Amendments come into force moreover, only "for each such Member accepting the amendment and thereafter for each remaining such Member on acceptance by it", [74] and not for all Members automatically. The actual process of acceptance is left to the discretion of Members which are States, in accordance with the relevant provisions of their respective constitutions.

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[73] See para. 7 above.

[74] In addition, "Such amendments shall come into force for any Member not responsible for its own international relations upon the acceptance on behalf of such a Member by the Member responsible for the conduct of its international relations" (Article 27(*b*), *in fine*).

Procedure under Article 27 (c) [75]

22. When amendments considered not to involve new obligations are adopted under paragraph (*c*), the sole requirement, following consideration by Congress, is that they must be approved "by two-thirds of the Members which are States." Thus an affirmative opinion must be obtained from two-thirds of the total number of Members which are States. Such amendments do not require any further steps to be taken in order that they may come into force and may accordingly do so either immediately, on the date of their adoption, or on the date indicated by Congress in the relevant resolution. Article 27(*c*) is clear in this respect. The difference between the English and French texts is that the English text uses the word "upon", whereas the French text states: "après". This difference does not change the basic intent of the article, namely that an amendment falling under (*c*) enters into force when, following consideration in Congress, it has been approved by two-thirds of Members which are States, at which stage it becomes binding upon all Members of the Organization.

23. To summarize the differences between the two procedures listed in Article 27:

(i) In the case of amendments deemed to fall under paragraph (*c*) it is necessary that, after consideration by Congress, the amendment must be approved by two-thirds of the total number of Members which are States; any amendments so approved may come into force immediately and apply even as regards Members which do not approve of them.

(ii) In the case of amendments falling under paragraph (*b*), it is necessary, firstly, that after consideration by Congress, the amendment must be approved by Congress by receiving the affirmative vote of two-thirds of the Members which are States and which are present and voting; and secondly, that to enter into force the amendment be accepted by two-thirds of the total number of Members which are States. Moreover, amendments involving new obligations are only binding on those Member States which accept them, and do not necessarily apply therefore with respect to all Members even after they have come into force.

Procedure to be followed in the event that a separate vote were to be taken on the question of whether or not a given amendment involves a new obligation

24. As already noted, all amendments which have actually been implemented by WMO have been adopted without recourse to a separate vote as to whether the amendmen involves a new obligation for Members, and so fell to be considered under paragraph (*b*)t or did not involve such an obligation and might therefore be dealt with under paragraph (*c*); accordingly, the vote as to the adoption of the amendment was fused with that as to the

[75] The answer to the question examined by the Working Group (see para. 8 above), namely whether the approval required under article 27(*c*) can be obtained outside Congress, has already been indicated in para. 16. The wording of para. (*a*) of article 27 requires that any proposed amendment, after being circulated to Members, will be considered by Congress. This fact in itself suggests that it was intended that the approval referred to in para. (*c*) would be obtained in Congress. On the basis of the words used, however, this requirement is not itself obligatory; the only express prerequisite, so far as Congress is concerned, is that Congress must be given an opportunity to consider the proposal; "consideration", however, is not necessarily the same as "approval". In summary therefore, the collective decision that a particular amendment is to fall under Article 27(*c*) and requires the approval of two-thirds of the Members which are States, might be obtained outside Congress. Despite the wording of para. (*c*) of Article 27 viewed in isolation, such action would nevertheless not suffice to bring the amendment into operation until it had also been considered by Congress. This conclusion therefore supports that already reached, that it was intended that the approval referred to in Article 27(*c*) would be obtained in Congress following that body's consideration of the draft amendment.

procedure being followed. It would be possible, however, to have recourse to a prior vote on the specific issue of whether or not a given amendment involved a new obligation [so as to require to be dealt with under paragraph (*b*)] or did not [so that it might be approved under paragraph (*c*)]. The problem would then arise as to the procedure to be observed in taking this prior vote.

25. In the absence of any provisions expressly on this point, two main questions would need to be settled: firstly, whether all Members would be entitled to vote or only those which are States; and, secondly, what majority would be required to reach a decision, and how that majority would be calculated.

26. As regards the first question, Article 10(*a*) provides that "In a vote in Congress each Member shall have one vote". This general statement is qualified by the provision that only Members which are States "shall be entitled to vote or to take a decision on", *inter alia*, "amendment or interpretation of the Convention". On the ground that a determination in Congress as to whether or not a proposed amendment involves a new obligation is "a decision on . . . amendment . . . of the Convention", it is submitted that only Members which are States would be entitled to take part in the vote whereby such a decision was taken.

27. On the question of the majority required, it is submitted that, in the absence of any express provision in Article 27, the matter is governed by paragraph (*b*) of Article 10, which provides that "Decisions shall be by a two-thirds majority of the votes cast for and against". Accordingly, the decision as to whether a proposed amendment involves a new obligation and is therefore to be considered under Article 27(*b*), or does not involve such an obligation and is therefore to be treated under Article 27(*c*), may be made by a two-thirds majority of the votes cast for and against by Members which are States. It would, of course, be open to Congress to consider the adoption of a special procedure to regulate this issue, such as that contained in rule 106 of the rules of Procedure of UNESCO. [76]

(iii) *The criteria to be followed in determining whether or not a proposed amendment involves a new obligation for Members*

28. Article 27 contains no words which may be used as criteria to determine whether or not a given amendment involves a new obligation for Members. Nor does any simple test suggest itself (such as, that the only "new obligations" envisaged were financial or material in character, and not those, for example, affecting the powers of the Organization itself). Although it would have been possible to specify certain categories and to declare that any amendments affecting these were to be regarded as involving new obligations, or were subject to special safeguards, this was not done. Accordingly, the criteria to be followed in making the determination as to whether a given amendment involves a new obligation for Members is left, in the first instance, to the discretion of individual Members. When the amendment in question is considered by Congress, each Member may therefore submit arguments in support of its assessment of the matter. For the reasons given in (i) above (paragraphs 13-16), the discussion on this question must eventually terminate in a collective decisions as to whether the amendment (if it is to be accepted at all) is to be regarded as involving a new obligation, and therefore requiring approval and acceptance in accordance with Article 27(*b*), or does not involve such an obligation and may accordingly be approved under Article 27(*c*). It may be added that, in keeping with the principle that restrictions upon sovereignty are not to be presumed, the determination through Congress that a given amendment does or does not contain a new obligation is

[76] Quoted in para. 74 below.

not itself a new obligation, but one which States accepted, under the terms of the Convention, by becoming Members of the Organization.

Section VI. Practice of WMO with respect to amendments

29. Article 27 of the International Law Commission's draft articles on the law of treaties provides that

> "3. There shall be taken into account, together with the context:
>
> . . .
>
> (*b*) Any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation."

It is therefore proposed to examine the practice followed by WMO in applying Article 27 of the Convention.

30. Amendments to the Convention were adopted at the Third and Fourth Congress of WMO, held in 1959 and 1963 respectively; amendments, and the question of the amendment procedure, were also considered by the WMO Executive Committee between the two Congresses. The following account, which does not attempt to deal exhaustively with every argument or proposal put forward by individual Members, is sub-divided accordingly.

(i) *WMO Third Congress, 1959*

31. The proceedings at the WMO Third Congress relating to amendments fall into three parts: firstly, consideration of the relevant discussion in the General and Legal Committee; secondly, the adoption of a resolution amending Article 13(*c*) of the Convention; and thirdly, the adoption of a resolution relating to the amendment of Article 10(*a*)(2) of the Convention.

32. *Consideration of the Report of the Chairman of the Committee on General and Legal Questions.* [77] The Committee on General and Legal Questions had had before it document Cg-III/11 (dated 4.IX.1958) submitted by the WMO Secretary-General and dealing with a number of questions relating to the amendment of the Convention. The first of these questions was whether the WMO Executive Committee has the right to submit proposals for amendments to the Convention on its own initiative. After consideration of the report of the discussions on this issue, in the Committee on General and Legal Questions, Congress adopted a resolution (Resolution 4[Cg-III]), by a vote of 36 Members in favour, 13 against and 10 abstentions, instructing the Executive Committee to keep the Convention under review and to submit to Congress any proposed amendments which might appear necessary. [78]

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[77] *Third Congress of the World Meteorological Organization, Proceedings*, WMO—No. 89. RC. 18, pp. 66-74.

[78] The full text of resolution 4(Cg-III) reads:

"*The Congress*

"*Noting*

"(1) The desirability of keeping the Convention under continuing review in order that its efficiency as the principal working instrument of the Organization may not be impaired;

"(2) That the Executive Committee, as the body responsible for guiding the activities of the Organization during the interval between meetings of Congress, is able to bring to the notice of Members any deficiencies or ambiguities in the Convention;

"(3) That Article 14(*d*) of the Convention does not contain a precise definition of the functions of the Executive Committee with regard to proposed amendments of the Convention;

"*Recognizing* that only Members which are States, as the contracting parties to the Convention, have a prescriptive right to propose amendments to the Convention;

33. Of more direct importance, the Committee on General and Legal Questions had also considered the question of the procedure for amending the Convention. The issue before the Committee, and before Congress, was whether the description of that procedure given in paragraphs 8 to 13 of document Cg-III/11 was acceptable to Members. [79] The

"*Instructs* the Executive Committee under Article 14(*h*) to keep the Convention under continuing review between meetings of Congress, and, bearing in mind the provisions of Article 28(*a*) of the Convention, to submit to Congress the text of any proposed amendment to the Convention which may appear to the Executive Committee to be necessary."

[79] After quoting the provisions of Article 28 (renumbered Article 27 after the Fourth Congress) of the Convention, document Cg-III/11 continues:

"8. In the former case (i.e., when new obligations are involved) it will be seen that the first step in obtaining approval to a proposed amendment to the Convention is that it shall receive at Congress a two-thirds majority vote by Members which are States. The amendment, however, only comes into force on acceptance by two thirds of the Members which are States. Acceptance would be effected by the deposit with the depository Government (the United States of America) of a formal instrument. The Governmental constitutional procedures prior to the deposit of such an instrument vary from one State to another and the time involved in obtaining acceptance will similarly vary from one State to another. The experience of other specialized agencies suggests that a period of between one and two years will need to elapse before acceptance, by two-thirds of the Members which are States, is received.

"9. It should be noted also that amendments involving new obligations come into force on acceptance by two-thirds of the Members which are States *for each such Member accepting the amendment and thereafter for each remaining such Member on acceptance by it.*

"10. With regard to amendments involving no new obligations, the Convention simply prescribes that they shall come into force "upon approval by two-thirds of the Members which are States". It seems clear that this requirement is effectively the same as the first step in the adoption of the other type of amendments (i.e., "approval by Congress") with the additional proviso that the approval of two-thirds of the Member States must be obtained.

"11. If, therefore, the approval given by Congress comprises two-thirds of the Member States, these amendments enter into force at once. If, however, the number of Member States represented at Congress is such that a two-thirds majority vote is obtained, but not a two-thirds majority of all Member States, then the votes of Member States not represented at Congress will have to be obtained by correspondence.

"12. In case of doubt as to whether a particular amendment falls within one category or the other, the decision should evidently be left to Congress to decide.

"13. A more detailed justification of the views expressed above in respect of this second category of amendments is given in the appendix to this document." (Emphasis in original.)

The Appendix mentioned in paragraph 13 distinguished between the two categories of amendments established in article 27 (then numbered 28) and refers to the similar distinction drawn in the constituent instrument of other specialized agencies, in particular UNESCO and FAO. The appendix continues:

"The constitutive acts of these agencies, like the WMO Convention, make a distinction between two categories of amendment. It is the general conference of these two Organizations which is authorized, under certain conditions, to make minor changes in the Convention. These become effective either on the date on which they were approved by the conference (by a two-thirds majority), or on a date fixed by it. The only difference between the conditions laid down in the WMO Convention and those indicated in the constitutive acts of the other two organizations is that an absolute majority of two thirds of the Member States is necessary in WMO for the amendment to come into force, whilst in UNESCO and FAO the amendments come into force once they are approved by two thirds of the Members represented at the Conference, provided—in the case of FAO—that the number of approvals is greater than half the Members of the Organization.

"5. The constitutive acts of the United Nations and certain specialized agencies such as WHO, ILO and ICAO do not provide for two categories of amendment. All amendments, after adoption by a two-thirds majority at the general assemblies (under certain conditions), are submitted for either ratification or acceptance by Member States.

"6. In support of the foregoing explanations, it might be added that the original text of article 28(*c*) of the Convention, which reads as follows; 'Other amendments shall take effect on adoption by the Congress by vote concurred in by two-thirds majority of all the Members which are States of the Congress', and the form of which closely resembled that of the

(*Continued on next page.*)

Committee on General and Legal Questions reached the conclusion that paragraphs 8 to 11 could be regarded as approved by Members, but there were differences of opinion with regard to amendments entailing new obligations.[80] The Committee was unable to agree whether Congress had power to decide if an amendment entailled new obligations or not. In a draft resolution, the Committee had therefore proposed that the Executive Committee should be asked to study the text of Article 28(*c*) [renumbered Article 27(*c*), following the Fourth Congress] and report to the next Congress.[81] In this draft resolution, which was approved without objection, becoming resolution 3 (Cg-III),[82] Congress decided that an amendment not falling under the provisions of Article 28(*b*) "may be given a date on which it shall come into force after the approval of the amendment during a session of the Congress by two thirds of the Members which are States".

(Continued.)

corresponding articles of the constitutive acts of UNESCO and FAO, shows that the original intention of this article was to empower Congress to make certain amendments to the Convention. The record of the debate does not show that there was any discussion on the substance of this article. The text appears to have been modified in order to render it clearer and also to stipulate that amendments do not become effective until two thirds of Member States have approved them and not simply after approval by two thirds of the Member States voting in Congress. The new, more general, wording also renders procedure more elastic. It offers a possibility either of obtaining the approval of two thirds of the Members during the Congress itself or, once the amendment has been approved by Congress but has not yet received the approval of two thirds of the Member States, to seek the approval of all Member States by correspondence and thus obtain perhaps the two thirds necessary for implementation of the amendments. The difference in the wording of the two sub-paragraphs (*b*) and (*c*) of article 28 should also be noted: regarding the entry into force of amendments, sub-paragraph (*b*) indicates that *after approval* of an amendment, it comes into force on *acceptance* by two thirds of the Members which are States, whereas in sub-paragraph (*c*) it is indicated that amendments shall come into force upon *approval* by two thirds of the Members which are States.

"7. The question as to whether or not an amendment shall be considered as involving new obligations for Members of the Organization appears to be one for decision by Congress if there are no indications on the subject in the Convention, bearing in mind the procedures followed by organizations with similar provisions in their constitutive acts. It therefore seems that when Congress has to give a ruling on proposed amendments, it should not only decide on the substance of the amendment, but also on the procedure to be followed subsequently in dealing with it. If, in the opinion of Congress, the amendment results in new obligations, it appears advisable to include in the resolution by which Congress approved the amendment a clause instructing the Secretary-General to submit it for acceptance by the Members which are States. In the opposite case, it might be sufficient to indicate in the resolution that the amendment is approved under the terms of sub-paragraph (*c*) of article 28 of the Convention and that it comes into force immediately, or on a date mentioned in the resolution by which the amendment is approved". (Emphasis in original).

[80] Statement of the Chairman of the Committee on General and Legal Questions, *Third Congress of the World Meteorological Organization, Proceedings*, WMO—No. 89, RC. 18, p. 72.

[81] Draft resolution G.4, document Cg-III/117, Appendix B.

[82] The full text of the resolution reads:

"*The Congress*

"*Noting*

"(1) That doubts have arisen concerning the interpretation of Article 28(*c*) of the Convention;

"(2) That other specialized agencies of the United Nations which have provisions in their constitutions similar to those of Article 28 often bring into force amendments which have been approved during sessions of their general assemblies immediately or on a fixed date;

"*Decides* that an amendment which is in good form and does not fall under the provisions of Article 28(*b*) may be given a date on which it shall come into force after the approval of the amendment during a session of Congress by two thirds of the Members which are States;

"*Instructs* the Executive Committee to study the text of Article 28(*c*) and its application and to report to Fourth Congress."

34. Before the adoption of resolution 3 (Cg-III), the representative of the United States made a statement expressing the view of his Government.[83] In the opinion of the United States Government, a sovereign State had the exclusive right to decide for itself whether an amendment involved a new obligation. The United States Government also considered that Article 28(*c*) could only apply if two-thirds of the Members which are States voted in favour of an amendment, at a meeting of Congress, and specified that their vote was cast under Article 28(*c*); it did not agree with the opinion expressed[84] that those Member States which were not present in Congress when an amendment was sought to be adopted under Article 28(*c*) could subsequently be polled by correspondence. He also declared that his Government interpreted Article 28(*c*)

> "to require that if an amendment is approved by a two thirds majority vote of the Member States present at a meeting of Congress but less than two thirds of all the Member States of the Organization . . . indicate support for the amendment at a meeting of Congress under Article 28(*c*), the amendment comes into force for each Member State only when the provisions of Article 28(*b*) are met."

35. The general summary which was adopted by Congress regarding resolution 3 (Cg-III), on the basis of the report made by the Chairman of the Committee on General and Legal Questions, followed closely the wording of paragraphs 8 to 10 of document Cg-III/11; in accordance with the proposal made by the United States delegate, however, the reference to the possibility that Members might be polled outside Congress, after an amendment had failed to receive in Congress the approval of two-thirds of the total number of Members which were States, was deleted. The statement in paragraph 12 of document Cg-III/11 that

> "In case of doubt as to whether a particular amendment falls within one category or the other, the decision should evidently be left to Congress to decide,"

was also omitted. The general summary which was approved without opposition by Congress reads as follows:

> "3.1.1.3
>
> In the case of amendments falling under Article 28(*b*), the first step in obtaining approval to a proposed amendment to the Convention is that it shall receive at Congress a two-thirds majority vote by Members which are States. The amendment, however, only comes into force on acceptance by two thirds of the Members which are States. Acceptance is effected by the deposit with the depository Government (the United States of America) of a formal instrument. The governmental constitutional procedures prior to the deposit of such an instrument vary from one State to another and the time involved in obtaining acceptance may similarly vary from one State to another. The experience of other specialized agencies suggests that a period of between one and two years will need to elapse before acceptance, by two-thirds of the Members which are States, is received.
>
> It should be noted also that amendments involving new obligations come into force on acceptance by two-thirds of the Members which are States for each such Member accepting the amendment and thereafter for each remaining such Member on acceptance by it.
>
> With regard to amendments involving no new obligations, the Convention simply prescribes that they shall come into force "upon approval by two thirds of the Members which are States". This requirement is effectively the same as the first step in the adoption of the other type of amendments (i.e., 'approval by Congress') with the additional proviso that the approval of two thirds of the Member States must be obtained.

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[83] *Third Congress of the World Meteorological Organization, Proceedings*, WMO—No. 89, RC. 18, p. 73.

[84] On page 5 of the Report of the Chairman of the Committee on General and Legal Questions (Cg-III/117), repeating the substance of para. 11 of Cg-III/11, quoted in footnote 79 above.

When approval given by Congress under Article 28(*c*) comprises two thirds of the Member States, these amendments enter into force at once.

The Congress considered that an amendment to the Convention, which is in good form and does not fall under the provisions of Article 28(*b*), can be adopted during the session of Congress on approval by two thirds of the Members which are States, and that Congress may fix a date on which such amendments shall come into force. In this connexion Congress adopted resolution 3(Cg-III)." [85]

36. Before briefly considering this general summary, it may be noted that Congress agreed, on the basis of the report of the Chairman of the Committee on General nda Legal Questions,

"that the formal adoption of a draft amendment to the Convention solely by a postal vote is neither permissible nor desirable." [86]

37. As regards the general summary quoted above, it is considered that the account given of the procedure to be followed in adopting amendments under either paragraph (*b*) or (*c*) of the present Article 27 is in accord with that reached in paragraphs 19 to 22 of section V of the present opinion. The general summary does not, however, deal with the question of whether Congress may decide if an amendment entails new obligations or not, on which unanimous agreement could not be reached. It will be recalled that this question is considered and, for the reasons given, answered affirmatively, in section V above. In the absence of a similar finding on the part of Congress, the question may be raised, with reference to the last paragraph of the general summary quoted in paragraph 35 above, how it can in fact be known whether an amendment which is in good form does or does not "fall under the provisions of Article 28(*b*)", so as to enable Congress to approve it under paragraph (*c*) of that article in the event that it does not. It is submitted that this question can only be answered by reference to a collective decision taken by Member States through Congress, in conformity with the reasoning and procedure specified in section V of the present opinion.

38. *Amendment of Article 13(c) of the Convention.* The Committee on General and Legal Questions had also considered the question of amending Article 13(*c*) of the Convention, so as to increase the number of Directors of Meteorological Services elected by Congress to the WMO Executive Committee from six to nine. The Committee reached agreement on this proposal (including the application of the principle of regional representation), and submitted a draft resolution to Congress accordingly. [87] This draft resolution, which was approved by more than two-thirds of all Member States in a vote taken in Congress, [88] was specified in the text to come force on 15 April 1959, the date of its adoption. By virtue of the procedure followed and the fact that the amendment came into force immediately, the amendment must be considered as having been regarded by Congress as not constituting a new obligation, and therefore eligible to be approved under paragraph (*c*) of the then numbered Article 28.

39. The representative of Ireland, who was the only speaker on this item, apart from the Chairman of the Committee on General and Legal Questions, declared [89] that

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[85] *Third Congress of the World Meteorological Organization, Abriged Report with resolutions*, WMO—No. 88. RC. 17, para. 3.1.1.3, pp. 20-21.

[86] *Ibid.*, para. 3.1.1.4, p. 21.

[87] Report of the Chairman of the Committee on General and Legal Questions, document Cg-III/119 (14.IV.1959).

[88] Resolution 2 (Cg-III).

[89] *Third Congress of the World Meteorological Organization, Proceedings*, WMO—No. 89, RC. 18, p. 75.

his delegation, although opposed to the increase of members of the Executive Committee, was prepared to accept the wishes of the majority. He took the opportunity to point out, however, that the draft resolution proposed [and which was approved as resolution 2 (Cg-III)] illustrated what was in the view of his delegation, the unacceptable interpretation of Article 28 which might follow from resolution 3 (Cg-III),[90] which had just been approved. The amendment to Article 13(*c*), so as to increase the number of elected members of the Executive Committee, constituted a new obligation, however small, for Member States. Nevertheless, an implementation date had been specified in the draft resolution amending Article 13(*c*), thus indicating that the proposal was not being treated under article 28(*b*). He stated that

> "A principle followed when interpreting articles of a convention or a treaty is that the interpretation cannot make inoperative another article or articles of the same convention or treaty. If Congress by a majority of two thirds may decide on whether an amendment comes under Article 28(*b*) or 28(*c*), as the same two-thirds majority is required for the adoption of the amendment, Article 28(*b*) becomes inoperative. Therefore, the Irish delegation opposes the granting in general to Congress of the faculty of deciding whether an amendment comes under Article 28(*b*) or 28(*c*) and reserves the right of decision on this matter."

In the particular case, however, the Irish delegation was prepared to accept the inclusion of an implementation date in the draft resolution.

40. As noted in paragraph 38 above, the amendment was approved by receiving the affirmative vote of two thirds of the total number of Member States. Thus, in its practice, the Organization treated the amendment as one falling under Article 28(*c*). As regards the objections raised by the representation of Ireland, it is submitted that the objection raised in the openeing sentence of his statement quoted above would apply with even more force if Member States gathered in Congress were not to have the power to determine whether an amendment fell under paragraph (*b*) or (*c*) of Article 28, since then, for the reasons given in paragraphs 13 to 16 above, no amendment could effectively be adopted or approved. Indeed it may have been from the realisation that the question whether a proposed amendment is to be approved under paragraph (*b*) or (*c*) must be uniformly determined, that caused the Irish delegation to decide that it would not oppose the wishes of the majority in the instant case; if it had not followed this course, the Member State concerned would have been led to regard the particular amendment as not in force until two thirds of Member States had accepted it, in accordance with paragraph (*b*) (and then not binding on Ireland, unless Ireland was one of the accepting States), with the result that two Executive Committees would have been in existence, namely one with six and another with nine elected members. From the nature of the case, this situation might arise if it had been decided that the amendment fell under paragraph (*b*), but for the reasons already given, this possibility is distinct from the issue of whether an amendment is to be deemed to fall under either (*b*) or (*c*), on which only a single answer is permitted. As regards the argument presented by the delegate of Ireland on the substance of the amendment, whereby he contended that an increase in the number of elected members constituted a new obligation, this is an issue on which each delegation was entitled to express its opinion during the proceedings in Congress. In the absence of specific criteria, however, against which to measure particular amendments, it cannot be said that the views of individual Members, as to whether a particular amendment does or does not constitute a new obligation, can be given a value over and above that reached by Member States collectively. The argument presented by the Irish delegation that, since Congress

[90] Cited in footnote 82 above.

may decide by a two-thirds majority [91] "whether an amendment comes under Article 28(*b*) or 28(*c*)", and since "the same two-thirds majority is required for the adoption of the amendment", therefore "Article 28(*b*) becomes inoperative", is, it is submitted, an incomplete statement of the position and one which, to the extent to which it is correct, directed to the use, or possible use, which Congress might make of its powers, and not to the legal interpretation to be given to those powers. Thus the fact that Congress can decide to consider an amendment under paragraph (*c*) and in fact so approve the amendment, despite the fact that individual Member States regard the proposal as constituting a new obligation and therefore falling under paragraph (*b*), does not mean that Congress will always follow the course of adopting all amendments under paragraph (*c*), so as to render paragraph (*b*) inoperative; it does mean however that the liberty given to Member States under paragraph (*b*) to accept (or not to accept) amendments constituting new obligations does not extend to the prior question of whether a proposed amendment constitutes a new obligation or not. That question rests with Member States in Congress, to ensure that a uniform answer is achieved, binding on all Members.

41. *Proposed amendment to Article 10(a)(2) of the Convention.* The Committee on General and Legal Questions examined the text of Article 10(*a*)(2) of the Convention, which reserves for the decision of Members which are States any question dealing with membership of the Organization, and put forward a draft resolution whereby that text would have been amended to read: "Requests for Membership in the Organization". [92] When the vote was taken on the draft resolution during the seventh plenary meeting of the Third Congress, the proposal received the approval of two thirds of the Members which are States, present and voting, but did not receive the approval of two-thirds of the total number of such Members. [93] Although the resolution was therefore adopted, becoming resolution 1 (Cg-III), it was stated in the proceedings of the meeting that the amendment "would not however come into force until at least two-thirds of the Member States of the Organization had formally accepted or approved the amendment". [94]

42. Besides comments on the substance of the proposal, made by the delegates of South Africa and Spain, the United States representative declared that the United States, which had voted in favour of the amendment, intended to process it under Article 28(*b*); the vote of the United States was therefore subject to the appropriate action being taken by the Senate of the United States in accordance with the Constitution of that country.

43. At the fifteenth plenary meeting, the Third Congress again returned to the question of the proposed amendment of Article 10(*a*)(2), in connexion with the text proposed by the Committee on General and Legal Question [95] for insertion in the General Summary. Under that text it was proposed that the Secretary-General should transmit the text of the resolution to Members which are States and ask them whether they accepted

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[91] For the reasons given in paras 24 to 27 above, the conclusion is reached in this opinion that the determination as to whether an amendment involves a new obligation or not could be made by Congress, in a separate vote, by a two-thirds majority of Members which are States, present and voting.

[92] The text which it was sought to amend read simply "Membership of the Organization"; there was, in addition, a discrepancy between the English and the French versions, the latter reading "*Questions relatives aux Membres de l'Organisation*".

[93] The result of the vote was 49 votes in favour, none against and 9 abstentions; 52 votes were required at the time for a two-thirds approval by the total number of Member States.

[94] *Third Congress of the World Meteorological Organization, Proceedings*, WMO—No. 89, RC. 18, p. 78.

[95] See the report by the Chairman of the Commission on General and Legal Questions, Cg-III/172 (2.IV.1959).

the amendment under paragraph (*b*) or approved it under paragraph (*c*) of the then numbered Article 28. In commenting on this procedure, the representative of Spain enquired what would happen if certain Members wished to accept the amendment under paragraph (*b*) while others approved it under paragraph (*c*). In response to this question, the United States delegate

> "recalled that during the discussions within the Committee on General and Legal Questions his delegation had stressed the difference between the action of approving and that of accepting the text of an amendment. By 49 votes, that was to say, a two-thirds majority of the votes cast, Congress had approved the proposed amendment to Article 10(*a*) (2) of the Convention. As the Members assembled in a plenary meeting had not specifically stated whether the approval was given by virtue of Article 28(*b*) or Article 28(*c*), that was to say, in fact, whether their governments approved the amendment as involving obligations or not, the question was to know under what conditions the approved amendment could come into force.
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> The Committee on General and Legal Questions had thought that the best solution would be to agree that the amendment, the text of which had been approved by Congress, should come into force once the conditions set out in Article 28(*b*) had been complied with. Under those conditions, governments which considered that the amendment did not involve any obligations for them, would send a memorandum to that effect to the Government of the United States, depository of the Convention. The other governments, which considered that the amendment involved obligations, would have to submit the text to the competent body of their country—in the case of the United States, the Congress—for ratification, and then inform the Government of the United States, depository of the Convention.
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> Once 52 affirmative replies had been received in Washington, the conditions necessary for the entry into force of the Convention would be fulfilled and the Secretary-General would be informed immediately. When the question came up for study in the Executive Committee, the latter would no doubt wish, bearing in mind the difficulties encountered by Third Congress, to propose to Fourth Congress an amendment covering the whole of Article 28, designed to render it clearer than it was at that time." [96]

Thanking the delegate of the United States for his reply, the representative of Spain stated that the situation was still somewhat confused for him. In particular, he "wondered what the situation would be if certain Members stated that they accepted the amendment by virtue of Article 28(*b*) and others by virtue of Article 28(*c*)". [97]

44. At the next plenary meeting the Chairman of the Committee on General and Legal Questions outlined the procedure which it was proposed to adopt, having regard to the form in which Article 28 was drafted:

> ". . . if the 52 Members were to state that they accepted an amendment under Article 28(*c*), the amendment would come into force. It would be reasonable to assume that Members accepting an amendment under Article 28(*c*) would *a fortiori* accept it under Article 28(*b*). If that majority could not be obtained, acceptance would be restricted to Members having deposited an instrument of acceptance with the United States Government. At that moment, therefore, there would be, so to speak, two Conventions, the former instrument and the new amended one which would have been accepted by certain Members only. Such a solution was obviously not very satisfactory but, given the present drafting of the article, it was inevitable; a similar situation was to be found in other specialized agencies." [98]

45. The proposed text of the General Summary which was then adopted without opposition reads as follows:

> "Having approved the text of the amendment to Article 10(*a*) (2) given in resolution 1(Cg-III), Congress directed the Secretary-General to transmit to Members which are

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[96] *Third Congress of the World Meteorological Organization, Proceedings*, WMO—No. 89. RC. 18, pp. 149-150.

[97] *Ibid.*, p. 150.

[98] *Ibid.*, p. 151.

States the text of the said amendment asking them whether they accept this amendment under Article 28(*b*) or approve this amendment under Article 28(*c*) of the Convention. Resolution 1(Cg-III) shall no longer remain in force.

Congress instructed the Secretary-General to transfer to the depository government the original of any communication from a Member on the amendment.

Congress further considered that there was no conflict between this procedure and that undertaken in relation to the amendment of Article 13(*c*) of the Convention. Pending clarification as requested in resolution 3(Cg-III) neither action should be considered as creating a precedent." [99]

46. In accordance with this instruction, the WMO Secretary-General transmitted the text of the proposed amendment contained in resolution 1 (Cg-III) to Members which are States and asked them whether they accepted it under Article 28(*b*) or approved it under Article 28(*c*). Of the 78 Member States at the time of consultation, ten accepted the proposed amendment under paragraph (*b*), and 43 approved it under paragraph (*c*). [100] Since neither procedure was approved by two-thirds of the total number of Members which are States, the proposed amendment did not enter into force under the provisions of either paragraph (*b*) or paragraph (*c*).

(ii) *WMO Executive Committee Proceedings under resolution 3 (Cg-III)*

47. In pursuance of resolution 3 (Cg-III), [101] instructing the Executive Committee "to study the text of Article 28(*c*) and its application and to report to Fourth Congress", the Executive Committee established a Working Group, [102] which submitted a report to the thirteenth session of the Executive Committee in 1961. A wide measure of agreement was obtained at that session on the substance of the amendments proposed, and a provisional text was approved. [103] It was decided that a legal expert should be asked to examine the texts concerned. At the following session of the Executive Committee, held in 1962, the Committee re-examined the proposed amendments in the light of the comments made by the legal expert (a senior official of the International Labour Organisation). The Committee accepted the majority of the suggestions, which were then incorporated in the proposed text. The Committee noted that the Working Group recommended that, in the event of Congress deciding to amend the Convention, it might be necessary to adopt an "instrument for the amendment of the Convention." A minority of members of the Executive Committee held the view that the proposed instrument was not necessary; they also objected to the inclusion in the instrument of a provision according to which no reservation to the text of the amended Convention might be accepted. Having considered the amendments proposed and the opinions expressed, the Executive Committee directed the Secretary-General to submit to Fourth Congress the proposed drafts of the instrument of amendment, the amendment to the Convention and the procedure for admission of new members to the amended Convention, as formal proposals of the Executive Committee submitted in accordance with resolution 4 (Cg-III), together with relevant information, including in particular the minority views expressed. [104]

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[99] *Third Congress of the World Meteorological Organization, Abridged Report with resolutions*, WMO—No. 88. RC. 17, p. 22.

[100] Information supplied by the WMO Secretary-General.

[101] Cited in footnote 82 above.

[102] Resolution 1 (EC-XII), *Twelfth Session of the Executive Committee, 1960, Abridged Report with resolutions*, WMO—No. 99. RC. 19, p. 50.

[103] *Thirteenth Session of the Executive Committee, 1961, Abridged Report with resolutions*, WMO—No. 107. RC. 20, pp. 11-12.

[104] *Fourteenth Session of the Executive Committee, 1962, Abridged Report with resolutions*, WMO—No. 121. RC. 21, p. 15. The proposals concerned were submitted to Fourth Congress by the Secretary-General in document Cg-IV/3 (28.VI.1962).

(iii) *WMO Fourth Congress, 1963*

48. *General Discussion.* The WMO Fourth Congress accordingly had before it the text of an extensive series of amendments to the articles of the Convention, together with the amendments proposed by individual Member States. Following an introductory statement by the Chairman of the Working Group which had been set up by the Executive Committee, there was a general discussion on the question of whether or not the Convention needed to be amended and, if so, whether any amendments should extend beyond editorial changes so as to affect the structure and procedures of the Organization. [105] Different opinions were expressed on this issue and also on that of whether the Committee on General and Legal Questions should be asked to consider all the amendments proposed or only those put forward by Member States. It was eventually decided that the Committee on General and Legal Questions should examine all the proposed amendments to the Convention.

49. *Amendment of Article 13(c) of the Convention.* The Committee on General and Legal Questions first examined the proposals made to increase the number of Directors of Meteorological Services to be elected to the Executive Committee from nine (as had been agreed in resolution 2 (Cg-III) by Third Congress, when the number was increased from six) [106] to twelve, and regarding regional representation. The Committee submitted a draft resolution to Congress incorporating the changes proposed and designed to replace resolution 2 (Cg-III). This draft resolution, which became resolution 1 (Cg-IV), was adopted by the affirmative vote of 81 Members which are States, with 2 abstentions, and the amendment in question came into force on the date of its adoption. [107] The procedure observed was thus identical with that followed when an amendment was made to the same article by the Third Congress through the adoption of resolution 2 (Cg-III). [108] The delegate of Ireland made a statement in which he repeated the views which he had expressed at the Third Congress. [109] He also requested that the proposed text of the General Summary should be changed to include a new sub-paragraph which would have read as follows:

> "Congress considered whether these amendments to Article 13(*c*) could be adopted under the provisions of Article 28(*c*) of the Convention. The majority of the delegations present stated that they were prepared to adopt those amendments under Article 28(*c*). One delegation reaffirmed that its Government considered that every Member had the right to decide whether it wished to support an amendment under the conditions of sub-paragraphs (*b*) and (*c*) of Article 28 of the Convention." [110]

The representative of Ireland eventually agreed to withdraw the proposed addition to the General Summary, in the light of the suggestion that, since Congress would eventually have to discuss article 28, the position taken by various delegations could be indicated in the General Summary at that time.

50. *Other amendments.* After the consideration of the amendments proposed to Article 13(*c*), the Committee on General and Legal Questions discussed the remaining

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[105] *Fourth World Meteorological Congress, 1963, Proceedings*, WMO—No. 145. RC. 24, pp. 43-53.

[106] See para. 38 above.

[107] *Forth World Meteorological Congress, 1963, Proceedings*, WMO—No. 145. RC. 24, pp. 59-60.

[108] See para. 38 above.

[109] See para. 39 above.

[110] *Fourth World Meteorological Organization, 1963, Proceedings*, WMO—No. 145. RC. 24, p. 60.

amendments proposed, relating to the majority of articles of the Convention. [111] Separate amendments were recommended by the Committee to the following articles:

Article 2 (Purposes)
Proposed new Article 4 (Control) [112]
Article 5 (Officers of the Organization and Members of the Executive Committee)
Article 6 (Composition)
Article 7 (Functions)
Article 9 (Meetings)
Article 10 (Voting)
Article 11 (Quorum)
Article 12 (First meeting of the Congress) (to be deleted)
Article 14 (Functions)
Article 15 (Meetings)
Article 17 (Quorum)
Proposed new Article 18 (Voting by Correspondence)
Article 18 (Regional Associations) (to be renumbered Article 19, if the proposed new articles adopted.)
Article 23 (Finances)
Article 25 (Relations with the United Nations)
Article 26 (Relations with other Organizations)
Article 27 (Legal Status. Privileges and Immunities)
Article 29 (Interpretation and Disputes)

51. It is not necessary to consider the details of the discussion regarding each of these amendments. In the case of Article 28, relating to amendments, however, it should be noted that the Committee on General and Legal Questions was unable to agree either on the text of the amendments proposed to that article by the Executive Committee or on that of the amendments proposed individually by Madagascar, the USSR, the United Kingdom, and the United States. Each of these proposed amendments was eventually withdrawn, as was the instrument of amendment which had been prepared by the Executive Committee. The relevant portion of the report of the Chairman of the Committee on General and Legal Questions, which is of interest in the present connexion, is reproduced below:

> "The United States delegation stated that in view of the tremendous difficulties involved in amending this article and the widely diverging views regarding the solution to be found for the problem of avoiding the multiplicity of conventions, it did not insist on the discussion of the proposal contained in Cg-IV/Doc. 120.
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> "However, it considered that the provisions of Article 28(*b*) are impracticable and will have to be revised. In the view of the United States delegation, any amendment to the Convention must enter into force for all Members at the same time. Amendments should not, however, bind Members which are unwilling to agree to them. For this reason, the

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[111] See the report submitted by the Chairman of the Committee, Cg-IV/174 (23.IV.1963), setting out the detailed changes proposed and the views expressed by members of the Committee regarding them.

[112] As regards the numbering of the articles of the Convention, it should be noted that it was proposed during the Fourth Congress to introduce two new articles, numbered 4 and 18, and to delete the then existing Article 12. Congress eventually agreed to delete Article 12 but did not approve the amendments designed to introduce two new articles. Accordingly, the numbering used here is that of the Convention as it existed up to the Fourth Congress. (Following the decision to delete Article 12, however, subsequent articles were re-numbered, Article 28 (Amendments) becoming Article 27, for example.)

Convention ought either to omit the requirement that Members give one year's notice of withdrawal or provide additional withdrawal provisions in the amending article.

"The USSR delegation preferred for this article the text which it had presented as Cg-IV/GEN/WP 19 but said that if Article 28 as in the 1947 Convention was to be left as it stood, it would not insist on the adoption of the text proposed.

"The delegation of Madagascar also stated that in view of the difficulties which would result from the amendment of this article it was prepared to withdraw its proposal contained in Cg-IV/Doc. 15.

"The delegation of the United Kingdom also withdraw the proposed amendment contained in Cg-IV/Doc. 13 but drew attention to the fact that, sooner or later, this article would have to amended. As it stood the article had good features in as much as it provided a time-limit for the presentation of proposals of amendment so that Governments are assured of disposing of enough time for the study of such proposals. The possibility to introduce minor changes, provided for in paragraph (*c*), was also a good feature. The main difficulty consisted in the provisions of paragraph (*b*) which results in the simultaneous existence of several conventions.

"Several delegations stated that two extreme solutions had been presented—one which makes the multiplicy of conventions unavoidable and one which makes all adopted amendments binding for the whole membership and which requires detailed withdrawal provisions. There should be further study of this article so as to find out whether some of the solutions found by the authors of the constitutions of other international organizations might not be adapted to the case of the WMO.

"On behalf of the Executive Committee, Sir Graham Sutton also withdrew not only the proposed amendment to Article 28 but also the proposed instrument of amendment, since it had become evident that it would not be possible to reach a conclusion in this connexion at Fourth Congress. However, it would not be possible for the Executive Committee alone to make a study of this problem which was a complex legal question and should be handed over to a working group composed of specialists in international law.

"The Irish delegation pointed out that Third and Fourth Congress had both been able to amend the Convention under Article 28.

'This article was drafted with a view to protecting the interest of the minority. The minority however should not use and has not used Article 28 (*b*) to block the wishes of the majority—even when opposing the amendments to Article 13 introduced in Congresses III and IV the minority waived their rights under Article 28 (*b*) in deference to the wishes of the majority.'

"The Committee therefore had no amendments to propose to Congress for this article." [113]

52. Introducing the report of the Committee on General and Legal Questions to Congress, the Chairman declared, *inter alia*, that "A large majority in the Committee had felt that the amendments proposed would not involve new obligations for Members of the Organization and would therefore be adopted by the procedure provided for under Article 28(*c*). [114]

53. Following a statement by the representative of Ireland, in which he repeated the opinion which he had earlier expressed, namely that it was not advisable to amend the articles in question, and also declared that the authorities of his country would ratify the proposed changes, in accordance with Article 28(*b*), if they were approved by Congress, Congress proceeded to approve the draft amendments by roll call vote. At the tenth plenary meeting an affirmative vote of over two thirds of the total number of Member States was received with respect to the amendments proposed to the following articles: 2,

[113] Cg-IV/174, pp. 20-21.

[114] *Fourth World Meteorological Organization, 1963, Proceedings*, WMO—No. 145. RC. 24, p. 84.

5, 6, 7, 10, [115] 11, 12, (i.e. deletion of Article 12), 14, 15, 17, 23, 25, 26 and 27. Two amendments which were voted on during that meeting, regarding Articles 9 and 29, failed to receive the requisite two-thirds majority; the results were, in the former case, 68 votes in favour, 7 against and 12 abstentions, and, in the latter case, 39 votes in favour, 13 against and 37 abstentions. At the fourteenth plenary meeting, Congress voted on the proposals to introduce two new articles, numbered 4 and 18, and to amend the existing Article 18. The results of the vote were as follow:

Proposed new article 4 (Control): 62 in favour, none against and 11 abstentions

Proposed new article 18 (Voting by Correspondence): 56 in favour none against and 17 abstentions.

Article 18 (Regional Associations): 24 in favour, 21 against and 28 abstentions.

Since in none of these three cases was the necessary two-thirds majority of the total number of Members which are States obtained, the amendments proposed did not come into effect.

54. At the sixteenth plenary meeting, Congress adopted resolution 3 (Cg-IV), on the recommendation of the Committee on General and Legal Questions, establishing a Working Group on the Convention. At the same meeting the United Kingdom delegate proposed that, in the case of the three amendments which had received the affirmative vote of more than two-thirds of the State Members present and voting but less than two-thirds of the total number of such Members (namely, the amendments to introduce two new articles, numbered 4 and 18, and to amend the existing Article 9), the same procedure should be followed as had been adopted by Third Congress with respect to the amendment then proposed to Article 10(*a*)(2). [116] This idea was strongly opposed by the delegate of Ireland who suggested, *inter alia*, that it would have been more in accordance with the Convention if all the amendments actually adopted had been dealt with under Article 28(*b*), unless unanimity had been secured to treat them under Article 28(*c*) that would, in addition, have respected the views of the minority. During the ensuing discussion, a number of comments were made. The representative of Romania pointed out that, if the United Kingdom proposal were to be followed, it would have to be decided in advance whether the amendments concerned were those which involved new obligations or not, since, unless it were decided that the amendments involved new obligations, they would come under Article 28(*c*). It was finally decided that the Working Group which had been established should be asked to study the procedure for acceptance of these three amendments, without however, re-examining the text of the amendments themselves. [117]

55. Congress adopted without discussion resolution 2 (Cg-IV), approving the amendments to the Convention which had been separately voted on and which had received the

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[115] In the case of the amendment to Article 10, the change proposed at the previous Congress and which formed the subject of resolution 1 (Cg-III), whereby part (*a*)(2) of that Article would have read "Requests for Membership in the Organization" (see paragraphs 41-46 above), was repeated with a slight editorial change ("Requests for Membership of the Organization"). Whereas, however, at the Third Congress the proposal received the approval of less than two-thirds of the total number of Member States, and 10 States subsequently declared that they accepted it under paragraph (*b*) and 43 approved it under paragraph (*c*), at the Fourth Congress it was approved by 88 Members, with no contrary votes and no abstentions.

[116] See paras. 41-46 above.

[117] The Working Group on the Convention unanimously concluded that, in the particular case of these amendments, "the texts must be considered as not having obtained the necessary majority at the Fourth Congress and consequently as not having been adopted by it. If a State, Member of the Organization, considered that these texts should be studied by Congress again with a view to their adoption, it could submit them as proposed amendments in accordance with Article 27(*a*) of the Convention". WG/CONV/Conference room paper 3 (21.XII.1964), p. 2. See also the quotation from the report of the Working Group contained in para. 8 above.

approval of more than two-thirds of the total number of Members which are States. In view of the deletion of Article 12, all subsequent articles were renumbered, the former Article 28 (Amendments) becoming Article 27. In resolution 2 (Cg-IV) it was specified that the amendments in question came into force on 27 April 1963, the date of adoption of the resolution. All these amendments were therefore characterized by Congress, on the basis of the collective determination made by Members which are States, as not involving new obligations and therefore eligible to be approved in accordance with Article 27(*c*). The process of characterisation was not made the subject of a separate vote, however, but was fused with the substantive decision taken in Congress, following the discussions in the Committee on General and Legal Questions where a "large majority. . . had felt that the amendments proposed would not involve new obligations. . . and could therefore be adopted by the procedure provided for under Article 28(*c*)". [118]

56. The representatives of three Members, Ireland, Mexico and Portugal, expressed reservations on behalf of their respective Governments as regards the procedure followed. The delegates of Ireland and Portugal reserved in particular the right of their Governments to decide whether an amendment came under paragraph (*b*) or (*c*) of the article relating to amendments. The representative of Mexico declared that the amendments would have to be approved by the Senate and be ratified by the Executive Authority of his country.

(iv) *Summary of WMO practice with respect to amendments*

57. All amendments approved by WMO have been approved by Congress in accordance with the procedure specified in paragraph (*c*) of Article 27. On one occasion at the Third Congress the decision was taken to ask Members outside Congress whether a proposed amendment which had received a two-thirds majority vote, but not the approval of two-thirds of the total number of Members which are States, was accepted by them under paragraph (*b*) or approved under paragraph (*c*). It was expressly stated in the General Summary that this action was not intended to constitute a precedent; in the particular case, since two-thirds of the total number of Member States did not accept or approve the proposal under either paragraph, it did not come into force.

58. In all instances in which an amendment was actually adopted, this followed a collective determination, in practice identified with the vote taken on the substance of the proposal, that the amendment did not involve a new obligation for Members. Even the amendment to Article 10(*a*)(2) which, both at the Third Congress and in subsequent correspondence, failed to receive a two-thirds majority of the total number of Member States, was unanimously approved at the Fourth Congress under Article 27(*c*).

59. Besides objections raised as to the merits of particular amendments, certain Members have questioned the procedure followed in adopting amendments, in especial the determination by Congress that a given amendment did or did not contain a new obligation for Members, so as to require to be adopted either under paragraph (*b*) or paragraph (*c*). In essence the argument presented was, first, that the right given to individual Members under paragraph (*b*) to decide whether or not to accept new obligations, carried with it, *a fortiori*, the right to determine whether or not a given amendment constituted a new obligation. The arguments against this reasoning and in favour of a collective determination of the prior issue of whether or not a given amendment constitutes a new obligation, have been given in section V above. It may be added here that, in the actual practice of WMO, the characterisation of an amendment as involving a new obligation or otherwise has in fact been made collectively, through Congress, as, it is submitted, was

[118] Statement of the Chairman of the Committee, quoted in para. 52 above.

inevitably to be the case if any amendments were to be effectively adopted. Secondly, those Members objecting to the determination of this question by Congress have pointed out that the difference in the results achieved, according to whether an amendment was treated under paragraph (*b*) (so as to be binding only on those Members which accepted it) or under (*c*) (so as to be binding on all), was intended to protect the interests of the minority; accordingly, the majority should not use the possibility available to them, to adopt proposals under paragraph (*c*), which were properly to be treated under paragraph (*b*). These arguments, directed to the possible use to which the powers of the requisite majority might be put, do not necessarily lead, however, to the conclusion that the powers of Congress in this respect are limited by the right of individual determination by each Member State, as to whether a given amendment does or does not impose a new obligation. Furthermore, there remains the possibility that, in the event of a serious dispute arising regarding the interpretation or application of the Convention, the question at issue may be submitted to arbitration under Article 28 and, under Article 29, for a Member to withdraw from the Organization. Thus, in the last resort, recourse may be had by individual States to several means if they consider that the use made by the majority of States Members of their powers is improper or unacceptable.

Section VII. Legislative history of Article 27 of the WMO Convention

60. The draft articles on the law of treaties prepared by the International Law Commission provide that, in addition to the general rule of interpretation contained in its draft article 27 [119] (the application of which was considered in section V of the present opinion), and the practice followed in applying the treaty (which was considered in section VI above), regard may be had to supplementary means of interpretation. Draft article 28, entitled "Supplementary means of interpretation", provides as follows:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 27, or to determine the meaning when the interpretation according to article 27:
>
> "(*a*) Leaves the meaning ambiguous or obscure; or
>
> "(*b*) Leads to a result which is manifestly absurd or unreasonable".

In order to confirm the meaning previously arrived at on the basis of article 27 of the International Law Commission's draft, it is therefore proposed to examine the history of the preparation and adoption of the present Article 27 of the WMO Convention.

61. The WMO Convention was drawn up by a Conference of Directors of the International Meteorological Organization which met at Washington between 22 September and 11 October 1947. [120] Proposals for a new convention had been considered by the International Meteorological Organization on previous occasions, in particular following a meeting held in Paris in 1946. The principal drafts before the Washington Conference, however, were those submitted by four Members individually: Canada, France, the United Kingdom and the United States.

62. Under the relevant provision of the French proposal, amendments were to be adopted, by a two-thirds majority, at a conference of plenipotentiaries of Member States

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[119] See footnote 69 above.

[120] See Conference of Directors, Washington, 22 September-11 October 1947, Final Report, Organisation Météorologique Internationale, Publication No. 71 (subsequently referred to as "Final Report").

and enter into force upon ratification by two-thirds of the Members. [121] The Canadian draft [122] eliminated the necessity of convening a conference of plenipotentiaries by giving Congress competence in respect of amendments; amendments were to enter into force for all Members provided they were adopted by a two-thirds vote and accepted by the same majority of Members "in accordance with their respective processes". While retaining the notion of the adoption of amendments through Congress, the United Kingdom proposal introduced a distinction [123] between amendments involving "new obligations" for Members and other amendments; only the latter were to be binding on all Members following acceptance by thirty Members. The distinction between amendments involving new obligations and others was also contained in the United States draft [124], together with the principle that only amendments in the second category were to take effect for all Members when adopted by a two-thirds majority. In a commentary the United States declared that this proposal afforded greater ease in amending the Constitution than the corresponding provision in the draft prepared at the Paris meeting in 1946 and was substantially the same as the amendment provision in the Constitution of the Food and Agriculture Organization. [125]

63. The first draft of the WMO Convention prepared during the 1947 Conference contained an article on amendments closely similar to the article proposed by the United States, with the addition, at the end of the second paragraph, of the latter part of the second sentence of the United Kingdom proposal, relating to the position in respect of Members other than States. Article 28 of the third draft read as follows:

> "(*a*) The text of the proposed amendments to the present Convention shall be communicated by the Secretary-General to Members of the Organization at least six months in advance of their consideration by the Congress.

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[121] Article 34: "Les amendements à la présente Convention entreront en vigueur pour tous les membres de l'OMM quand ils auront été adoptés à la majorité des deux tiers des membres de l'OMM, par la Conférence des plénipotentiaires et ratifiés, conformément à leurs règles constitutionnelles respectives par les deux tiers des membres de l'OMM. Final Report, p. 680.

[122] Article 57: "Texts of proposed amendments to this Convention shall be communicated by the President to Members at least six months in advance of their consideration by Congress. Amendments shall come into force for all members when adopted by two-thirds vote of the Congress and accepted by two-thirds of the Members in accordance with their respective constitutional processes." Final Report, p. 647.

[123] Article 41: "Congress may by resolution adopted by two-thirds of the votes cast approve amendments of the present Convention. Any amendment which involves new obligations for Members or Associate Members shall come into force in respect of the Members or Associate Members accepting it upon acceptance by thirty Members, and thereafter in respect of each Member or Associate Member upon acceptance by it, and in respect of each Associate Member not responsible for its own international relations upon the making of a declaration by the Member responsible for its international relations that the acceptance of the amendments includes that Associate Member. Any other amendment shall come into force for all Members and Associate Members upon acceptance by thirty Members. Acceptance for the purpose of this article shall be made by instrument in writing deposited with the Director-General of the Organization". Final Report, pp. 656-57.

[124] Article 11: "1. The text of proposed amendments to this Constitution shall be communicated by the Executive Director to Member States at least six months in advance of their consideration by the Congress. 2. Amendments to this Constitution involving new obligations for Member States shall require approval of the Congress by a two-thirds majority vote of the Members present and voting and shall take effect on acceptance by two-thirds of the Member States for each Member State accepting the amendment and thereafter for each remaining Member State on acceptance by it. 3. Other amendments shall take effect on adoption by the Congress by a vote concurred in by a two-thirds majority of all the Members of the Congress". Final Report, p. 669.

[125] Final Report, p. 664.

(*b*) Amendments to the present Convention involving new obligations for Members of the Organization shall require approval of the Congress by a two-thirds majority vote of the Members which are States present and voting and shall take effect on acceptance by two-thirds of the Members which are States for each such Member accepting the amendment and thereafter for each remaining such Member on acceptance by it. Such amendments shall come into effect for any Member not responsible for its own international relations upon the acceptance on behalf of such a Member by the Member responsible for the conduct of its international relations.

(*c*) Other amendments shall take effect on adoption by the Congress by a vote concurred in by a two-thirds majority of all the Members which are States of the Congress." [126]

64. This proposal was considered at the twenty-sixth meeting of the Conference. The relevant portion of the minutes of the meeting read:

"*The President* next read Article 28.

"*Mr. Rivet* proposed the deletion of the words: 'Members which are States', and the addition to paragraphs (*b*) and (*c*) of the words: 'Members specified in Article 3, paragraphs (*a*), (*b*) and (*c*)'. He thought that if these changes were made, there would be no need to define 'sovereign State'.

"These changes were *approved* by the *Conference*.

"*Mr. Ferreira* thought that the provision in paragraph (*b*) of Article 28 would cause two sets of provisions to be in force, if some members accepted certain amendments and others did not.

"*Mr. Foley* advised that the provision was a common feature of international Conventions, because a Member State cannot be bound to an amendment of a Convention until it indicated that it was satisfied with the amendment.

"*Mr. Ferreira* thought, then, that it would be preferable not to have an amendment come into force until all Member States had accepted it.

"However, the *President* thought it better to accept the risk of two parts of a Convention in force, rather than to insist on unanimous acceptance each time.

"The *Conference* agreed with the President's view." [127]

65. Following editorial changes approved by the Conference without discussion at the twenty-ninth meeting, [128] the article was adopted in its present form, becoming Article 28 of the Convention (and subsequently Article 27, following the amendments approved by Fourth Congress).

66. It is submitted that the conclusions reached in the sections V and VI of this opinion are confirmed by the legislative history of the provision. In particular that history substantiates the view that it was intended that all amendments should be adopted through Congress, the reference to adoption by Congress in paragraph (*c*) having been dropped for purely editorial reasons. As regards the voting provisions, the third draft (see paragraph 63 above) shows that, in the case of amendments falling under paragraph (*b*), a two-thirds majority vote of Members which are States present and voting was envisaged and, in the case of amendments falling under paragraph (*c*), a two-thirds majority of all Members which are States. The changes made in the third draft were treated as editorial in nature, and not as amendments of substance.

67. The written records show no discussion of the question whether Congress was intended to decide whether or not an amendment involves a new obligation for Members.

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[126] Final Report, pp. 728-729. For the first draft see *ibid.*, p. 704.

[127] Final Report, p. 575. Mr. Foley, whose remarks are quoted above, was the treaty adviser to be Conference.

[128] Final Report, p. 605.

The opinion expressed by Mr. Foley, the treaty adviser of the Conference, at the twenty-sixth meeting (see paragraph 64 above) was in reply to a remark made concerning the application of paragraph (*b*) of the future Article 28; his answer cannot, having regard to the wording of paragraph (*c*), have been intended to be of general application. In the absence of any specific debate during the legislative history, the fundamental question of the power of Congress with respect to this issue thus remains to be determined primarily by the application of the principles of interpretation considered in sections V and VI of the present opinion. The conclusions reached in those sections regarding that question are not contradicted, moreover, by the legislative history of the provision.

Section VIII. Practice of FAO and UNESCO with respect to amendments

68. Since the history of the drafting of Article 27 shows that, when that provision was adopted by the Washington Conference in 1947, a draft was adopted (with some minor changes) based on Article XX of the FAO Constitution, it is proposed to examine the practice FAO has followed when adopting amendments to its Constitution, and, similarly, the practice observed by UNESCO in applying the corresponding provision of its Constitution. It may be recalled that reference was also made to the practice of these two organizations in the document regarding amendments submitted by the Secretary-General of WMO to the Third Congress (Cg-III/11, appendix) (see footnote 16 above). The following account of the relevant practice of FAO and UNESCO is based on information supplied by the Secretariats of those organizations.

(i) *Practice of FAO*

69. Article XX of the FAO Constitution [129] provides that the Constitution may be amended by a two-thirds majority of the votes cast at the FAO Conference, provided this majority is more than one half of the Member Nations of the Organization. An amendment not involving a new obligation for Members enters into force forthwith, unless the resolution by which it is adopted provides otherwise. Amendments involving new obligations on the other hand, take effect only when accepted by two-thirds of the Member Nations, and then only in respect of each Member Nation or Associate Member so accepting.

70. A number of amendments were adopted by the FAO Conference at its tenth, eleventh and twelfth sessions, held in 1959, 1961 and 1963. All these amendments were

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[129] Article XX of FAO Constitution (Amendment of Constitution):

"1. The Conference may amend this Constitution by a two-thirds majority of the votes cast provided that such majority is more than one half of the Member Nations of the Organization.

2. An amendment not involving new obligations for Member Nations or Associate Members shall take effect forthwith, unless the resolution by which it is adopted provides otherwise. Amendments involving new obligations shall take effect for each Member Nation and Associate Member accepting the amendment on acceptance by two-thirds of the Member Nations of the Organization and thereafter for each remaining Member Nation or Associate Member on acceptance by it. As regards an Associate Member, the acceptance of amendments involving new obligations shall be given on its behalf by the Member Nation or authority having responsibility for the international relations of the Associate Member.

3. Proposals for the amendment of the Constitution may be made either by the Council or by a Member Nation in a communication addressed to the Director-General. The Director-General shall immediately inform all Member Nations and Associate Members of all proposals for amendments.

4. No proposal for the amendment of the Constitution shall be included in the agenda of any session of the Conference unless notice thereof has been dispatched by the Director-General to Member Nations and Associate Members at least 120 days before the opening of the session."

adopted in accordance with the procedure laid down in Article XX, paragraph 1, of the FAO Constitution and since none of these amendments were considered as involving "new obligations" they took effect immediately upon adoption, in accordance with the first sentence of Article XX, paragraph 2, of the FAO Constitution. Although no formal determination was made by the Conference regarding the "classification" of these amendments, from the fact that the question whether any of these amendments were to be classified as involving new obligations was not raised during the deliberations of the Conference—nor after their adoption—the FAO Conference apparently considered that these amendments did not entail any new obligations for Members. Furthermore it was the Conference which in each case decided that these amendments were to be adopted under the procedure laid down in Article XX, paragraph 1, of the FAO Constitution.

(ii) *Practice of UNESCO*

71. Article XIII of the UNESCO Constitution reads as follows:

> "1. Proposals for amendments to this Constitution shall become effective upon receiving the approval of the General Conference by a two-thirds majority; provided, however, that those amendments which involve fundamental alteration in the aims of the Organization, or new obligations for the Member States, shall require subsequent acceptance on the part of two-thirds of the Member States before they come into force. The draft texts of proposed amendments shall be communicated by the Director-General to the Member States at least six months in advance of their consideration by the General Conference.
>
> 2. The General Conference shall have power to adopt by a two-thirds majority rules of procedure for carrying out the provisions of this Article".

72. Both of the two draft proposals for a constitution which were considered by the Conference for the establishment of the United Nations Educational, Scientific and Cultural Organization, held in London in November 1945, provided for the adoption of amendments by the UNESCO General Conference by a two-thirds majority followed by ratification by two-thirds of the Member States. The Second Commission of the Conference, which examined the particular proposals in question, recognized

> "that, while it was necessary, in creating this new structure, to provide for ratification by States, the method of having all amendments to the Constitution submitted for ratification by individual members was a difficult and dilatory one and it was hoped that some progress might be made in future toward modifying it. Meanwhile it would be desirable to make a distinction between amendments of substance which would require ratification and adjustments of form which could be adopted by a two-thirds majority of the Conference... It was proposed that the text should specify which were the articles for which amendments would require ratification and which were those which would not, but it was agreed that this point could only be decided by the General Conference". [130]

At the following meeting, the Second Commission again

> "agreed that the Conference should decide whether an amendment involved a fundamental alteration or new obligations". [131]

At the ninth plenary meeting, on 15 November 1945, the Chairman of the Second Commission further stated that

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[130] Ninth Meeting, Second Commission, 13 November 1945. *Conference for the Establishment of the United Nations Educational, Scientific and Cultural Organization, Preparatory Commission UNESCO*, London 1945, p. 113.

[131] *Ibid.*, Tenth Meeting, Second Commission, 13 November 1945.

"The question as to where alterations are fundamental and when no obligations are being incurred is one on which the General Conference must take decisions under the rules of Procedure." [132]

73. Amendments to the UNESCO Constitution have been adopted by the General Conference at all its sessions except the first, eleventh and thirteenth sessions. In no case was it considered that the amendment under consideration required subsequent acceptance.

74. In accordance with Article XIII, paragraph 2, of the Constitution, the General Conference adopted, at its sixth session, a new section XIX of its rules of procedure entitled "Procedure for the amendment of the Constitution." This section, as subsequently amended, reads as follows:

"*Rule 103—Draft Amendments*

The General Conference shall not adopt a draft amendment to the Constitution unless the draft has been communicated to Member States and Associate Members at least six months in advance.

Rule 104—Proposals for substantive changes in draft amendments

The General Conference shall not introduce substantive changes in draft amendments under the terms of the preceding rule unless the proposed changes have been communicated to Member States and Associate Members at least three months before the opening of the session.

Rule 105—Amendments of form

The General Conference may, however, without prior communication to Member States and Associate Members, adopt any changes in the drafts and proposals referred to in Rules 103 and 104 which are purely matters of drafting, and any changes designed to embody, in a single text, substantive proposals communicated to Member States and Associate Members in accordance with the provision of Rules 103 and 104.

Rule 106—Interpretation of amendments

In case of doubt, a proposed amendment shall be deemed to be an amendment of substance unless on a vote being taken there is a two-thirds majority of the members present and voting in favour of interpreting the amendment as an amendment of form falling under the provision of Rule 105."

75. It may be noted that the amendment to the Constitution adopted by the General Conference at its fourth session contains the following *considerandum:*

"Considering that this amendment does not involve any fundamental alterations in the aims of the Organization or new obligations for the Member States".

Similar wording is to be found in the amendments adopted at the fifth and sixth sessions

76. The report of the Procedure Committee of the fourth session [133] states that the Committee noted that the amendment under consideration "did not involve any fundamental alterations in the aims of the Organization or any new obligations for the Member States and that there was no necessity for this amendment to be accepted on the part of two-thirds of the Member States before coming into force". The reports of the Procedure Committee to the fifth session [134] and to the sixth session [135] contain similar statements. The first report of the Legal Committee to the tenth session of the General Conference also states that the Committee considered that the amendment under consideration "did not involve fundamental alterations in the aims of the Organization or new obligations for the Member States and would therefore become effective upon receiving the approval of the General

[132] *Ibid.*, p. 77.

[133] 4C/Resolutions, p. 83.

[134] 5C/Resolutions, p. 129.

[135] 6C/Resolutions, p. 84.

Conference by a two-thirds majority". [136] This statement was noted by the Administrative Commission which recommended the adoption of the amendment by the General Conference. [137]

77. In summary therefore, the General Conference of UNESCO was recognized at the London Conference, as it has been in subsequent practice, as competent to decide whether a proposed amendment involves new obligations for its Members. A two-thirds majority is required for the adoption of amendments to the Constitution and for the adoption of rules of procedure governing such amendments. All amendments adopted have been treated as not involving fundamental alterations in the aims of the Organization or new obligations for Members, and approval through Congress. If any doubt should arise as to whether or not a proposed amendment is one of substance, rule 106 of the rules of procedure requires that the amendment shall be deemed to be one of substance unless a two-thirds majority of the Members present and voting are in favour of interpreting the amendment as an amendment of form. It may be noted that under Article IV, paragraph 8(*a*) of the Constitution, decisions in the General Conference are made by simple majority, except in cases in which a two-thirds majority is required by the provisions of the Constitution or by the rules of procedure of the General Conference.

(iii) *Summary of FAO and UNESCO practice*

78. The description given above of the practice of FAO and UNESCO with respect to amendments shows no major divergence from the practice observed by WMO. The constitution of each of these organizations divides amendments between those involving new obligations and those which do not; in each of these organizations amendments are adopted by the main plenary body (subject to subsequent ratification in the case of amendments involving new obligations). In each instance so far, as in the case of WMO, the amendments proposed have been deemed not to involve new obligations for Members; the decision on this point has been taken by the plenary body when voting on the amendment itself. Neither FAO nor UNESCO have had recourse in practice to a separate vote on the question whether a particular amendment involved a new obligation. UNESCO has, however, in rule 106 of the rules of procedure of its General Conference, a special means of determining this issue, if any doubt should arise. In no instance, either in FAO or UNESCO, has any objection been raised to the determination by the plenary body of the question whether a given amendment involves a new obligation (and is therefore to be adopted in accordance with one procedure), or does not, (and therefore falls to be adopted in accordance with the alternative procedure).

Section IX. Application to the constituent instruments of international organizations of the principles of the draft articles on the Law of Treaties prepared by the International Law Commission

79. In sections V, VI and VII of the present opinion, Article 27 of the WMO Convention is examined in the light of the principles of interpretation formulated by the International Law Commission in its draft articles on the law of treaties. It should be noted, however, that in its draft article 4 the International Law Commission recognized the special status of international organizations within the law of treaties by formulating a general reservation, subjecting the constituent instruments of such organizations to

[136] 10C/ADM/2.

[137] 10C/Resolutions, pp. 127-128.

"any relevant rules of the organization". [138] The commentary given by the Commission to this provision makes it clear, however, that this reservation is directed to the preservation of the particular rules and practices of the organizations in question, and not to the exclusion of the principles generally applicable, such as those relating to interpretation. In the opening paragraph of its commentary on draft article 4, the International Law Commission stated:

> "The draft articles, as provisionally adopted at the fourteenth, fifteenth and sixteenth sessions, contained a number of specific reservations with regard to the application of the established rules of an international organization. In addition, in what was then Part II of the draft articles and which dealt with the invalidity and termination of treaties, the Commission had inserted an article (article 48 of that draft) making a broad reservation in the same sense with regard to all the articles on termination of treaties. On beginning its re-examination of the draft articles at its seventeenth session, the Commission concluded that the article in question should be transferred to its present place in the introduction and should be reformulated as a general reservation covering the draft articles as a whole. It considered that this would enable it to simplify the drafting of the articles containings specific reservations. It also considered that such a general reservation was desirable in case the possible impact of rules of international organizations in any particular context of the law of treaties should have been inadvertently overlooked". [139]

80. In addition, in its commentary on the article dealing with the rule regarding the amendment of treaties (draft article 35), the International Law Commission again stressed the special character of international organizations:

> "The development of international organizations and the tremendous increase in multilateral treaty-making has made a considerable impact on the process of amending treaties. In the first place, the amendment of many multilateral treaties is now a matter which concerns an international organization. This is clearly the case where the treaty is the constituent instrument of an organization. . . In all these cases the drawing up of an amending instrument is caught up in the machinery of the organization. . . As a result, the right of each party to be consulted with regard to the amendment or revision of the treaty is largely safeguarded." [140]

81. Under the terms of Article 27 of the WMO Convention the right of Members to be consulted is adequately safeguarded; in accordance with paragraph (*a*) of that provision, all proposed amendments must be communicated to Members at least six months in advance of their consideration by Congress. At the sessions of Congress itself, each Member is at liberty to express its views regarding the change proposed. The entitlement of Members in this respect does not, however, deprive Congress (in which all Members are represented) of its competence to adopt amendments or to take other decisions in connexion with the implementation of article 27 of the WMO Convention.

Section X. Conclusions

82. The conclusions reached in this opinion are summarized in paragraph 83 below. These conclusions are based on an analysis of the text of the WMO Convention, the actual practice followed by WMO, and the legislative history of Article 27 of the WMO Convention. The practice followed by FAO and UNESCO, which have a similar provision in their respective constitutions, also substantiates these conclusions. In both FAO and UNESCO

[138] The article reads in full as follows: "The application of the present articles to treaties which are constituent instruments of an international organization or which are adopted within an international organization shall be subject to any relevant rules of the organization".

[139] See *Official Records of the General Assembly, Twenty-first Session, Supplement No. 9* (A/6309/Rev.1), p. 24.

[140] *Ibid.*, p. 62.

the decision as to whether or not a particular amendment involves a new obligation for Members is made by the plenary body, following consideration of the proposal. In FAO and UNESCO, as in WMO, the procedure followed with regard to the substance, and the method by which the amendment was accordingly to be adopted, has been identified with the determination of the category into which the amendment was to be deemed to fall. In the case of UNESCO, however, a special rule has been laid down, regulating the procedure to be followed in the event that there is any doubt as to whether a particular amendment involves an amendment of substance; this procedure has not, in practice, been used.

83. The conclusions reached on the issues examined in this opinion are as follows:

(i) *Who determines whether or not a proposed amendment involves a new obligation for Members?*

Congress, the plenary body in which all Members are represented, is the appropriate organ to determine, in accordance with the procedures of the Organization, whether or not a proposed amendment involves a new obligation for Members. Determination of this question is not left to the discretion of individual Member States, except as regards their participation in proceedings in Congress, including their participation, in accordance with the rules of the Organization, in any votes or decisions taken.

(ii) *According to what procedure is this determination made?*

The existing provisions of the Convention and of the General Regulations of WMO do not provide a special procedure for the determination of the specific question of whether or not a proposed amendment involves a new obligation for Members. Accordingly, the procedure for determining this question is either the same as that followed in order to adopt the amendment itself [under either paragraph (*b*) or paragraph (*c*) of Article 27], or recourse must be had to the relevant general provisions.

Procedure under Article 27(b)

In the absence of a specific vote on the issue, the determination by Congress that an amendment involves a new obligation for Members will coincide with its observance of the procedure laid down in Article 27(*b*). Under that provision an amendment must first be approved by Congress, by a two-thirds majority of those Members which are States, present and voting, and subsequently accepted by two-thirds of the total number of such Members. The amendment then comes into effect for each such Member so accepting.

Procedure under Article 27(c)

In the absence of a specific vote on the issue, the determination by Congress that an amendment does not involve a new obligation for Members will coincide with its observance of the procedure laid down in Article 27(*c*). Under that provision an amendment must be approved by two-thirds of the total number of Members which are States, before coming into effect, either immediately or on the date specified, for all Members of the Organization.

Procedure if a separate vote is taken on the question whether or nota proposed amendment involves a new obligation for Members

If the question whether or not a given amendment involves a new obligation for Members were itself to be put to the vote, under the existing provisions the decision might be taken by a two thirds majority of the Members which are States, present and voting.

(iii) *According to what criteria is this determination made?*

In the absence of specific criteria in the text of the Convention or elsewhere, the criteria to be observed in making the determination whether or not a proposed amendment involves a new obligation for Members are those chosen by Members in their individual capacities and advanced by them in the proceedings of the Organization.

10 April 1967

B. Legal opinions of the secretariat of inter-governmental organizations related to the United Nations

International Labour Office

The following memoranda concerning the interpretation of certain international Labour Conventions and one international Labour Recommendation were prepared by the International Labour Office at the request of the Governments concerned: [141]

(a) *Memorandum on the Minimum Age (Underground Work) Convention, 1965 (No. 123)*, prepared at the request of the Government of Czechoslovakia, 25 May 1967. Document G.B.172/14/7, 172nd session of the Governing Body, Geneva, May-June 1968.

(b) *Memorandum on the Medical Examination of Young Persons (Underground Work) Convention, 1965 (No. 124)*, prepared at the request of the Government of Czechoslovakia, 25 May 1967. Document G.B.172/14/7, 172nd session of the Governing Body, Geneva, May-June, 1968.

(c) *Memorandum on the Conditions of Employment of Young Persons (Underground Work) Recommendation, 1965 (No. 125[5])*, prepared at the request of the Government of Czechoslovakia, 25 May 1967. Document G.B.172/14/7, 172nd session of the Governing Body, Geneva, May-June 1968.

(d) *Memorandum on the Minimum Age (Underground Work) Convention, 1965 (No. 123)*, prepared for the Government of the United Kingdom at the request of the Commissioner of Labour of Hong Kong, 7 July 1967. Document G.B.172/14/7, 172nd session of the Governing Body, Geneva, May-June 1968.

(e) *Memorandum on the Hygiene (Commerce and Offices) Convention 1964 (No. 120)*, prepared at the request of the Government of Guatemala, 14 December 1967. Document G.B.172/14/7, 172nd session of the Governing Body, Geneva, May-June 1968.

[141] These memoranda are published in the *Official Bulletin*, vol. LI, No. 4, October 1968.
