



REGIONAL COURSES IN INTERNATIONAL LAW

Addis Ababa, Ethiopia
7 April - 2 May 2014



STUDY MATERIALS LAW OF TREATIES & STATE RESPONSIBILITY

Codification Division of the United Nations Office of Legal Affairs

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MR. SANTIAGO VILLALPANDO

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LAW OF TREATIES

Legal Instruments and Documents

1. Vienna Convention on the Law of Treaties, 1969
For text, see *The Work of the International Law Commission*, 8th ed., vol. II
2. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986
For text, see *The Work of the International Law Commission*, 8th ed., vol. II
3. Guide to Practice on Reservations to Treaties, 2011
For text, see *The Work of the International Law Commission*, 8th ed., vol. II
4. United Nations General Assembly resolution 2166 (XXI) of 5 December 1966 12
(International conference of plenipotentiaries on the law of treaties)
5. *United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, Official Records: Summary records of the first plenary meeting*, 26 March 1968, paras. 15-49 (“Question of participation in the Conference”) 16
6. *United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April-22 May 1969, Official Records: Summary records of the thirty-fourth plenary meeting*, paras. 26-85; *Summary records of the thirty-fifth plenary meeting*, paras. 1-50; *Summary records of the thirty-sixth plenary meeting*, paras. 1-3 and 12-75. 24
7. *Treaty Handbook. Prepared by the Treaty Section of the Office of Legal Affairs*, United Nations, 2013 50
8. *Final Clauses of Multilateral Treaties. Handbook. Prepared by the Treaty Section of the Office of Legal Affairs*, United Nations, 2003 92

STATE RESPONSIBILITY

Legal Instruments and Documents

1. Articles on Responsibility of States for Internationally Wrongful Acts, 2001
For text, see *The Work of the International Law Commission*, 8th ed., vol. II
2. Draft articles on diplomatic protection, with commentaries (Report of the International Law Commission, Fifty-eighth session (1 May-9 June and 3 July-11 August 2006), A/61/10, p. 22) 166
3. *Materials on the Responsibility of States for Internationally Wrongful Acts*, United Nations Legislative Series, 2012 (ST/LEG/SER.B/25) (publication distributed)
4. United Nations General Assembly resolutions 56/83 of 12 December 2001, 59/35 of 2 December 2004, 62/61 and 62/67 of 6 December 2007, 65/19 and 65/27 of 6 December 2010, and 68/104 and 68/113 of 16 December 2013 208

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5. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 3
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*

6. *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, *I.C.J. Reports 1980*, p. 3
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
7. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports 1986*, p. 14
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
For full text, see *Study Materials, Peaceful Settlement of International Disputes*
8. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p. 7
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
9. *Prosecutor v. Duško Tadić*, ICTY Appeals Chamber, 15 July 1999 (Judgment)
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
For full text, see *Study Materials, International Humanitarian Law*
10. *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004*, p. 136
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
For full text, see *Study Materials, Self-Determination in International Law*
11. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment, *I.C.J. Report 2007*, p. 43
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
12. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 232 Preliminary Objections, Judgment, *I.C.J. Reports 2007*, p. 582



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**General Assembly resolution 2166 (XXI) of 5 December 1966
(International conference of plenipotentiaries on the law of
treaties)**

RESOLUTIONS ADOPTED ON THE REPORTS OF THE SIXTH COMMITTEE

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2166 (XXI). International conference of plenipotentiaries on the law of treaties*The General Assembly,*

Having considered chapter II of the report of the International Law Commission on the work of its eighteenth session,¹ which contains final draft articles and commentaries on the law of treaties,

Noting that the International Law Commission at its first session in 1949 listed the law of treaties among the topics of international law as being suitable for codification, that at its thirteenth session in 1961 it decided to prepare draft articles on the law of treaties intended to serve as the basis for a convention, and that at its fourteenth session in 1962 it included the law of treaties in the revised programme for its future work,

Recalling that in its resolutions 1686 (XVI) of 18 December 1961, 1765 (XVII) of 20 November 1962, 1902 (XVIII) of 18 November 1963 and 2045 (XX) of 8 December 1965 it recommended that the International Law Commission should continue the work of codification and progressive development of the law of treaties, taking into account the views expressed in the General Assembly and the comments submitted by Governments, in order that the law of treaties might be placed upon the widest and most secure foundations, and that in its resolution 2045 (XX) of 8 December 1965 it recommended that a final draft on the law of treaties should be submitted to the Assembly by the Commission in its report on the work of its eighteenth session,

Noting further that, at its seventeenth and eighteenth sessions in 1965 and 1966, the International Law Commission, in the light of the observations and comments submitted by Governments and taking into account the relevant resolutions and debates of the General Assembly, revised the provisional draft articles on the law of

treaties prepared at its fourteenth, fifteenth and sixteenth sessions, and that at its eighteenth session the Commission finally adopted the draft articles,

Recalling that, as stated in paragraph 36 of the report of the International Law Commission on the work of its eighteenth session, the Commission decided to recommend that the General Assembly should convene an international conference of plenipotentiaries to study the Commission's draft articles on the law of treaties and to conclude a convention on the subject,

Mindful of Article 13, paragraph 1 a, of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

Believing that the successful codification and progressive development of the rules of international law governing the law of treaties would contribute to the development of friendly relations and co-operation among States, irrespective of their differing constitutional and social systems, and would assist in promoting and implementing the purposes and principles set forth in Articles 1 and 2 of the Charter,

1. Expresses its appreciation to the International Law Commission for its valuable work on the law of treaties and to the Special Rapporteurs for their contribution to this work;

2. Decides that an international conference of plenipotentiaries shall be convened to consider the law of treaties and to embody the results of its work in an international convention and such other instruments as it may deem appropriate;

3. Requests the Secretary-General to convoke, at Geneva or at any other suitable place for which he receives an invitation before the twenty-second session of the General Assembly, the first session of the conference early in 1968 and the second session early in 1969;

4. Invites States Members of the United Nations, States members of the specialized agencies, States Par-

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

ties to the Statute of the International Court of Justice and States that the General Assembly decides specially to invite, to participate in the conference;

5. *Invites* the States referred to in paragraph 4 above to include as far as possible among their representatives experts competent in the field to be considered;

6. *Invites* the specialized agencies and the interested intergovernmental organizations to send observers to the conference;

7. *Refers* to the conference the draft articles contained in chapter II of the report of the International Law Commission on the work of its eighteenth session as the basic proposal for consideration by the conference;

8. *Requests* the Secretary-General to present to the conference all relevant documentation and recommendations relating to its method of work and procedures, and to arrange for the necessary staff and facilities which will be required for the conference, including such experts as may be necessary;

9. *Invites* Member States, the Secretary-General and the Directors-General of those specialized agencies which act as depositaries of treaties to submit, not later than 1 July 1967, their written comments and observations on the final draft articles concerning the law of treaties prepared by the International Law Commission;

10. *Requests* the Secretary-General to circulate such comments so as to facilitate the discussion of the subject at the twenty-second session of the General Assembly;

11. *Decides* to include an item entitled "Law of treaties" in the provisional agenda of its twenty-second session with a view to further discussion of the draft articles in order to facilitate the conclusion of a convention on the law of treaties at the conference of plenipotentiaries convened pursuant to the present resolution.

*1484th plenary meeting,
5 December 1966.*

2167 (XXI). Reports of the International Law Commission

The General Assembly,

Having considered the reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session,²

Recalling its resolutions 1686 (XVI) of 18 December 1961, 1765 (XVII) of 20 November 1962, 1902 (XVIII) of 18 November 1963 and 2045 (XX) of 8 December 1965, by which it recommended that the International Law Commission should continue its work of codification and progressive development of the law of treaties, State responsibility, succession of States and Governments, special missions and relations between States and intergovernmental organizations,

Emphasizing the need for the further codification and progressive development of international law in order to make it a more effective means of implementing the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations and to give increased importance to its role in relations among nations,

² *Ibid.*, Supplement No. 9 (A/6309/Rev.1).

Noting with satisfaction that at its eighteenth session the International Law Commission adopted the final text of its draft articles on the law of treaties and also made progress in the codification and progressive development of the international law relating to special missions,

Noting further with appreciation that the United Nations Office at Geneva organized in May 1966, during the eighteenth session of the International Law Commission, a second session of the Seminar on International Law for advanced students and young government officials responsible in their respective countries for dealing with questions of international law and that the Seminar, which was made possible by the generous collaboration of members of the Commission, was well organized and functioned to the satisfaction of all,

1. *Takes note* of the report of the International Law Commission on the work of the second part of its seventeenth session and of chapters I, III and IV of the report on the work of its eighteenth session;

2. *Expresses its appreciation* to the International Law Commission for the work it has accomplished;

3. *Notes with approval* the programme of work for 1967 proposed by the International Law Commission in chapter IV of the report on the work of its eighteenth session;

4. *Recommends* that the International Law Commission should:

(a) Continue the work of codification and progressive development of the international law relating to special missions, taking into account the views expressed at the twenty-first session of the General Assembly and the comments which may be submitted by Governments, with the object of presenting a final draft on the topic in the report on the work of its nineteenth session;

(b) Continue its work on succession of States and Governments, State responsibility and relations between States and intergovernmental organizations, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII);

5. *Expresses the wish* that, in conjunction with future sessions of the International Law Commission, other seminars be organized which should continue to ensure the participation of a reasonable number of nationals from the developing countries;

6. *Requests* the Secretary-General to forward to the International Law Commission the records of the discussions at the twenty-first session of the General Assembly on the reports of the Commission.

*1484th plenary meeting,
5 December 1966.*

2181 (XXI). Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations

The General Assembly,

Recalling its resolutions 1815 (XVII) of 18 December 1962, 1966 (XVIII) of 16 December 1963 and 2103 (XX) of 20 December 1965, which affirm the importance of the progressive development and codification of the principles of international law concerning friendly relations and co-operation among States,

**United Nations Conference on the Law of Treaties, First
Session, Vienna, 26 March-24 May 1968, Official Records:
Summary records of the first plenary meeting, 26 March 1968
(excerpt)**

UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES

First session

Vienna, 26 March—24 May 1968

OFFICIAL RECORDS

*Summary records of the plenary meetings
and of the meetings
of the Committee of the Whole*



UNITED NATIONS

SUMMARY RECORDS OF THE PLENARY MEETINGS

FIRST PLENARY MEETING

Tuesday, 26 March 1968, at 3 p.m.

Acting President: Mr. STAVROPOULOS
(Legal Counsel of the United Nations, representing the
Secretary-General)

President: Mr. AGO (Italy)

Opening of the Conference

[Item 1 of the provisional agenda]

1. The ACTING PRESIDENT said it was his privilege and honour to welcome the Federal President of the Republic of Austria. The United Nations was grateful for the facilities and assistance provided by the Austrian Government, which had made a notable contribution to the success of the 1961 and 1963 Conferences on Diplomatic and Consular relations.

2. On behalf of the Secretary-General, he declared the United Nations Conference on the Law of Treaties open and invited the Conference to observe a minute's silence for prayer or meditation.

The Conference observed a minute's silence.

3. The ACTING PRESIDENT said that his next duty was to welcome participants on behalf of the Secretary-General of the United Nations, who had asked him to express his regret at his inability to be present and to convey to the Conference his best wishes for its success.

4. The present Conference was the sixth in a series of conferences called by the General Assembly for the purpose, laid down in the Charter, of "encouraging the progressive development of international law and its codification". It was the most important, and might also prove to be the most difficult, of those conferences. Since the Second World War, there had been a steady increase in the number of treaties concluded each year, and international relations were now carried out more within the framework of treaties than within that of customary international law. Moreover, international relations themselves were taking on an increasing importance with the growing recognition that the pressing problems of humanity could best be dealt with by co-operation at the international level. The rules of law governing such matters as the conclusion, interpretation, validity and termination of treaties were therefore of fundamental importance and the clarification of those rules and their embodiment in a multilateral convention would have an immense significance for the whole future of international law.

5. The draft placed before the Conference was the result of long years of work by the International Law Commission. The Conference was fortunate in having as its expert consultant Sir Humphrey Waldock who, as that Commission's Special Rapporteur, had helped to bring that work to fruition.

6. Following their adoption by the Commission, the draft articles on the law of treaties had been submitted in 1966 to the General Assembly, which had requested further comments from Governments, and had discussed the draft articles at its twenty-first and twenty-second sessions in 1966 and 1967. The present Conference was thus the climax of long years of work by the Commission, by Governments and by the Assembly. The plans for the Conference which had been adopted by the General Assembly called for the examination at the present session of the entire draft at the committee stage. The Conference would meet again in 1969 for a second session, at which the results of the committee stage would be examined in plenary meeting and finally adopted in the form of a convention.

Address by the Federal President of the Republic of Austria

7. H. E. Dr. Franz JONAS (Federal President of the Republic of Austria) said that in December 1966 the General Assembly of the United Nations had decided that an international conference should be convened to prepare a convention on the law of treaties. The antecedents of that decision of the General Assembly could be traced back as far as 1949. In that year the International Law Commission of the United Nations had placed the problem of the law of treaties on its agenda as a topic suitable for codification, and the Commission had been dealing with the problem ever since 1950. At its eighteenth session the Commission had adopted draft articles on the law of treaties, had submitted them to the General Assembly and had recommended the holding of an international conference of plenipotentiaries to study the draft articles with a view to the conclusion of an international convention on the law of treaties.

8. With the opening of the Conference that day the discussions concerning a convention on the law of treaties entered a decisive phase. Delegates to the Conference had an important and responsible task before them. The United Nations was the competent international body for the consolidation and further development of international law as one of the most important means of maintaining peace and progress.

9. It was no accident that the International Law Commission had taken up the codification of the law of treaties as one of its first tasks. International law without treaties was unthinkable. The principles of the international legal order were based on treaties. Treaties should replace armed force and be recognized as a moral force, the expression of democracy and of peace in international life. Treaties should lay down generally applicable rules for the co-existence of peoples, and endow material ties with moral strength. In cases of doubt, naturally, the authority of a court of arbitration was needed, but the stability and effectiveness of treaties were based on mutual trust between the contracting parties. For the same

reasons the United Nations adhered to the principles of respect for treaties and of the peaceful settlement of disputes, renunciation of the use of force in international relations, and the self-determination of peoples.

10. There was another reason why the codification of the law of treaties was growing more and more urgent and important. The development of trade, of the world economy, of science, of technology and now of space research continually created new legal problems which required to be solved by treaties. In short, international legal relations were growing steadily more concentrated. The development of the family of nations, particularly during the present stormy phase of transition, could not be left to chance. In the interests of the human community, a serious effort must be made, through wise treaties, to make the community of peoples a community of law and justice, of freedom and democracy.

11. Recognizing the great significance of the Conference and appreciating the lofty tasks before it, Austria had decided to invite the United Nations to hold it at Vienna, and to Austria's great pleasure, the Secretary-General of the United Nations had informed the Austrian Government that the invitation was accepted. That he regarded as an acknowledgement of the efforts of neutral Austria for the furtherance of international co-operation and understanding among peoples.

12. The distinguished representatives of the participating States could rest assured that Austria would do its utmost to make the Conference a success. All Austrian citizens would be proud if the codification of the law of treaties, which would be an important event in the life of the international legal community, were to be associated with the name of the Federal capital. After the successful United Nations Conferences at Vienna in 1961 and 1963, when diplomatic and consular law had been codified, the position of Vienna as the traditional home of diplomacy and international law would be affirmed anew.

13. On behalf of Austria, he welcomed that great United Nations Conference and prayed that the moral force of law might come into its own, and the spirit of understanding and international co-operation prevail. He wished the Conference every success.

14. The ACTING PRESIDENT thanked the Federal President of the Republic of Austria for honouring the Conference by addressing its opening meeting.

The Federal President of the Republic of Austria withdrew.

Question of participation in the Conference

15. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that his delegation felt obliged to make a categorical protest against the discrimination that was being practised in the organization of the Conference. It was well known that all States, as equal members of the international community, had the same right to participate in the settlement of problems of common interest. That followed from the principles of the sovereignty and equal rights of States, enshrined in the United Nations Charter, and from generally accepted principles of international law: no State or group of States was entitled to exclude others from participation in the

settlement of problems that were of common interest to all States. Accordingly, all countries without exception should have been allowed to participate in the present Conference. The violation of that principle was a blatant injustice and a gross affront to international law.

16. But owing to the biased attitude of certain States Members of the United Nations, a number of international conferences of common interest had been marred by the imposition of an artificial and discriminatory formula providing that only States Members of the United Nations, members of the specialized agencies and parties to the Statute of the International Court of Justice could participate, regardless of whether or not the Conference in question affected the interests of all the countries of the world. Under the cover of that formula, certain States, particularly the United States and the United Kingdom, were trying to further their narrow political interests and to infringe the rights of a number of sovereign States, especially of socialist countries. Such an attempt was being made at the present Conference, although the purpose of the Conference was to prepare a general multilateral convention, designed to regulate treaty relations between all the countries of the world. The Conference was obviously of interest to certain States which were not Members of the United Nations, but which concluded international agreements, including agreements with States Members of the United Nations. Since the convention to be prepared at the Conference was universal in its purposes, its functions and its subject-matter, any State, irrespective of its political and social structure, should have the right to be a party to it. Obviously, therefore, it was both desirable and necessary that the Conference should be genuinely representative in character and that all those States which expressed the desire to participate in it should be allowed to do so.

17. The United States, the United Kingdom and the other countries which had imposed the decision to prevent certain States from participating in the Conference had acted in violation of the United Nations Charter and had thus prejudiced the achievement of the main purpose of the Conference, which was the codification and progressive development of international law. It was perfectly obvious that the value of the convention to be prepared by the Conference would be vitiated by the exclusion of the People's Republic of China, which accounted for one-fifth of the population of the whole world. On the one hand, that was a gross violation of the rights of that State and of the great Chinese people, and on the other it reduced the significance of the new convention, which would be drawn up without the participation of the People's Republic of China. The same applied to such socialist States as the German Democratic Republic, the Democratic Republic of Viet-Nam, and the Democratic People's Republic of Korea. The German Democratic Republic had diplomatic and consular relations with many countries and participated in a wide variety of international conferences and organizations. It was especially important to note that the German Democratic Republic was in the vanguard of the States which resolutely fought for peace and friendship among nations. It had concluded hundreds of international agreements with Members and non-Members of the United Nations alike. It had also participated

in such general multilateral agreements as the 1963 Moscow Treaty banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water and the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, and many other general multilateral agreements. The convention that was to be prepared was undoubtedly of interest to the German Democratic Republic, and its participation in the Conference would have helped to improve the drafting of the convention, as had been demonstrated by the interesting and significant comments on the draft articles which had been submitted by the German Democratic Republic and which would certainly be found very useful when the articles were being considered.

18. A number of countries represented at the Conference had entered into various treaty relations with the socialist States he had mentioned, and if the latter were debarred from participating in the preparation of a convention on the law of treaties, it was hard to see what instrument would govern those treaty relations. Clearly, the United States and the United Kingdom and their supporters were prejudicing the interests of the entire international community by their discriminatory action. The Soviet Union, which had always supported the principle of universality and of the development of friendly relations among all States, categorically condemned that action and insisted that all States had equal rights to participate in international conferences on questions of common interest.

19. Mr. KRISHNA RAO (India) said that the work of the Conference was of the greatest importance to the newly independent countries. The codification of the law of treaties would serve to express in writing the contemporary rules of law on the subject and thus release those countries from the need to refer to customary rules of international law; the search for those lawyer-based rules often gave only a picture of what international law had been rather than of what it actually was.

20. Against that background, his delegation reaffirmed its steadfast adherence to the principle of non-discrimination between States. Since the international community was a community of States, no distinction should be made between States, whether based on population, size, importance or power. It was significant that the right of all States to participate without discrimination in multilateral conventions adopted under United Nations auspices had been accepted in the vitally important matters of disarmament and outer space.

21. The present Conference, however, had been convened by the United Nations, and General Assembly resolution 2166 (XXI) set out the basis on which that had been done. Under operative paragraph 4 of that resolution, those invited to participate in the Conference were "States Members of the United Nations, States members of the specialized agencies, States Parties to the Statute of the International Court of Justice and States that the General Assembly decides specially to invite." The Conference could not go beyond the terms of reference laid down for it in that paragraph.

22. Consequently, although his delegation supported the idea put forward by the USSR representative, it must insist, with regret, that the Conference was not legally competent to extend participation in the Conference in

the manner suggested. The proper time to raise that question had been during the discussion in the General Assembly leading to the adoption of resolution 2166 (XXI). But whatever convention was eventually adopted by the present Conference should be open to accession by all States. At the appropriate time, his delegation would take a firm stand on that issue.

23. Mr. EL-ERIAN (United Arab Republic) said that his delegation had consistently expressed its support of the principle of universality of participation in conferences preparing general multilateral conventions of concern to all members of the international community. In 1966, during the General Assembly debate on the convening of the Conference, the United Arab Republic had supported the proposal that operative paragraph 4 of General Assembly resolution 2166 (XXI) should be so drafted as to ensure that invitations were issued to all the countries of the world. In doing so, it had been guided by the fact that participation in the formulation of general norms of international law was an inherent right of the independent statehood of sovereign members of the community of nations. That was a fundamental rule which no group of States had the right to infringe or curtail. It was most regrettable that that formula had not been adopted and that certain important States had not been invited to participate in the Conference.

24. Sir Francis VALLAT (United Kingdom) said that the problem raised by the USSR representative was fundamentally political and could not properly be debated at a conference of jurists engaged in preparing a convention on the law of treaties. The Conference had been convened under the auspices of the United Nations, and the General Assembly had unequivocally decided what States should be allowed to participate, since Assembly resolution 2166 (XXI) had been adopted by over 100 votes. It could not be maintained, therefore, that the decision had rested with one or two Governments.

25. The Conference was embarking on a task the importance of which to the future of international law could not be overestimated. Controversy would undoubtedly arise on many points, for international law was not an exact science. He would appeal to participants to confine their remarks to issues which concerned them as international lawyers, and not to add to the burdens of the Conference by attempting to interfere with a decision already taken by the General Assembly.

26. Mr. PELE (Romania) said his delegation regretted that all the States of the world had not been invited to participate in such an important conference. It was becoming obvious that the development of international law required the active co-operation of all countries. Codification could not be confined to systematization of existing legal norms, for the progressive development of international law must also be borne in mind. That was why the Romanian delegation considered that the participation of the People's Republic of China, the German Democratic Republic, the Democratic Republic of Vietnam and the Democratic People's Republic of Korea would greatly help the Conference to bring its work to a successful conclusion and to promote peaceful co-existence and friendly co-operation among nations.

27. Sir Lalita RAJAPAKSE (Ceylon) said that the formulation of general multilateral treaties was so universal a task that it should not be carried out by a group of States, however large, but that all States, regardless of their ideology or commitments, should be allowed to participate. The absence of the People's Republic of China, a world power of the first magnitude, and of other States, could only have an adverse effect on the Conference's deliberations and on the value of the ultimate product.
28. Mr. USTOR (Hungary) said that his delegation shared the misgivings expressed by earlier speakers concerning the wording of operative paragraph 4 of General Assembly resolution 2166 (XXI), because it was essential to invite all States to participate in conferences of universal interest. The codification of the law of treaties was of concern to all States, since the convention would govern all subjects of international law, and it was an elementary requirement of democracy that no subject of law should be excluded from its making. That principle had been sacrificed to obvious political aims, and the discrimination practised against the People's Republic of China, the German Democratic Republic, the Democratic Republic of Viet-Nam and the Democratic People's Republic of Korea constituted a violation of the vital principle of the equal sovereignty of States. During the relevant debate in the Sixth Committee of the General Assembly, Hungary had protested that discrimination against those countries was not only illegal, but unjust, inequitable and unfair. His delegation wished again to record its protest against that practice.
29. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said that contemporary international life showed a general trend towards the co-operation of all States in matters of general interest. That trend was leading to increased observance of the principle of the universality of multilateral treaties, a principle reflected in such important instruments of international law as the 1963 Moscow Treaty banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water and the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. In addition, a number of General Assembly resolutions on questions of general interest contained a formula for the participation of all States without exception. The development of international co-operation predicated the participation of all States in universal conventions, as a basic principle of international law.
30. The wording of operative paragraph 4 of General Assembly resolution 2166 (XXI) was therefore highly regrettable, since it excluded a group of peace-loving States from participation. It had been said that a conference of jurists could not deal with political matters, but it seemed anomalous, in preparing an instrument on the law of treaties, to allow even a shadow of discrimination and a departure from the principle of universality. To take only one example, the German Democratic Republic, which was one of the outstanding industrial countries of the world, which abided entirely by the principles of the United Nations Charter in its foreign policy, and which had concluded a number of international agreements as a sovereign State, should not be excluded from participation. The same applied to the Democratic Republic of Viet-Nam, the Democratic People's Republic of Korea and the People's Republic of China. His delegation therefore strongly urged the observance of the principle of universality in the work of the Conference.
31. Mr. JAMSRAN (Mongolia) said that since the codification and progressive development of rules of international law were of interest to all States, all of them should participate in the process. Moreover, that was required by the principle of sovereign equality on which the Charter was founded. The discrimination applied against some States under General Assembly resolution 2166 (XXI), operative paragraph 4, conflicted with the right of all States to conclude treaties. Universal participation in the present Conference, whatever the political and social system of any State would ensure its success.
32. Mr. SEATON (United Republic of Tanzania) said he deplored the exclusion of certain States; progress and international security depended on the rule of law which all States must take a hand in formulating. Every State had an inherent right to participate in the Conference and the law of treaties could not be codified by a restricted group which then imposed rules on others which had not taken part. Though the Conference was not competent to revoke a General Assembly decision, he hoped that the discussion would ensure that in future all States contributed to the creation of legal rules.
33. Mr. OSIECKI (Poland) said that during the discussion in the General Assembly of operative paragraph 4 of resolution 2166 (XXI), his delegation had advocated universal participation in the Conference on the ground that depriving certain States of the right to attend was contrary to the principle of equality of States. The outcome of the Conference was of vital importance because the rules adopted would regulate relations between all States. The States excluded supported the aims of the United Nations, took part in some of the work of specialized agencies and were parties to bilateral and general multilateral treaties.
34. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said he endorsed what had been said about the importance of all States taking part in elaborating a convention on the law of treaties which would help to promote peaceful relations and economic and social progress. Any attempt at codification could only be fully successful if each State made its contribution.
35. The delegations at the General Assembly responsible for excluding certain States had acted in defiance of Charter principles and their action would diminish the prestige of the Conference. For example, the German Democratic Republic was a full subject of international law and maintained diplomatic, consular and economic relations with countries the population of which represented two-thirds of the population of the world. It had concluded numerous treaties and participated in many international bodies. It had trade relations with over one hundred countries, including some in western Europe. Historic events were irreversible and it was no use blinking facts or ignoring the existence of that State.

36. A policy of discrimination was also pursued by western countries with regard to other socialist countries, namely the Democratic People's Republic of Korea, the Democratic Republic of Viet-Nam and the People's Republic of China.

37. Members of the United Nations must put an end to discrimination and support the principle of universality.

38. Mr. KOUTIKOV (Bulgaria) said he objected to discrimination against certain States, which was a violation of contemporary international law and totally anomalous.

39. Mr. ALVAREZ TABIO (Cuba) said that all States had an inalienable right to participate in a conference that would formulate universally applicable rules. If States were to assume legal obligations, they must take part in defining them.

40. Mr. KEITA (Guinea) said he deplored the absence of some States whose lawyers and experts could have contributed so much in devising generally valid rules for regulating relations between States.

41. Mr. HU (China) said that under General Assembly resolution 2166 (XXI), the Conference had one task only, that of preparing a draft convention on the law of treaties, and it should not discuss extraneous matters. The Republic of China was fully represented, and according to the Charter a State could only possess one vote.

42. Mr. JELIC (Yugoslavia) said he regretted that the principle of universality had been flouted and a number of interested States prevented from attending the conference.

43. Mr. NACHABE (Syria) said that his delegation had consistently upheld the right of all States to attend international conferences and to become parties to general multilateral treaties, and on various occasions it had co-sponsored General Assembly resolutions on the subject, particularly those concerned with the codification and progressive development of international law. The exclusion from the conference of some members of the international community was contrary to the letter and spirit of the Charter and illegal.

44. Mr. MOUDILENO (Congo, Brazzaville) said it was quite wrong to exclude from the conference certain international entities which possessed all the attributes of sovereign States and had treaty-making power.

45. Mr. SMEJKAL (Czechoslovakia) said that the work of the Conference would suffer from the absence of a group of States which could contribute to the development of international law. That situation was incompatible with the very foundation of international law, which was universality and justice. One group of States was excluding another group from codifying general international law because of their economic and social structure. That was nothing less than discrimination, which was flagrantly at variance with international law.

46. For instance, the German Democratic Republic was a party to general multilateral treaties such as the Moscow Nuclear Test Ban Treaty and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, while other treaties to which it was a party were registered with the United Nations Secretariat.

47. It was equally absurd that the People's Republic of China, the Democratic People's Republic of Korea and the Democratic Republic of Viet-Nam could not be represented at the Conference.

48. His delegation deeply regretted that the effects of the cold war had also made their appearance at the Conference, which could justifiably be regarded as one of the most important in the history of the United Nations.

49. The ACTING PRESIDENT said that the foregoing statements would appear in the summary record.

Election of the President

[Item 2 of the provisional agenda]

50. The ACTING PRESIDENT said the next item on the agenda was the election of the President of the Conference.

51. Mr. VEROSTA (Austria) proposed Mr. Roberto Ago, an outstanding lawyer with wide experience of work in international organizations which would specially qualify him for the task.

52. Mr. RUEGGER (Switzerland) seconded the proposal.

53. Mr. KRISHNA RAO (India), Mr. EL-ERIAN (United Arab Republic) Mr. SMEJKAL (Czechoslovakia), Mr. RUDA (Argentina), Sir Francis VALLAT (United Kingdom), Mr. YASSEEN (Iraq), Mr. REGALA (Philippines), Mr. KELLOU (Algeria), Mr. MATINE-DAFTARY (Iran), Mr. KHLESTOV (Union of Soviet Socialist Republics) and Mr. de BRESSON (France) all supported the proposal.

Mr. Roberto Ago (Italy) was elected President by acclamation and took the Chair.

54. The PRESIDENT said he was deeply appreciative of the honour done to his country and to himself by his election and sincerely grateful for the kind words of the representatives who had just spoken. He wished first to pay a tribute to the contribution made by Austria to the success of the 1961 and 1963 Conferences and to the outstanding leadership of those Conferences by Professor Verdross in 1961 and Professor Verosta in 1963.

55. The international community had grown in a remarkable manner during the past two decades and an active role was now being played by new members of that community whose diverse philosophical, religious, legal, social and economic conceptions were often markedly different from those which had formerly prevailed in the world. Those developments made it imperative to adapt international law to the new dimensions and the new requirements of the society of States.

56. The codification of international law in pursuance of Article 13 (1) of the Charter was therefore both urgent and essential. The task before the Conference, however, was the most ambitious ever undertaken within that framework because of the vital importance to international relations of the rules governing the law of treaties.

57. In the preparation of that task in the United Nations over a period of eighteen years, a leading role had been played by the International Law Commission's Special Rapporteurs on the law of treaties; the Secretariat, in

**United Nations Conference on the Law of Treaties, Second
Session, Vienna, 9 April-22 May 1969, Official Records:
Summary records of the thirty-fourth, thirty-fifth and thirty-
sixth plenary meetings**

II

UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES

Second session

Vienna, 9 April-22 May 1969

OFFICIAL RECORDS

*Summary records of the plenary meetings
and of the meetings
of the Committee of the Whole*



UNITED NATIONS

New York, 1970

development of relations among all States on a basis of justice and to take part in the consolidation of international peace and security.

The meeting rose at 1 p.m.

THIRTY-FOURTH PLENARY MEETING

Wednesday, 21 May 1969, at 4.10 p.m.

President: Mr. AGO (Italy)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 (continued)

Proposed new article (continued)

1. The PRESIDENT invited the Conference to continue its consideration of the new article which had been proposed by twenty-two States (A/CONF.39/L.36 and Add.1).

2. Mr. USTOR (Hungary) said that his delegation was among those which had submitted the proposal for a new article designed to introduce the principle of universality into the text of the convention on the law of treaties. That principle had failed to secure the necessary majority in the Committee of the Whole, although in his opinion it was a basic and valid principle of contemporary international law. The new article would apply mostly if not exclusively to multilateral treaties concluded for the purposes of the codification and progressive development of international law; it would confirm the incontestable right of all States to participate in the process of codification. If the codification of international law was considered to mean the codification of general international law, in other words, of the law which should prevail all over the world, then the requirement of universality logically followed *ex definitione*. His delegation attached the utmost importance to the recognition of that principle in a convention on the law of treaties and would consider it most deplorable failure if the Conference did not recognize that principle and embody it in the instruments to be adopted.

3. Mr. KHESTOV (Union of Soviet Socialist Republics) said that his delegation considered the proposed new article essential for six reasons. First, because the principle of the universality of general multilateral treaties had its source in the very character of contemporary international law; secondly, because that principle had acquired vital importance by reason of the increase in the number of multilateral treaties being concluded at the present time; thirdly, because the right of States to participate in such treaties was derived from a basic principle of contemporary international law, namely, the principle of state sovereignty, according to which no single State could refuse to grant other States

the same rights as it enjoyed itself; fourthly, because that principle took on added importance in the light of the objective rules of international law stated in Part V of the draft articles; fifthly, because it was also a necessary consequence of the idea of international co-operation, which was one of the most important principles laid down in the United Nations Charter; and sixthly, because the right of all States to participate in general multilateral treaties followed from the very nature of such treaties.

4. Universal participation in general multilateral treaties did not necessarily imply recognition of all the other parties to them and the establishment of treaty relations between them. The arguments advanced by the opponents of universality, who for political reasons persisted in refusing to recognize the existence of certain States, had therefore no proper foundation either in law or in fact.

5. His delegation wished to make it clear that, unless the principle of universality was embodied in the proposed new article or in some other articles, it would be unable to support the convention as a whole.

6. Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) said that all the considerations and arguments advanced for and against the principle of universality were based on a complex of legal, practical and, unfortunately, political problems. Obviously, neither side could ignore the arguments of the other. The Ukrainian delegation, which was in favour of inserting in the convention a statement of the principle of universality without any restrictions whatsoever, had carefully considered the arguments of the delegations which wished to limit that progressive principle, and had become a sponsor of the proposed new article which now, in its opinion, constituted a golden mean and did not seriously prejudice the position of either side.

7. The participation of all States in multilateral treaties was the only just solution and would open up wide prospects, not least for the convention itself, since it would thereby become an instrument expressing the will of all States, instead of being, at best, adopted by an arithmetical majority. Adoption of the principle of universality, moreover, would enable all States to make their contribution to the common cause of strengthening world peace, developing friendly relations among nations and securing international co-operation in accordance with the United Nations Charter. Admission of a State to participation in multilateral treaties was neither a reward for good behaviour or evidence of goodwill, nor evidence of approval of its political system or its social and economic structure; a treaty was the result of the coincidence of the will and interest of States.

8. In a number of spheres, the interests of some States did not coincide with those of others. That was perfectly natural, for example, in the economic sphere. But there were areas where the interests of all or nearly all States were identical; that fact was borne out by the existence of treaties on the partial prohibition of nuclear tests, on the non-proliferation of nuclear weapons, on the peaceful uses of outer space and, finally, the convention on the law of treaties. Thus, there could be no doubt

of the existence of treaties, the object and purpose of which were of interest to the international community of States as a whole. For example, European security was an object which could not be achieved without the participation of all the States concerned, and security as a whole was unthinkable unless all the States of Europe participated in its consolidation.

9. At the same time, his delegation understood the misgivings of those who had expressed the wish that participation in multilateral treaties should be unequivocally closed to régimes the very existence of which was illegal. But those misgivings were exaggerated, since the interests of illegal régimes could never by definition be compatible with the object and purpose of treaties which were of interest to the international community as a whole. For example, the interest of a racist régime would always be profoundly hostile not only to the interests of the people subjected to its rule, but to the entire international community.

10. The rules which had already been adopted by the Conference represented a balance of rights and duties in the sphere of the law of treaties. Only States could have rights and only States could carry out duties. The proposal of which the Ukrainian SSR was a sponsor referred not to régimes but to States, or the entities which possessed rights and were capable of assuming obligations. The Ukrainian delegation was sure that the Conference would listen to the voice of reason and adopt a principle which must have its lawful place in contemporary international law.

11. Mr. SMEJKAL (Czechoslovakia) said that the question of the universality of international multilateral treaties concerning general rules of international law, or involving the interests of all States, had been widely discussed during the first session of the Conference and all the arguments in its favour had already been presented. Now that the present session was drawing to a close, however, his delegation wished to emphasize one aspect of the problem which in its opinion deserved special attention.

12. In the interest of the peaceful development of international relations, all States should not only actually participate in creating international law in which international treaties were of paramount importance, but should also assume responsibility for ensuring respect for that law and for those obligations which were in the interest of all. It would be paradoxical if, instead of making greater efforts to persuade States to undertake obligations designed to improve their mutual relations, a situation should arise, merely as the result of certain bilateral relations, where the principle of universality was not reflected in the convention on the law of treaties. For those reasons, he appealed to all delegations to support the principle, which was in the interest of the international community as a whole.

13. Mr. SHUKRI (Syria) said that he wished to associate himself with what had been said by the preceding speakers in support of the principle of universality. No delegation, in fact, had pronounced itself against that principle, which made it all the more difficult to understand the failure so far to include a single article

on it in the convention. Some delegations, indeed, had questioned the meaning of the term "every State", although, ironically enough, they had found no difficulty in accepting that allegedly vague expression in a number of international treaties, such as the Nuclear Test Ban Treaty.

14. Another untenable argument was that the inclusion of an article on universality in the convention would introduce a political question which had no proper place at the present Conference. But since it was obvious, that every international legal question had some political aspects, he appealed to the Conference not to confuse the primarily legal question of the right of every State to participate in general multilateral principles with the primarily political question of the recognition of States. The fact that a State disliked the political or economic system of another State provided no legal ground for preventing that State from exercising its legitimate right of sovereign equality.

15. The right to conclude treaties was one of the aspects of State sovereignty. How was it possible to speak of the progressive development of international law through treaties while at the same time preventing certain States with populations of millions of people from participating in law-making treaties, in particular the convention on the law of treaties itself? In view of the impasse in which the Conference now found itself as the result of the stubborn refusal of some delegations to recognize the principle of universality, it was clear that the convention might fail to receive support from an important group of States. He appealed to all delegations, therefore, to make an effort to reach a satisfactory solution.

16. Mr. BOLINTINEANU (Romania) said that the principle of universality embodied in the proposed new article applied to a category of multilateral treaties which had their substantive source in the objective trends of inter-State relations, in the requirements of international co-operation, as set forth in the United Nations Charter, and in the fundamental principles of international law which governed such co-operation. The existence of multilateral treaties, which were open to the participation of all States, was confirmed by long practice, but the practice followed in the United Nations of restricting the universal application of treaties was hardly normal and reflected a discriminatory policy which was contrary to the principles governing international relations and the requirements for their further development. The lack of any juridical basis for that practice was illustrated, *inter alia*, by the fact that in certain cases it had been abandoned.

17. It should now be abandoned once and for all and the Conference could take the only decision necessary, namely to recognize the principle of universality in connexion with the multilateral treaties referred to in the proposed new article. Adoption of that article would fill a gap in the convention and provide a just solution to a particularly important problem concerning the rule of law in international relations. By acting in support of co-operation and realism, the Conference could thus ensure that the convention would contribute to the progressive development of international law.

18. Mr. BIKOUTH (Congo, Brazzaville) said that he wished to express his country's concern at the systematic black-out which continued to be imposed on certain members of the international community with which his own country and many others maintained diplomatic relations. His delegation of course was not empowered to speak for any country other than his own, but felt that it was most unrealistic to consider history as static. For that was the only term to describe an approach which amounted to reducing every problem to the limited dimensions of contemporary events, which were unfortunately dominated by nationalistic passions. It was those passions which explained the marginal status which was given to certain geographical entities, although they had all the legal attributes of sovereign States.

19. His delegation was convinced of the need to formulate a convention on the law of treaties on sound foundations rather than on the narrow basis of certain transient political circumstances, and for those reasons it fully subscribed to the principle of universality. Although that principle might seem nebulous to certain other delegations, failure to adopt it could indermine the legal monument which the Conference hoped to erect and which represented the result of years of painstaking effort.

20. The PRESIDENT invited the Conference to vote on the twenty-two State proposal for a new article (A/CONF.39/L.36 and Add.1).

At the request of the representative of the Federal Republic of Germany, the vote was taken by roll-call.

El Salvador, having been drawn by lot by the President, was called upon to vote first.

In favour: Ghana, Hungary, India, Indonesia, Iraq, Kuwait, Mexico, Mongolia, Nepal, Pakistan, Panama, Poland, Romania, Sierra Leone, Sudan, Syria, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Yugoslavia, Zambia, Afghanistan, Algeria, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Ceylon, Congo (Brazzaville), Cuba, Czechoslovakia, Ecuador.

Against: El Salvador, Federal Republic of Germany, Finland, France, Gabon, Greece, Guatemala, Guyana, Honduras, Iceland, Ireland, Israel, Italy, Jamaica, Japan, Lebanon, Liechtenstein, Luxembourg, Madagascar, Malaysia, Malta, Monaco, Netherlands, New Zealand, Norway, Portugal, Republic of Korea, Republic of Viet-Nam, Sweden, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Argentina, Austria, Australia, Barbados, Belgium, Bolivia, Brazil, Canada, Central African Republic, China, Colombia, Costa Rica, Denmark, Dominican Republic.

Abstaining: Ethiopia, Holy See, Iran, Ivory Coast, Kenya, Libya, Morocco, Nigeria, Peru, Philippines, San Marino, Saudi Arabia, Senegal, Singapore, South Africa, Spain, Trinidad and Tobago, Tunisia, Chile, Congo (Democratic Republic of), Cyprus, Dahomey.

The proposed new article (A/CONF.39/L.36 and Add.1) was rejected by 50 votes to 34, with 22 abstentions.

Draft declaration proposed by Spain

21. The PRESIDENT invited the Conference to consider the draft declaration on participation in multilateral treaties (A/CONF.39/L.38), proposed by Spain.

22. Mr. DE CASTRO (Spain) said that his delegation had already recognized the importance of the principle of universality during the discussion on the proposal for an article 5 *bis* in the Committee of the Whole. In view of the obstacles, both technical and political, which that proposal had encountered, his delegation had suggested a solution which it hoped would attract general agreement not only on the subject-matter of article 5 *bis* but also on the problems arising from article 62 *bis* and on the question of reservations.

23. In the draft declaration, which his delegation had submitted in the form of a resolution (A/CONF.39/L.38), the preamble stressed the value of the principle of universality and its importance to international co-operation. It stated "that all States should be able to participate in multilateral treaties which codify or progressively develop norms of general international law or the object and purpose of which are of interest to the international community of States as a whole", and then recommended to the General Assembly "that it consider periodically the advisability of inviting States which are not parties to multilateral treaties of interest to the international community of States as a whole to participate in such treaties".

24. When he had announced his delegation's intention of submitting a draft resolution on those lines, he had indicated that it was intended as part of a general solution which, it was hoped, would ensure a substantial majority in favour of the convention. Since, however, his delegation's efforts had not met with sufficient support, he would not ask for the draft declaration to be put to the vote, but would again emphasize the importance of the contents of the draft and express the hope that, in more favourable circumstances, the ideas it contained would be recognized by all States.

25. His delegation was prepared to support any reasonable compromise solution that might be put forward for the outstanding issues before the Conference. Nevertheless, it wished to make it clear that it would vote in favour of the convention on the law of treaties even without an article 62 *bis* and without any reference to the principle of universality, because it considered that the draft submitted by the International Law Commission represented a great contribution to the progress of international Law.

Draft declaration on universal participation in and accession to the convention on the law of treaties, proposed new article on procedures for adjudication, arbitration and conciliation and draft resolution

26. The PRESIDENT invited the Conference to consider the draft declaration on participation in the convention on the law of treaties proposed, along with a new article and a draft resolution, by a group of ten States (A/CONF.39/L.47 and Rev.1).

27. Mr. ELIAS (Nigeria), introducing the combined proposal on behalf of the ten sponsors, said that it consisted of three parts but constituted an organic whole. It read as follows:

Draft Declaration on Universal Participation in and Accession to the Convention on the Law of Treaties

The United Nations Conference on the Law of Treaties,

Convinced that multilateral treaties which deal with the codification and progressive development of international law or the object and purposes of which are of interest to the international community as a whole, should be open to universal participation,

Aware of the fact that Article ... of the Convention on the Law of Treaties authorizes the General Assembly to issue special invitations to States not members of the United Nations, the specialized agencies or parties to the Statute of the International Court of Justice, to accede to the present Convention,

1. Invites the General Assembly to give consideration, at its twenty-fourth session, to the matter of issuing invitations so as to ensure the widest possible participation in the Convention on the Law of Treaties;

2. Expresses the hope that the States Members of the United Nations will endeavour to achieve the object of this declaration;

3. Requests the Secretary-General of the United Nations to bring the present declaration to the notice of the General Assembly;

4. Decides that the present declaration shall form part of the Final Act of the Conference on the Law of Treaties.

Proposed new article

Procedures for Adjudication, Arbitration and Conciliation

If, under paragraph 3 of article 62, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

1. Any one of the parties to a dispute concerning the application or the interpretation of article 50 or 61 may, by application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration.

2. Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the convention may set in motion the procedure specified in annex I to the present convention by submitting a request to that effect to the Secretary-General of the United Nations.

Annex I

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article ... the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

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

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

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

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

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

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

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

3. The Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

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

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute. The report and conclusions of the Commission shall not be binding upon the parties, either with respect to the statement of facts or in regard to questions of law, and they shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate a friendly settlement of the controversy.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

Draft resolution

The United Nations Conference on the Law of Treaties,

Considering that the provisions in Article ... concerning the settlement of disputes arising under Part V of the Convention on the Law of Treaties, lays down that the expenses of any conciliation commission that may be set up under Article ... shall be borne by the United Nations,

Requests the General Assembly of the United Nations to take note of and approve the provisions of paragraph 7 of the Annex to Article ...

28. All participants in the Conference realized that there were still two major outstanding issues to settle: the first was that of universality and the second that of the provision of satisfactory procedures for the settlement

of any disputes that might arise out of the various provisions included in Part V dealing with grounds for invalidating, terminating, withdrawing from or suspending the operation of treaties. Some delegations attached the greatest importance to the principle of universality, while others attached equal importance to the question of including in the convention provisions relating to the settlement of disputes. Many efforts had been made, in consultation and negotiation, to find an amicable solution to that dual problem. It was maintained by some that the two issues had no organic connexion and were not necessarily related. The sponsors of the present proposals would readily admit the force of that argument, but the Conference could not ignore the possibility of an agreement based on a simultaneous solution of both problems.

29. The sponsors accordingly now submitted their proposal which, apart from the draft resolution on conciliation expenses which he would describe later, consisted of two parts. The first was a "Draft Declaration on Universal Participation in and Accession to the Convention on the Law of Treaties". The second was a proposed new article entitled "Procedures for Adjudication, Arbitration and Conciliation", with an annex setting forth details of the organization of the conciliation procedure. Those two parts constituted a "package proposal" which could not be divided. The sponsors fully realized that no delegation would find the whole package completely satisfactory. Some would object to the terms of the draft declaration, others might not want a declaration at all, still others might be willing to accept the declaration but would not be fully satisfied with certain features of the procedures for the settlement of disputes. The sponsors wished to make it clear that they had not attempted to satisfy any particular group of delegations completely. Their sole aim had been to try to achieve the possible and for that purpose it had been necessary not to insist on the ideal. In the lively and even passionate discussions which had taken place, it had become clear that the gap which separated the advocates and the opponents of the principle of universality was still very wide, but the sponsors thought that the draft declaration now proposed by them represented the maximum measure of achievement possible at the present stage.

30. Two changes had been made (A/CONF.39/L.47/Rev.1) to the original text (A/CONF.39/L.47) of the proposed new article on "Procedures for Adjudication, Arbitration and Conciliation". The first related to the title and consisted of the insertion of a reference to arbitration. The second was an amendment to paragraph 1, which enabled any of the parties to a dispute concerning the application or the interpretation of article 50 or 61 to submit that dispute to the International Court of Justice for a decision. Apart from clarifying the wording, the sponsors had now added the concluding proviso, "... unless the parties by common consent agree to submit the dispute to arbitration". The third element of the combined proposal was a draft resolution requesting the General Assembly to take note of and approve the provisions of paragraph 7 of the annex to the proposed new article. That paragraph,

in addition to specifying that the Secretary-General should provide the proposed Conciliation Commission with the required assistance and facilities, stated that the expenses of the commission "shall be borne by the United Nations".

31. It should be clearly understood that the proposal which he had thus introduced must be considered as a whole and voted upon as such. The sponsors hoped that the support that it would attract would not be limited to any particular group or groups, and that the proposal would commend itself to the widest possible participation by delegations from all parts of the world. He appealed to those who might be opposed to some parts of the proposal to consider what the alternative would be to the rejection of that proposal. The answer that article 62 would remain was not convincing. Such a provision might be sufficient in other circumstances but, in the present instance, would not be enough for the purpose of arriving at a harmonious solution. The proposal which he had introduced did not give the whole loaf to either of the two groups of delegations to which he had referred at the beginning of his statement, but it did give something to each. He therefore earnestly hoped that it would be accepted in a spirit of conciliation and general harmony.

32. Mr. DADZIE (Ghana) said that his delegation was one of the sponsors of the ten-State proposal. When he had spoken in connexion with the proposed article 62 *bis*, he had pointed out that, for an acceptable compromise to be reached, steps would have to be taken by each side to meet the views of the other. The time had now come to take those steps if the Conference was not to see the results of its labours during the past two years reduced to naught. The proposal before the Conference was an attempt to strike a bargain, recognizing only what was possible and having regard to the interests of all delegations, and he urged representatives to give it their serious consideration. He hoped that the draft declaration and the proposed new article would commend themselves to all and that even those delegations which could not vote in favour of the proposal would at least refrain from casting a negative vote.

33. Mr. ESCHAUIER (Netherlands) said that he had been favourably impressed by the Nigerian representative's presentation of the new compromise proposal. With regard to the proposed new article, he said that the original sponsors of article 62 *bis* had been in favour of a procedure for the settlement of disputes by the International Court of Justice. Realizing that that would not gain universal acceptance, they had thought it necessary to have recourse to compulsory conciliation and arbitration procedure for disputes arising from Part V of the convention. While there was a considerable difference between the proposed article 62 *bis* and the new proposal, he noted that the idea of compulsory conciliation was retained and he was glad to see that the concept of arbitration was not entirely dropped. One positive feature of the proposed new article was that it proposed a procedure involving the International Court of Justice, though it restricted the cases to be submitted to the International

Court to those arising out of disputes regarding the principle of *jus cogens* as set out in articles 50 and 61. During the negotiations to arrive at a compromise solution, he had done his utmost to persuade the sponsors of the new proposal to include also disputes under articles 49 and 59 for adjudication by the International Court. He was sorry to see that they had not done so and again appealed to them to reconsider their decision on that point.

34. The new compromise proposal might be the best that could be expected in view of the very wide divergence of opinion which had been evident on the subject. His delegation would therefore give serious consideration to the proposed new article. So far as the draft declaration was concerned, the change in its title was probably an improvement. He would give careful consideration to the other amendments proposed, but would like to hear the views of other delegations before committing his delegation. He noted that the draft declaration invited the General Assembly to give consideration, at its twenty-fourth session, to the matter of issuing invitations so as to ensure the widest possible participation in the convention. He was not sure that it was within the Conference's competence to issue instructions to the General Assembly but obviously an invitation would not be binding.

35. He would urge delegations to cast aside their prejudices and give favourable consideration to the proposed "package deal" so as to achieve the widest possible measure of agreement.

36. Sir Francis VALLAT (United Kingdom) said he both respected and appreciated the intense efforts which had been made by the delegations which had sponsored the proposals in document (A/CONF.39/L.47/and Rev.1). Although it was dangerous to identify delegations and people in that kind of context, he would nevertheless like to express the appreciation of his delegation for the efforts which had been made personally by Mr. Elias, the Chairman of the Nigerian delegation, to find, even at that late hour, a way to salvage the work of the International Law Commission over the last eighteen years and of the Conference over the last two years.

37. To his mind, a "package deal" was rarely attractive and sometimes turned out in the end to be merely a bitter pill. The present compromise was difficult to accept, since, on the one hand, the draft declaration went further than he would have wished to go and, on the other hand, the settlement procedures did not go far enough. He felt strongly, however, that the Conference should not discard the last opportunity to save the results of its work. He appealed to all delegations to adopt a statesmanlike attitude in their consideration of the new proposal, in emulation of the statesmanlike attitude adopted by its sponsors and, at that stage, to put on one side their wishes in one respect or another.

38. Of course, delegations to the Conference could not bind their Governments to future action, whether in the General Assembly or elsewhere, and it was on that understanding that his delegation would vote for the proposal. It was regrettable that delegations should

be forced to support such proposals; however, in a spirit of real compromise, he would lend the support, of his delegation to the proposals in document A/CONF.39/L.47 and Rev.1.

39. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that his delegation wished to express its profound gratitude to all the delegations which had made such great efforts to seek a compromise solution with a view to bringing the Conference to a successful conclusion.

40. It had been interesting to hear that the United Kingdom representative regarded the proposal now before the Conference as a compromise even though, in that representative's opinion, one part went too far and the other not far enough. The Soviet Union delegation had striven for a real compromise throughout the Conference, and now wished to analyse the solution proposed.

41. To begin with the draft declaration, the core of that proposal lay in the invitation to the General Assembly to consider at its twenty-fourth session the matter of issuing invitations so as to ensure the widest possible participation in the convention. But the effect of that proposal was to place the onus of solving the problem on the General Assembly, and the United Kingdom representative had implied that the attitude of delegations to the Conference voting for the draft declaration would not be binding on the delegations of the same States to the General Assembly. Indeed, every Member of the United Nations had the right to raise any question at any session of the General Assembly so that, in practice, the vital paragraph of the draft declaration added nothing to a right that already existed for nearly all the delegations attending the Conference. Of course, the declaration did contain some positive provisions concerning the principle of universality, but its main flaw was that it carried no obligations whatsoever.

42. The draft declaration was followed by a proposed new article on procedures for adjudication and conciliation, which, if adopted, would impose firm obligations on States. Where the compulsory jurisdiction of the International Court of Justice was concerned, no vague provisions for the future and no general phrases were used, but clearly binding, if limited, undertakings were imposed. Thus, any State which supported the proposal must agree in principle to the Court's compulsory jurisdiction and must re-examine its position on compulsory arbitration.

43. In those circumstances, the new proposal could hardly be described as a compromise in which concessions had been made by both sides, since those who could not agree to compulsory jurisdiction were supposed to accept a binding provision, whereas those who disagreed with the ideas set out in the draft declaration, far from being bound by any obligations, would be absolutely free to act as they wished in matters relating to universal participation in the convention. Perhaps that was the reason why the United Kingdom delegation was prepared to support the proposal.

44. If a real compromise were sought, either both sides should agree to undertake binding obligations, or both sides should be given the same freedom of action. Since

some delegations felt that they could not accept binding obligations in respect of the principle of universality, a genuine compromise would be to make the new article an optional protocol to be adopted at the Conference. There might be other technical means of making the second part of the proposal less mandatory: for instance, the words "with the consent of all the parties" might be inserted in paragraph 1 of the proposed article, in connexion with the submission of disputes to the International Court of Justice. In any case, the second part of the proposal should have the same legal character as the first part.

45. The USSR delegation considered that the draft declaration contained certain positive elements, which went some way towards meeting its position. Accordingly, if a separate vote were taken on the draft declaration, it could vote in favour of it, although it could not vote for the proposed new article in its present form. He would suggest that the sponsors consider presenting the new article as an optional protocol: if they could not agree to that suggestion or to a separate vote on the draft declaration, the USSR delegation would be obliged to vote against the proposal as a whole.

46. Mr. SEATON (United Republic of Tanzania) said he was glad that the compromise solution proposed by his own and other delegations had, on the whole, met with a favourable response. It was most gratifying that delegations holding such widely differing views as those of the United Kingdom, the USSR and the Netherlands had all found positive elements in the proposal. The Conference had attempted for weeks to find a solution to meet the widely divergent interests of delegations; those attempts had failed, not for want of effort or goodwill, but owing to the inherent difficulty of the problem. The statements of earlier speakers had shown that the latest endeavour to break the deadlock had been successful to some extent, since the Netherlands and USSR representatives had made a number of suggestions and the United Kingdom representative had not insisted on the incorporation of certain ideas which he had pressed earlier in the debate.

47. The Tanzanian delegation hoped that an understanding would be reached among the great Powers on the principal of universality, which could subsequently be settled in the General Assembly, and that delegations which supported the draft declaration would vote for that principle in the Assembly. The true interests of the Conference would be served if those delegations could find it possible to accept the declaration on that understanding. The draft declaration could be described as very mild, for in its first operative paragraph it merely invited the General Assembly to give consideration to the matter of issuing invitations. In his delegation's opinion, the Conference was fully competent to invite the General Assembly to consider such a matter. The second operative paragraph, however, which expressed the hope that States Members would endeavour to achieve the object of the declaration, constituted an appeal to all States, especially the great Powers, to try to resolve the differences which divided them, so as to achieve the wide consensus without which international law was nothing but an illusion.

48. In his delegation's view, the new proposal was a modest step towards achieving the goal of putting an end to unequal and unjust treaties, while strengthening treaty stability and the *pacta sunt servanda* principle.

49. Mr. PINTO (Ceylon) said that his delegation was perhaps unique in the consistent support it had accorded to the compulsory procedures proposed in article 62 *bis* and the principle of universality set out in article 5 *bis*. When both those proposed new articles had been rejected, his delegation had sought achievement rather than compromise; it was therefore most gratified that the sponsors of the new proposal had been able to submit a document which represented a modest step towards both goals. Although the Ceylonese Government intended to continue working towards the final achievement of these ends, his delegation agreed with others that the ten-State proposal was the only one likely to command the wide measure of consent which would permit the efforts of the International Law Commission and the Conference to be crowned with success.

50. Mr. KEARNEY (United States of America) said that his delegation would vote for the new compromise solution. The sponsors, especially the Nigerian delegation, were to be commended for their strenuous efforts to bring the Conference to a successful conclusion. The United States delegation shared the views expressed by a variety of representatives concerning the interpretation to be given to the draft declaration and also shared the hope of the Tanzanian delegation that the great Powers would succeed in resolving their differences.

51. Mr. HUBERT (France), referring to the second part of the combined proposal, said that although his delegation associated itself with the many tributes paid to the sponsors for their efforts, it found the compromise unsatisfactory.

52. According to paragraph 1 of the proposed new article, the compulsory jurisdiction of the International Court of Justice, if it was indeed compulsory, applied only to articles 50 and 61. But it was well-known how imprecise were the rules referred to in those articles, and France could not accept even the Court's interpretation of peremptory norms of general international law, or agree that the Court should thus become a kind of international legislature. Moreover, the other articles in Part V of the convention were not placed under any compulsory jurisdiction, but were made subject only to a conciliation procedure. Such a procedure was totally inadequate for the settlement of disputes; even if only one party refused to accept the conclusions of a conciliation commission, disputes arising from articles 49 or 59, which were of vital importance, might remain unsettled for an indefinite period, thus poisoning international relations. That serious shortcoming threatened the balance of the entire convention and the French delegation would vote against the ten-State proposal.

53. M. WERSHOF (Canada) said that his delegation would vote in favour of the new proposal if it were

put to the vote in its entirety. Canada greatly appreciated the efforts made by the sponsors, especially the delegation of Nigeria.

54. In voting for the "package deal", his delegation understood that the new paragraph of the preamble to the draft declaration did not affect the obligation or right of every State Member of the United Nations to treat on its merits any proposal that might be made in the General Assembly in pursuance of the declaration. With regard to the revised version of paragraph 1 of the proposed new article, his delegation understood the sponsors to intend it to mean compulsory jurisdiction of the International Court of Justice unless the disputing parties agreed to submit to arbitration instead.

55. Although his delegation did not consider that the new article provided a fully satisfactory method of settling disputes under Part V, it would vote for the compromise, because the new article was much better than article 62 by itself.

56. Mr. ALVAREZ TABIO (Cuba) said that his delegation had consistently expressed the view that the convention should be open for signature by all States without discrimination and that, where settlement procedures were concerned, the convention could not go beyond Article 33 of the Charter, so that no compulsory conciliation or arbitration was acceptable. Since the draft declaration dealt with the problem of universality in an unsatisfactory way and since the notion of compulsory jurisdiction was introduced in the new article, his delegation would vote against the proposal.

57. Mr. USTOR (Hungary) said he was not clear as to the interpretation of the provisions of the draft declaration. The first paragraph of the preamble expressed the conviction of the Conference that multilateral treaties which dealt with the codification and progressive development of international law or the object and purposes of which were of interest to the international community as a whole should be open to universal participation and, in the second operative paragraph, the Conference expressed the hope that the States Members of the United Nations would endeavour to achieve the object of the declaration. The Conference was attended by plenipotentiary representatives of States; the question therefore arose how far the declaration would be binding upon States in the General Assembly. Would the overriding principle of good faith bind them when voting at the twenty-fourth session? Was he right in thinking that the favourable votes which would be cast for the declaration in the Conference would have the effect that the States whose plenipotentiaries had voted in favour of the declaration would be thereby prevented from casting contrary votes on the same question in the General Assembly? Perhaps the President could confirm that States voting for the declaration would be under at least a moral obligation not to vote against the principles of the declaration in the General Assembly.

58. The PRESIDENT said that it was not for him to give an opinion on the matter. The Hungarian representative would no doubt find an answer to his question in the statements made during the debate.

59. Mr. BIKOUTHIA (Congo, Brazzaville) said that his delegation always advocated compromise, but only acceptable compromise. The new proposal, however, seemed to be compromise for the sake of compromise, and his delegation would vote against it, unless a separate vote was taken on the draft declaration.

60. Mr. DE LA GUARDIA (Argentina) said that the solution presented to the Conference after great efforts was a satisfactory compromise, for which his delegation would vote.

61. Mr. BILOA TANG (Cameroon) said his delegation supported the proposal for a separate vote on the draft declaration. Cameroon upheld the principle of universality, but could not prejudge what its delegation's position would be when the matter was raised at the twenty-fourth session of the General Assembly. It would therefore abstain in a separate vote on the draft declaration.

62. With regard to the proposed new article, it was indeed a compromise, but not a satisfactory one. Articles 50 and 61 related to very controversial questions, and yet it was proposed that any party to a dispute could apply unilaterally to the International Court of Justice. Moreover, only compulsory conciliation was provided for the settlement of other disputes under Part V. His delegation would therefore vote against the proposed new article.

63. Mr. HAYTA (Turkey) said that his delegation had for years advocated compulsory jurisdiction as an effective and impartial means of settling disputes. It could not therefore lend its full support to the new proposal, but would not oppose it, because at least disputes under articles 50 and 61 were to be submitted to the International Court of Justice. On the other hand, his delegation expressed reservations against the failure to submit other articles in Part V to adequate jurisdictional guarantees, and would therefore abstain in the vote.

64. Mr. GROEPPER (Federal Republic of Germany) expressed his appreciation of the efforts made by the authors of the compromise proposal. His delegation had always held the view that it was not the task of the Conference to seek solutions to general political questions. It was particularly inappropriate for it to go into the purely political problem of the existence of disputed territorial entities in international law. In order to facilitate the work of the Conference, his delegation would not oppose the compromise solution, including the draft declaration on universal participation in the convention, on the understanding, however, that the declaration did not bind the General Assembly to issue invitations to specific entities and did not prejudge the position of States in that respect.

65. The ten-State proposal showed some improvement with regard to settlement procedures, but those procedures were less satisfactory than those proposed in article 62 *bis*.

66. His delegation would abstain in the vote on the proposal.

67. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that the USSR delegation had suggested that the sponsors might consider submitting the second part of their proposal as an optional protocol. There had been no response to that suggestion, and perhaps that silence implied tacit consent. If the proposal were put to the vote as it stood, his delegation would vote against it; otherwise, it would reconsider its position.

68. Mr. WYZNER (Poland) said that, although his delegation appreciated the efforts made by the sponsors, it unfortunately could see no balance between the first and second part of the "package deal". His delegation had delayed its explanation of vote, in the hope that some member of the group of States which had long opposed the principle of universality would give some indication of an intention to reconsider their attitude. But no such indication had yet been given; on the contrary, an influential delegation had stated that the declaration would not be binding either on the General Assembly or on States. Poland would therefore vote against the proposal if it were put to the vote in its present form.

69. Mr. N'DONG (Gabon) said that his delegation appreciated the sponsors' efforts, but could not vote for the proposal, because the choice of articles 50 and 61 for submission to the compulsory jurisdiction of the International Court of Justice was injudicious. Neither propounders of legal doctrine nor members of the International Law Commission, nor representatives at the Conference were agreed on what constituted rules of *ius cogens*, and to submit the settlement of disputes concerning such rules to the jurisdiction of the Court was a risk which Gabon refused to take.

70. Mr. BLIX (Sweden) said that his delegation's active endeavours to bring about the solution of the problems of settlement procedures and universal participation in the convention made it particularly appreciative of the difficulties encountered by the sponsors of the proposal now before the Conference. They had not achieved a final solution of either of those vital issues and, indeed, such a solution was impossible at the present time, but although no immediate solution had been found for the problem of universal participation, an opportunity for such a solution in the General Assembly was offered; on the other hand, the problem of settlement procedure had to be solved immediately, for if no appropriate procedure were included in the convention now, it would be difficult to do anything about it in the future. Minimum solutions had been provided for both issues, and it was to be hoped that better ones would be reached subsequently.

71. Mr. ELIAS (Nigeria) said that the sponsors could not accept either the proposal for a separate vote on the draft declaration or the suggestion that the second part of the proposal should become an optional protocol.

72. The PRESIDENT invited the Conference to vote on the draft declaration, proposed new article and draft resolution submitted by ten States (A/CONF.39/L.47 and Rev.1).

At the request of the Nigerian representative, the vote was taken by roll-call.

Nigeria, having been drawn by lot by the President, was called upon to vote first.

In favour: Nigeria, Norway, Pakistan, Panama, Portugal, San Marino, Senegal, Singapore, Spain, Sudan, Sweden, Switzerland, Trinidad and Tobago, Tunisia, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Yugoslavia, Zambia, Argentina, Austria, Barbados, Belgium, Cambodia, Canada, Ceylon, Chile, Colombia, Congo (Democratic Republic of), Costa Rica, Cyprus, Denmark, Ecuador, El Salvador, Finland, Ghana, Greece, Guyana, Holy See, Honduras, Iceland, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kenya, Kuwait, Lebanon, Liberia, Liechtenstein, Luxembourg, Malta, Mexico, Morocco, Nepal, Netherlands, New Zealand.

Against: Poland, Romania, Thailand, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cameroon, Central African Republic, Congo (Brazzaville), Cuba, Czechoslovakia, France, Gabon, Hungary, Madagascar, Malaysia, Mongolia.

Abstaining: Peru, Philippines, Republic of Korea, Republic of Viet-Nam, Saudi Arabia, Sierra Leone, South Africa, Syria, Turkey, Venezuela, Afghanistan, Algeria, Australia, Bolivia, Brazil, China, Dahomey, Dominican Republic, Ethiopia, Federal Republic of Germany, Guatemala, India, Indonesia, Iran, Libya, Monaco.

The ten-State proposal (A/CONF.39/L.47/Rev.1) was adopted by 61 votes to 20, with 26 abstentions.

73. Mr. ROMERO LOZA (Bolivia), explaining his delegation's abstention on the proposed new article, observed that the title of Part V of the draft convention — "Invalidity, termination and suspension of the operation of treaties" — implied the existence of a procedure for carrying out what it proposed. In the absence of such a procedure, it was hard to say why Part V included to many articles which every delegation regarded as necessary but which few of them believed would have to be applied in practice. With the rejection of article 62 *bis* the real force of Part V had been removed, and the elimination of the procedures for arbitration and conciliation proposed in that article undermined the basic purpose of the convention. The non-inclusion of the important article 49 in the compromise proposals showed that no attempt was being made to ensure that the convention would be applied in such a way as to meet the wishes of a large number of States. In fact, Part V, and article 49 in particular, would be purely academic in character and have no practical effect.

74. Nevertheless, his delegation had instructions from the Bolivian Government to sign the convention, subject to placing on record its declaration that, first, the defective terms in which the convention had been framed meant that the fulfilment of mankind's aspirations in the matter would be postponed; and secondly, despite those defects, the rules embodied in the convention clearly represented progress and derived their inspiration from those principles of international justice which Bolivia traditionally upheld.

75. Mr. BINDSCHEDLER (Switzerland) said that, after much hesitation, his delegation had finally decided to vote in favour of the combined proposal, and he paid a warm tribute to the sponsors for achieving a formula which had proved acceptable to the largest possible number of delegations.

76. The Swiss delegation welcomed that proposal as a modest step in the direction of the acceptance of the compulsory jurisdiction of the International Court of Justice. It considered that paragraph 1 of the new article just adopted, in the form in which it now appeared, established a genuine compulsory procedure for adjudication. Under the provisions of that paragraph, every State party to the convention on the law of treaties would have the right to submit, by application, to the International Court of Justice any dispute with another party concerning the application or the interpretation of article 50 or of article 61. That first step which had now been taken gave great promise for the future. His delegation's hopes in that direction were strengthened by the vote at the 29th plenary meeting on the Swiss proposal for a new article 76 (A/CONF.39/L.33), which showed that forty-one States had favoured that proposal and thirty-six had opposed it.

77. At the same time, his delegation did not regard the new article as a satisfactory provision on the settlement of disputes; it had voted in favour of it simply because it was better than nothing. The new article made provision only for a conciliation procedure with regard to disputes arising from the application or the interpretation of the articles of Part V other than articles 50 and 61. Questions of the application and interpretation of the grave provisions contained in such articles as articles 48, 49 and 59 should undoubtedly have been left for settlement by the International Court of Justice. The conciliation procedure embodied in the new article, apart from having the defects to which he had already drawn attention at a previous meeting, provided no assurance of an objective and final decision to such disputes.

78. His delegation wished to place on record that, should Switzerland sign the convention on the law of treaties, it would do so subject to the reservation that the provisions of all the articles in Part V would only apply in the relations between Switzerland and those States parties which, like Switzerland, accepted the compulsory jurisdiction of the International Court of Justice, or compulsory arbitration, for the settlement of any dispute arising from the application or the interpretation of any of those articles.

79. Mr. MARESCA (Italy), explaining his vote in favour of the proposal, said he wished at the same time to pay a tribute to the efforts of its sponsors. The Italian delegation had consistently maintained that a procedure for the settlement of disputes on the lines of article 62 *bis* constituted an essential safeguard in respect of the provisions of Part V. It would therefore have wished for a more strict and more complete procedure than that embodied in the new article. That article nevertheless constituted a remarkable step forward, in that it made provision for the compulsory

jurisdiction of the International Court of Justice in respect of disputes arising from articles 50 and 61, and for compulsory conciliation in respect of those arising from all the other articles in Part V. His delegation continued to believe, however, that a settlement procedure was necessary for the application and interpretation of such articles as articles 49 and 59 and expressed the hope that bilateral treaties would make provision for such procedure.

80. His delegation's acceptance of the declaration on universal participation was in keeping with Italy's consistent stand that the General Assembly was alone competent to invite States to participate in the convention. The recommendation made to the General Assembly in that declaration had its value but it also had its limits. It did not commit the General Assembly in any way and the General Assembly remained sovereign to take its future decisions objectively in the light of circumstances. The Italian delegation to the present Conference could undertake no commitment regarding the attitude of the Italian delegation to the General Assembly.

81. Mr. BAYONA ORTIZ (Colombia), explaining his delegation's vote in favour of the declaration and the new article, said that his delegation had consistently maintained that the question of universality was a political issue which fell within the competence of the General Assembly. Although his delegation had voted in favour of the declaration, it wished to place on record that its vote did not prejudice in any way the position of the Colombian delegation to the General Assembly in any future debate on the question of universal participation.

82. With regard to the new article on procedures for adjudication, arbitration and conciliation, his delegation had accepted it as a compromise solution, solely because it represented the maximum that could be obtained at the present Conference. Its text, however, did not in any way satisfy his delegation's aspirations as one of the sponsors of the article 62 *bis* approved by the Committee of the Whole.

83. Although the new article just adopted represented some progress, his delegation would have preferred provision to be made for the compulsory settlement by the International Court of Justice of disputes relating to the application and interpretation of such articles as article 49 and article 59; the absence of such provision was a gap in the convention which could later create difficulties in treaty relations between States.

84. He was glad to be able to announce that he had instructions from his Government to sign the convention on the law of treaties.

85. The PRESIDENT said that, if there were no objection, he would consider that the Conference agreed to postpone any further explanations of vote until the next meeting and to proceed with the consideration of the final provisions.

It was so agreed.

120. Mr. USTOR (Hungary) said that his delegation would vote for the report, subject to the same reservations as those expressed in its paragraph 6.

121. Mr. KEARNEY (United States of America) said that in the view of his delegation, it was enough that the countries whose credentials had been attacked had been duly invited to participate in the Conference by the Secretary-General under General Assembly resolution 2166 (XXI).

The report of the Credentials Committee (A/CONF.39/23/Rev.1) was adopted unanimously.

The meeting rose at 8.20 p.m.

THIRTY-FIFTH PLENARY MEETING

Thursday, 22 May 1969, at 12 noon

President: Mr. AGO (Italy)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 (continued)

Draft declaration on universal participation in and accession to the convention on the law of treaties, proposed new article on procedures for adjudication, arbitration and conciliation and draft resolution (resumed from the previous meeting)

Explanations of vote

1. The PRESIDENT invited representatives to explain their votes on the draft declaration, new article and draft resolution (A/CONF.39/L.47 and Rev.1) adopted at the previous meeting.

2. Mr. PHAM-HUY-TY (Republic of Viet-Nam) said that, from the legal point of view, there was no link, in his delegation's opinion, between the two quite different questions dealt with in document A/CONF.39/L.47 and Rev.1. But the Conference had had to vote on the two questions together. In the circumstances, his delegation had abstained in the vote on the proposals in the document. On the one hand, it disapproved of the draft declaration on universal participation in and accession to treaties, but on the other, it had already supported article 62 *bis* and was still in favour of the part of the proposal relating to procedures for adjudication.

3. Mr. HU (China) said that the text proposed in document A/CONF.39/L.47 and Rev.1 was in two parts, which were independent of each other. The document had been submitted as a compromise formula. Since it had been impossible to take a vote by division, the Chinese delegation had been placed in a very difficult position, as it was in favour of the second part and strongly opposed to the first. It had therefore decided

to abstain, but had reserved the right to explain its vote. Its abstention should in no way be construed as indicating approval of the first part of the proposal, since it was opposed to the declaration on the principle of universality, which it regarded as a mere recommendation with no mandatory force. The General Assembly remained the sole judge. He reserved his Government's right to express its view when the question of universality was discussed in the General Assembly.

4. Mr. SHUKRI (Syria) said he had abstained in the vote on document A/CONF.39/L.47 and Rev.1 because the formula did not go as far as his delegation would have wished where the principle of universality was concerned, and further than it would have wished on the question of the settlement of disputes. It had not, however, cast a negative vote, because it had wished to contribute to the success of the convention and to express its appreciation of the arduous efforts of the representative of Nigeria and his colleagues. If a separate vote had been taken on the declaration, the Syrian delegation would have voted in favour of it; but it regarded the declaration as merely a minimum. The Syrian Government would not only strive to achieve the object of that declaration at the next session of the General Assembly, but would also continue its efforts in all organizations and conferences to bring about the universal recognition of the principle of universality; for his country that was a matter of principle.

5. Mr. KHLESTOV (Union of Soviet Socialist Republics) explained that his delegation had voted against document A/CONF.39/L.47 and Rev.1 as a whole because the vote had not been taken by division. The document was composed of two unbalanced parts, and the second part, which provided for recourse to the International Court of Justice and had serious financial implications, was unacceptable.

6. The declaration contained merely a feeble appeal to the United Nations and the General Assembly to ensure that the question of universality should remain under consideration. Nevertheless, it had been adopted, and sixty-one States, including a large number of delegations of western States, had voted in favour of it. That meant that the Conference recognized the existence of the principle of universality in relation to multilateral treaties. Recognition of that principle was clearly expressed in the first paragraph, and confirmed what the USSR delegation had so often advocated. The USSR delegation supported the principle and the declaration.

7. Mr. CARMONA (Venezuela) said his delegation had already explained its position on the problem of arbitration and compulsory adjudication in the Committee of the Whole. That position had not changed. The Venezuelan delegation had taken the view that it should not intervene to influence the result of the vote on document A/CONF.39/L.47 and Rev.1 at the previous meeting. It had abstained, leaving the final decision to its Government.

8. Mr. FUJISAKI (Japan) said he wished to express his appreciation of the efforts made by those representatives who, until the last moment, had worked so hard to

arrive at the compromise formula submitted in document A/CONF.39/L.47 and Rev.1. Since it was a compromise, it was only natural that that formula did not entirely satisfy anyone and Japan was no exception in that respect. His delegation had voted for the formula, not because it fully supported the contents of the compromise proposal, but solely because it believed that it was the only way of saving the convention as a whole.

9. Mr. ALVAREZ (Uruguay) explained that his delegation had voted for the text submitted in document A/CONF.39/L.47 and Rev.1 because it was anxious that the Conference should reach agreement on the questions that were the subject of controversy. The proposal was a first move towards recognizing compulsory adjudication as a means of settling international disputes, but its scope was too restricted and bore no relation to the position traditionally adopted by his Government for many years, which his delegation had explained on numerous occasions during the discussion. The formula did however make a positive contribution to the progressive development of international law and substantially improved the machinery provided for in article 62.

10. His delegation's attitude towards the principle of universality did not in any way commit his Government with regard to the position it might subsequently adopt when the principle in question was again discussed in the General Assembly.

11. Mr. SAULESCU (Romania) said that his delegation had emphasized from the very beginning of the Conference's work that the convention could only be effective in so far as it contained a provision establishing the principle of universality. For that reason his delegation had joined the other delegations which had submitted amendments to that effect to the Committee of the Whole and to the plenary Conference; it considered that the convention was, by definition, a multilateral treaty of interest to the entire international community. The Conference had unfortunately decided differently by adopting at the previous meeting the draft declaration on universal participation in and accession to the convention on the law of treaties.

12. His delegation realized that the draft declaration had certain merits, although it was still far from what should have been included in a convention of world-wide effect. He therefore desired to express his appreciation to the sponsors of the draft declaration, and in particular to the representative of Nigeria. If the draft declaration had been put to the vote separately, Romania would have voted for it.

13. In the absence of a separate vote, his delegation had had to take a position on the proposals as a whole. It could not support the principle of the procedures for the settlement of disputes included in the compromise proposal. It had on several occasions explained why it supported the procedures provided for in article 62 and why it rejected machinery for compulsory settlement set up in advance. In those circumstances, his delegation had been compelled to vote against the proposals submitted together in document A/CONF.39/L.47 and Rev.1.

14. Mr. SINHA (Nepal) said he had voted for the draft declaration, the new article and the draft resolution.

His delegation had, however, voted against article 62 *bis*: the Conference had been deeply divided on the issue of compulsory arbitration in case of dispute; moreover, the provision proposed in article 62 *bis* had been defective in respect of many important points. In particular, his Government did not like the idea of *ad hoc* tribunals giving decisions on vital but nebulous questions of *jus cogens*. Such tribunals might well have given conflicting decisions, particularly as there was no institution to make them uniform. Moreover, the proposed article 62 *bis* adopted a negative attitude towards the International Court of Justice which was after all the judicial organ of the world order. Again, the adoption of that provision would have prevented a considerable number of countries from acceding to the convention.

15. On the other hand, the new article just adopted on procedures for adjudication, arbitration and conciliation, although not ideal since it was a compromise solution, at least filled some of the gaps on the institutional side of the convention. It restored confidence in the International Court of Justice; although many delegations had reason to doubt the wisdom of some decisions of the International Court, the Court was an international creation and could not therefore be blamed for its merely congenital weaknesses. In future it was sure to grow in wisdom and stature.

16. His delegation had also voted for the draft declaration contained in document A/CONF.39/L.47 and Rev.1. Although the declaration did not guarantee participation by all nations in multilateral conventions of interest to the international community as a whole, it nevertheless emphasized the principle of universality. For his delegation at all events the declaration was morally binding on States; they would feel themselves called on to bring it to fruition by voting for it in the General Assembly. Nepal, at least, would not fail in its duty in that respect. It was a tragedy that at that stage, when article 1 of the convention made it applicable to treaties concluded between all States and article 5 empowered all States to conclude treaties, the convention did not provide that it was open to all States. It was because of its desire to correct that injustice that his delegation had associated itself with the sponsors of a new article laying down the principle of universality (A/CONF.39/L.36). That article had not been adopted, but he was convinced that the principle of universality would eventually triumph and his delegation would continue to work to that end.

17. His delegation had not voted against the so-called "Vienna formula", which remained the only one acceptable in the circumstances, and had simply abstained.

18. As a result of the adoption of the compromise proposal (A/CONF.39/L.47 and Rev.1) which had provided a happy solution to the crisis in the Conference's work, the convention on the law of treaties was manifestly a success.

19. Mr. SEOW (Singapore) said that in his view the draft declaration, the new article and the draft resolution contained in document A/CONF.39/L.47 and Rev.1 represented a genuine attempt to bridge differences

of opinion so deep that they had threatened to bring about the failure of the Conference. His delegation had therefore wished to support the proposals in which those efforts had resulted, primarily in order to ensure the success of the convention. He wished to pay a tribute to the sponsors of those compromise solutions.

20. Mr. JAGOTA (India) said he wished to explain exactly why his delegation had abstained in the vote at the preceding meeting on the proposals contained in document A/CONF.39/L.47 and Rev.1.

21. The dissensions that had made themselves felt in the Conference related essentially to articles 5 *bis* and 62 *bis*. The Indian delegation had supported the principle of article 5 *bis*, and its various formulations, without involving itself in any political issue arising from those proposals. As to article 62 *bis*, his delegation had been opposed to the idea of compulsory settlement procedures, and had been determined to do everything possible to prevent its adoption. The proponents of article 62 *bis* were equally determined on the opposite course, and had spent the year between the two sessions of the Conference in intensive lobbying to ensure that the article was accepted. In the process the Asian and African States had been deeply divided. When both article 5 *bis* and article 62 *bis* had been rejected the Conference had been in a mood of despondency. Yet the Conference had adopted the basic proposal of the International Law Commission by a very large majority, much larger than that by which it had adopted the proposals in document A/CONF.39/L.47 and Rev.1. Thus it could not be said that the seventeen years of work by the International Law Commission had been in jeopardy. All that had been in jeopardy had been the new proposals making additions to the draft articles prepared by the International Law Commission.

22. At that juncture, the Asian and African States, on the initiative of Nigeria and India, among others, had sought to find a fair and reasonable solution. The delegations of Nigeria and India had given shape to certain ideas that were regarded as representing a basis for negotiation, and so document A/CONF.39/L.47 had been born.

23. India had intended to support the proposal if it had received broad support from all groups in the Conference, especially the Asian and African States. Since the proposal, if adopted, would have imposed definite legal obligations upon Governments, the promotion of the proposal had had to be left to those delegations whose Governments were already prepared to go beyond article 62. Consequently the Indian delegation had been unable to join the other delegations concerned in promoting the proposal without consulting the Government of India. But the Indian delegation had decided that in any case it would not oppose it. And if the proposal had received widespread support, his delegation had decided to support it also, and to recommend it to the Indian Government for acceptance. Unfortunately, when the proposal had been put to the Asian-African group, it had not received widespread support, and it consequently became impossible to present it to the Conference on behalf of that group. Thereafter, the sponsors of the proposal had

decided to put it to the Conference on their own behalf at the 34th plenary meeting. The Indian delegation's position had remained unchanged. The result of the vote — 61 votes to 20, with 26 abstentions — had clearly indicated the measure of support and the measure of opposition and caution with which the proposal had been received. India had neither supported nor opposed the proposal.

24. His delegation had not wished to oppose it principally because of its close association with the subject-matter of the proposal, and because of its deep respect for the sponsors, the representative of Nigeria and the representative of Ghana. It must also be admitted that the proposal had restored hope to the Conference.

25. The Indian delegation would continue to adopt a positive attitude towards the convention on the law of treaties as a whole, and would vote for it. India would be guided by the convention in its treaty relations, in anticipation of the entry into force of the convention. And if in the near future the sixty-one States which had supported the proposals contained in document A/CONF.39/L.47 and Rev.1 became parties to the convention without any reservation whatever on Part V, the Indian Government might very well also be inclined to follow their example.

26. Miss LAURENS (Indonesia) said that her delegation had abstained in the vote on the compromise formula consisting of the draft declaration, the new article and the draft resolution.

27. The Indonesian delegation had come to the Conference prepared to accept in principle the draft articles presented by the International Law Commission after so many years of work. At the first session of the Conference, Indonesia had stated on several occasions that it was quite satisfied with that text and was ready to subscribe to it without major changes. At the second session, her delegation had restated its position, which remained unchanged, on such major unsolved issues as the principle of universality and the compulsory settlement of disputes arising from Part V of the convention and from the interpretation and application of the other articles in general. At the plenary stage, as in the Committee of the Whole, her delegation had voted in accordance with the position it had adopted from the very beginning.

28. However, the compromise formula on which the Conference had taken action at the previous meeting represented something new. Indonesia had unequivocally stated its position, which was that it could not agree to the insertion in the convention on the law of treaties of a provision on the compulsory settlement of disputes. It had nevertheless refrained from opposing the draft declaration, the new article and the draft resolution presented together in document A/CONF.39/L.47 and Rev.1, because that formula represented a final attempt to find a solution acceptable to the great majority. In that connexion, her delegation wished to express its appreciation to those who had carried through the negotiations. Moreover, the draft declaration forming part of the proposal was quite acceptable to Indonesia. That being the case, her delegation had not wished to

stand in the way of the efforts undertaken by a number of friendly delegations and had simply abstained. It wished nevertheless to make it clear that, had there been a separate vote, it would have voted against what was in effect a new article 62 *bis*.

29. In any case, her delegation considered the convention as a whole to be acceptable and it would therefore vote in favour of it.

30. Mr. RAMANI (Malaysia) said that his delegation had voted against the compromise formula (A/CONF.39/L.47 and Rev.1) because it considered the inclusion of a declaration and a new article in a single proposal to be an unusual procedure.

31. If the sponsors had not objected to a separate vote, the Malaysian delegation would have supported the draft declaration, because the Conference, having been convened by the General Assembly, should leave it to the General Assembly to decide which States should be invited to participate in the convention on the law of treaties.

32. During the consideration of article 62 *bis*, the Malaysian delegation had already explained why it objected to the procedure laid down in that article. It continued to believe that the world had not yet reached the stage where it could accept a compulsory arbitral procedure or international jurisdiction.

33. The basic principle of international law was that every State must respect the dignity and independence of other States. There was no common ground beyond that principle. Every State applied that principle in its own way and every State had applied it in a different way. The declaration adopted by the Conference at the previous meeting jeopardized that essential principle, on which the United Nations Charter was based. For, when referring to the role of the Security Council in the pacific settlement of disputes, the United Nations Charter did not provide that legal disputes must be submitted to the International Court of Justice; it merely stated that, in making its recommendations, the Security Council should take into consideration that legal disputes should as a general rule be referred to the International Court of Justice.

34. Moreover, adoption of the new article had *ipso facto* extended the jurisdiction of the International Court of Justice, under Article 36, paragraph 1, of its Statute, to disputes arising from the convention. Accordingly, in the case of a dispute between two States concerning the existence of a norm of *jus cogens* or on the question whether a new norm had emerged, all the parties to the convention had a right to be heard by the International Court under Article 63 of its Statute. That argument should provide food for thought to those delegations which had expressed undue enthusiasm following the adoption of the compromise formula.

35. When the time came to sign the convention, the Government of Malaysia would reserve its position on that article in order to refute in advance arguments based on estoppel.

36. Mr. WYZNER (Poland) said that he had voted against the proposals contained in document

A/CONF.39/L.47 and Rev.1 simply because, in the opinion of the Polish delegation, they did not represent a really balanced compromise.

37. He noted, however, that the draft declaration on universal participation in and accession to the convention on the law of treaties had been approved by an overwhelming majority. It gave him especial satisfaction that the declaration stated the principle of universality as clearly as it had previously been stated in draft article 5 *bis*. Moreover, the declaration contained a particularly important element in that it invited the General Assembly to ensure the widest possible participation in the convention. He wished to say that his delegation fully approved of the declaration and would have voted for it if it had been put to the vote separately.

38. Mr. MITSOPOULOS (Greece), explaining his delegation's vote, said that the compromise text adopted at the previous meeting was not satisfactory; the Greek delegation had always considered that the Conference's task was limited to the codification of the law of treaties and that it was therefore not competent to deal with highly political problems such as the status and legal capacity of certain territorial entities which were not recognized by the great majority of States. Moreover, the Greek delegation did not think it possible to trade legal principles against political considerations without impairing the quality and efficacy of the new system of written international law elaborated by the Conference.

39. Nevertheless, in view of the desire of most delegations to safeguard the work accomplished by the Conference, the Greek delegation had voted in favour of the compromise formula. He need hardly say that in approving that formula, his delegation was not entering into any undertaking; moreover, his powers did not permit him to commit Greece with regard to the question dealt with in the first part of the compromise formula. That question must be examined at the next session of the General Assembly, without prejudice to the right of every Member State to decide freely and without any prior obligation.

40. Mr. REY (Monaco), explaining his vote, said that the delegation of Monaco had made considerable efforts to introduce the rule of morality into the international law of obligations, to find a reasonable and clear definition of public order in the form of *jus cogens* and to make it possible to establish and organise a real system of settlement for any disputes that might arise in the future.

41. The gulf separating the results obtained and the great hopes which had been raised by the opening of the Conference had prevented his delegation from supporting the compromise text submitted.

42. For various reasons, his delegation had not voted against the text. In the first place, most of its sponsors were developing countries, and the formula showed that they were aware of the considerable part played by conciliation in international relations. Moreover, a real system of compulsory settlement — limited, it was true, but of great moral significance — had been devised for

the first time, a system entrusted to the International Court of Justice which remained the finest achievement of international law and jurisdiction. Lastly, his delegation had thought that it was not possible to do better in existing circumstances and that the present wording of the compromise formula could always be improved in the future.

43. Mr. YU (Republic of Korea) said that his delegation had abstained because it was not satisfied with the present wording of the compromise formula, which combined two different questions of substance.

44. His delegation could not accept the idea contained in the draft declaration but would have been prepared to vote in favour of the second part of the formula, relating to the compulsory procedures for the settlement of disputes arising from the application of Part V of the convention.

45. Since, however, the vote had been taken on both questions at the same time, his delegation had considered it preferable to abstain.

46. Mr. SMEJKAL (Czechoslovakia), explaining his negative vote, said that his delegation's attitude had been determined mainly by the fact that, although that part of the proposal relating to article 62 *bis* and the proposed declaration on universality did not balance one another, the two proposals had been submitted as a compromise formula.

47. The Czechoslovak delegation appreciated the efforts made by certain delegations and, if a motion for a separate vote had been accepted, it would have voted without hesitation in favour of the declaration. It regretted that it should not have been possible to arrive at a solution generally acceptable to the majority of States and one which would have made it possible to make decisive progress in the field of international relations. Nevertheless, his delegation was optimistic and hoped that the General Assembly of the United Nations would take the necessary measures to create a climate favourable to the work of exceptional importance which the Conference had just completed.

48. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that his delegation had voted against the proposed solution because it did not regard the proposed formula as a genuine compromise that took the opinions of all parties into account.

49. Since the sponsors of that formula had refused to convert the second part of the text into an optional protocol, his delegation had voted against the proposed solution.

50. If the motion for division had been accepted, his delegation would have voted in favour of the declaration, which proclaimed a principle of vital importance.

The meeting rose at 1 p.m.

THIRTY-SIXTH PLENARY MEETING

Thursday, 22 May 1969, at 3.30 p.m.

President: Mr. AGO (Italy)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 (continued)

Draft declaration on universal participation in and accession to the convention on the law of treaties, proposed new article on procedures for adjudication, arbitration and conciliation and draft resolution (continued)

Explanations of vote (continued)

1. The PRESIDENT said that the representative of Algeria wished to explain his vote on the draft declaration, new article and draft resolution (A/CONF.39/L.47 and Rev.1) adopted at the 34th plenary meeting.

2. Mr. KELLOU (Algeria) said that his delegation's abstention in the vote should not be interpreted as a refusal to accept the compromises necessary to enable the Conference to arrive at a general agreement. His delegation greatly appreciated the efforts made by the delegation of Nigeria to lead the Conference out of an impasse.

3. The draft declaration (A/CONF.39/L.47 and Rev.1) was acceptable to his delegation despite its imperfections, but the new article on procedures for adjudication, arbitration and conciliation was not, since it provided for a compulsory procedure for the settlement of disputes which did not meet the objections put forward by his delegation.

Report by the Chairman of the Drafting Committee

4. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had only been able to devote one meeting to the examination of the declaration, new article, annex and resolution adopted at the 34th plenary meeting and, in the short time available, it had not been able to give to those texts the same attention as it had given to other provisions of the convention.

5. The Drafting Committee had therefore confined itself to essential drafting changes, of which he need mention only the change in the title of the declaration. The title in the proposal adopted by the Conference (A/CONF.39/L.47 and Rev.1) was "Declaration on Universal Participation in and Accession to the Convention on the Law of Treaties". The Drafting Committee had taken the view that the adjective "universal" could not be applied to "accession". Accession was only one of several means whereby a State could express its consent to be bound by a treaty. To refer to accession in the title could thus appear to exclude other means of expressing consent to be bound, such as ratification or approval. The Drafting Committee had therefore

amended the title of the Declaration to read: "Declaration on Universal Participation in the Vienna Convention on the Law of Treaties".

6. The PRESIDENT said that, if there were no objection, he would take it that the Conference confirmed its adoption of the new article 66,¹ entitled "Procedures for judicial settlement, arbitration and conciliation", and the annex to the convention, in the form in which they had emerged from the Drafting Committee.

It was so agreed.

7. The PRESIDENT said that, if there were no objection, he would take it that the Conference also confirmed its adoption of the "Declaration on Universal Participation in the Vienna Convention on the Law of Treaties" and the "Resolution relating to article 66 of the Vienna Convention on the Law of Treaties and the Annex thereto" in the form in which they had emerged from the Drafting Committee.

It was so agreed.

8. Mr. SHUKRI (Syria) noted that the resolution adopted at the 34th plenary meeting and now confirmed by the Conference provided that the United Nations should bear the expenses of the conciliation commission to be established under article 66 and the annex thereto. He asked the Secretariat whether that provision would cover the case of a non-member of the United Nations involved in a dispute submitted to the conciliation commission.

9. Mr. WATTLES (Secretariat) said that the question of the expenses involved in the conciliation procedure would, under the resolution adopted by the Conference, be submitted to the General Assembly. It would be for the Assembly to lay down how those expenses should be borne. The terms of the resolution made no distinction between Members and non-members of the United Nations.

10. Mr. KHLESTOV (Union of Soviet Socialist Republics) said he wished to place on record that his delegation's position on the declaration, the new article 66, the annex and the resolution was the same as that which had already been placed on record in respect of the ten-State proposal (A/CONF.39/L.47 and Rev.1) which the Conference had adopted at its 34th plenary meeting.

11. Mr. DELEAU (France), referring to the reservations made by his delegation at a previous meeting regarding the financial implications of the conciliation procedure, asked that those reservations should also be placed on record.

Adoption of the Convention on the Law of Treaties

12. Mr. YASSEEN, Chairman of the Drafting Committee, said that, in pursuance of rule 48 of the rules of procedure, the Drafting Committee submitted to the

¹ This was the number allotted to the new article adopted at the 34th plenary meeting when the articles were renumbered.

Conference the complete draft of the Vienna Convention on the Law of Treaties (A/CONF.39/22 and Add.1 to 6 and A/CONF.39/22/Amend.1).

13. The numbering of the articles was provisional. He suggested that the Conference leave to the Secretariat the responsibility for ensuring, after the adoption of the convention, that all the articles were correctly numbered and for making any corrections to those numbers that might prove necessary.

14. The PRESIDENT invited those representatives who wished to do so to explain their votes before the vote on the convention as a whole.

15. Mr. HUBERT (France) said that, as the Conference was about to conclude its work, his delegation wished first to pay a tribute to the important work accomplished by the International Law Commission. The Commission's draft, which had provided the basis for the Conference's discussions, was the fruit of long, scholarly and frequently successful endeavour. Those parts of the draft which represented codification properly so called merited unanimous approval. The only question was whether, in a commendable desire to achieve perfection, the authors of that draft had not sometimes ended by raising problems of such complexity that they had been a drag on the Conference's deliberations.

16. No one would be surprised if he mentioned first the provisions concerning *jus cogens*; it was no doubt a lofty concept but it was liable to jeopardize the stability of treaty law, which was a necessary safeguard in inter-State relations. On that point, even the best conceived procedures for the settlement of disputes, even recourse to the International Court of Justice, could not make up for the lack of precision in the drafting of the texts. In consequence, the judge would be given such wide discretion that he would become an international legislature and that was not his proper function.

17. If provision had been made for the jurisdiction of the International Court in disputes arising from the other articles of Part V, in particular those relating to coercion by the threat or use of force and to fundamental change of circumstances, that would have gone a long way towards allaying the fears which had been aroused over those articles. But unfortunately, just where it would have been most valuable, the compulsory jurisdiction of the Court had been rejected. And no provision had been made for compulsory arbitration, so that disputes of vital importance would merely be submitted to a conciliation procedure, which must be treated with the utmost reserve and which in any case could always be rendered nugatory by the action of one of the parties alone.

18. With regard to the provisions of the convention outside Part V, no clause had been included on the settlement of disputes to which they might give rise. That omission led to the remarkable situation that, apart from the articles relating to *jus cogens*, any dispute arising out of the interpretation or the application of the convention on the law of treaties could continue indefinitely, thereby causing irremediable harm to the relations between the States concerned.

19. There was nothing to be gained by passing over the disturbing deficiencies of a compromise sought with such zeal and accepted with such reticence. It was illusory to ignore the grave dangers which must inevitably follow therefrom and reckless to court such dangers. That was why the French delegation, while reiterating its country's steadfast adherence to the cause of progress in international law, would vote against a convention which was liable to raise more problems than it would solve.

20. Mrs. ADAMSEN (Denmark) said that her delegation would vote in favour of the draft convention as a whole because it agreed in general with a large number of the articles it contained. Her delegation had on several occasions, and especially as one of the sponsors of the rejected article 62 *bis*, stressed the necessity of establishing a compulsory procedure for the settlement of disputes in connexion with all the articles of Part V. Her delegation was still of the opinion that disputes arising out of any of those articles must be automatically subject to decision by an impartial third party, and the fact that the convention only provided for such a procedure to a limited extent might be expected to influence the final position which the Danish Government would take on the convention.

21. She wished to add that, when voting at the 34th plenary meeting in favour of the ten-State proposal (A/CONF.39/L.47 and Rev.1), the Danish delegation had not interpreted the draft declaration it contained as being decisive with regard to the position which Denmark would in due course take in the General Assembly or elsewhere on the subject dealt with in the declaration.

22. Mr. GALINDO-POHL (El Salvador) said that his delegation would vote in favour of the convention as a whole without prejudice to its reservations regarding some of the articles, reservations in respect of which it had already made an official statement.

23. Contemporary international law abounded in general norms but had few rules on the means of effective application and enforcement of those norms. That situation was bound to affect the convention on the law of treaties. It had, however, at least been possible to make provision for compulsory settlement of disputes arising out of the rules of *jus cogens* and that was a great step forward. Some would consider that the provision went too far; others that it did not go far enough. Viewed in its historical perspective, it could be considered as remarkable progress and would set a precedent for further progress in the same field.

24. The convention which the Conference was about to adopt did not merely codify generally accepted customs and principles; it also kept pace with contemporary changes and contained dynamic elements, such as the rules on *jus cogens*, and it would have a great influence on the international law of the future. In certain matters, such as the clause to the effect that treaty provisions might become binding through international custom, the convention went beyond its proper scope and embodied questionable pronouncements. His delegation shared the view of those who had drawn attention to the dangers arising from the imprecise formulation

of the rules on the subject of *jus cogens*, which was made dependent not on the will of individual States but on that of the international community as a whole. It was true that that community consisted of States, but the various means whereby it adopted its decisions did not always coincide with the will of individual States. His delegation had nevertheless voted in favour of the articles on *jus cogens* because it considered that they introduced a dynamic element of progressive development and recognized the international community itself as a source of legal rules. The provisions on *jus cogens* would provide judges and arbitrators with a sensitive and delicate instrument which, if used with prudence, could serve to reflect the legal conscience of mankind at every stage of its development.

25. Contemporary political issues had affected the work of the Conference, but it had been possible to surmount those difficulties by means of solutions which, although not the best from the strictly legal point of view, were politically viable. The influence which political considerations had thus exerted over a legal instrument was one more demonstration of the fact that the law derived its content from the realities of life and that it would be nothing but an academic exercise to frame rules of law on the basis of pure logic.

26. The convention on the law of treaties was the most complete and progressive example of legal co-operation, and the experience gained with its adoption would facilitate future codification work.

27. Subject to the reservations it had expressed in the course of the discussions, his delegation would vote in favour of the convention.

28. Mr. USTOR (Hungary) said that the work of the Conference and the adoption of the convention on the law of treaties was an outstanding event in the long process of codification. His delegation was glad that most of the provisions of the convention had been adopted unanimously or by large majorities and either reflected rules established in international practice or added new progressive elements to the law of treaties.

29. At the same time, the Hungarian delegation regretted that the Conference had failed to include in the convention a provision to the effect that multilateral treaties which dealt with the codification and progressive development of international law should be open to universal participation. Hungary considered that to be a valid rule of contemporary international law and one which should therefore have been given a place in any convention on the law of treaties.

30. Again, that valid rule had not been reflected in the final provisions. That was a matter which Hungary, as a socialist country, could not pass over in silence, because the final provisions as adopted excluded some socialist countries from participation in the convention, although those countries, like all States in the world, had an equal and inalienable right to participate in the codification and progressive development of international law. His delegation also had misgivings in connexion with the article that had been adopted in place of article 62 *bis*, because that article accepted the

compulsory jurisdiction of the International Court of Justice.

31. Consequently, although the Hungarian delegation appreciated the results of the Conference, it was obliged to state that the great merits of the text were heavily outweighed by the exclusion of the valid and just principle of universality. To its deep and sincere regret, it would be unable to support the convention as a whole; nevertheless, it welcomed the declaration on universal participation in the convention on the law of treaties and hoped that that declaration would be implemented fully and, most important, in good faith.

32. Mr. BRAZIL (Australia) said that his delegation would abstain in the vote on the convention as a whole; it regretted that it could not support the text that had emerged from the long labours of the Conference on the basis of the draft articles prepared by the International Law Commission. The Australian delegation considered that many of the Commission's proposals marked valuable steps in the consolidation of existing law; examples of those were articles 31 and 32² on the interpretation of treaties.

33. The fact remained that the Australian delegation had difficulties over a number of basic points. The first of those was the very flexible system of reservations adopted in articles 19 and 20,³ which was bound to tend towards the erosion of texts of conventions adopted at international conferences. The second difficult point was that of procedures for the settlement of disputes under Part V of the convention. Australia considered that binding settlement procedures were indispensable if the international community was to undertake the major steps in the development of international law proposed in Part V. It must be acknowledged that the commendable efforts of the authors of the "package proposal" went some way to meet that view, but although the Australian delegation understood the satisfaction of the majority of delegations at the compromise that had been reached, which had enabled it to achieve positive results, it had been unable to support the proposal, because it did not go far enough in certain essential respects; for example, compulsory jurisdiction did not cover the sensitive grounds of invalidity set out in articles 52 and 62.⁴

34. Finally, as his delegation had stated at the 19th plenary meeting, articles 53 and 64⁵ formulated a doctrine of *jus cogens* of unspecified content, against which Australia had voted for the reasons set out in the summary record of that meeting. In that respect, Australia shared the reservations expressed by the French representative, to the effect that, although disputes under those articles were to be referred to the International Court of Justice, the problems of imprecision had not been eliminated and gave rise to concern with regard to the stability of treaties.

35. All those matters were of great importance, and

² Formerly articles 27 and 28.

³ Formerly articles 16 and 17.

⁴ Formerly articles 49 and 59.

⁵ Formerly articles 50 and 61.

the Australian delegation would unfortunately be obliged to abstain in the vote on the convention as a whole.

36. Mr. WYZNER (Poland) said that the text of the convention which had emerged from the Conference's detailed consideration of the draft articles submitted by the International Law Commission was generally acceptable to the Polish delegation and constituted a significant example of codification and progressive development in what was perhaps the most important branch of international law. Nevertheless, some fundamentally important questions had not yet been properly solved.

37. Poland had always considered that the convention should serve the interests of all States, irrespective of their political and economic systems, and his delegation had therefore collaborated closely with many others in search of compromise solutions acceptable to all States, in the belief that the spirit of good will and co-operation would finally prevail over the particular interests of a small group of States. Nevertheless, because of the intransigent attitude taken by some delegations, the Conference had been unable to confirm in the convention itself the right of every State to participate in general multilateral treaties, the universal application of which was in the interests of the whole international community. Moreover, the convention itself had not been made open directly to all States, although the right of universal participation in it was confirmed in a separate declaration.

38. The consultations conducted during the past few days had revealed that it had been chiefly due to the stubborn attitude of one State that a formula could not be found which would make the convention open to all States forthwith. It was deplorable that the short-range political interests of that one State should have prevented the Conference from inserting in the convention a formula which would ensure the legitimate right of all States to enter into international treaty relations.

39. The Polish delegation had therefore decided to abstain in the vote on the convention as a whole and to refrain from signing the instrument. At the same time, it wished to express its confidence that the General Assembly, given a clear mandate under the declaration on universal participation in the convention, would issue the necessary invitations at its twenty-fourth session, thus opening the convention to participation by all States.

40. Mr. KHASHBAT (Mongolia) said that the convention on the law of treaties should reflect the increasing development of treaty relations between countries with different political, social and economic systems. The convention now contained some positive elements and useful provisions, but his delegation regretted that, because the legitimate principle of universality had not been included in the convention itself, the significance and value of the whole instrument was severely restricted. It was unthinkable that such an important instrument as the convention on the law of treaties, which governed the treaty relations of States, should not be open to participation by all States; it could not be denied that the convention was a multilateral treaty, the object and purpose of which were of interest to the interna-

tional community of States as a whole. As a socialist State, Mongolia regarded that shortcoming of the convention as extremely serious, and would therefore abstain in the vote on the convention as a whole and would not sign it.

41. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that his delegation would be unable to support the draft convention as it stood, for a number of reasons.

42. The convention on the law of treaties had a special character in comparison with other multilateral conventions concluded with a view to codifying rules of international law, such as, for instance, the 1961 Convention on Diplomatic Relations. Since the object of the present convention was to codify rules of international law concerning the law of treaties, and to establish rules by which the entire international community would be guided in concluding international treaties, it must be based on the principle of universality, for it was common knowledge that all States participated in treaty relations and concluded international treaties.

43. The Conference had adopted a declaration on universal participation which confirmed that principle. All delegations were to be congratulated on the emergence of the Vienna Declaration on Universality, which would become a component part of international law and would undoubtedly play a positive role in the development of international relations. Unfortunately, the principle of universality had not been duly reflected in the convention itself, a shortcoming which naturally vitiated the significance of that instrument. The USSR delegation had made great efforts from the outset of the Conference to secure the inclusion of appropriate provisions on universality in the convention, and in doing so had shown all the necessary flexibility and willingness to compromise. Nevertheless, as the result of the attitude of certain delegations which had opposed the inclusion of such provisions, the problem had not been solved satisfactorily.

44. Furthermore, the final provisions of the convention contained a formula which limited the right of all States to participate in the convention, although by rights it should be open to all States, since its object and purpose were of interest to the international community of States as a whole. The existing draft therefore discriminated against a number of socialist States, and that was inadmissible.

45. In the light of those considerations, the USSR delegation was authorized to state that the Soviet Union could not sign the convention in its present form.

46. Mr. MANNER (Finland) said that his delegation would vote for the convention as a whole. The present text of the convention might not meet all the wishes of most delegations, but it still marked a historic advance in the progressive development of international law. Finland hoped that the convention would be adopted and applied by the great majority of States.

47. Mr. HU (China) said that his delegation would vote for the convention, on the understanding that China did not consider the declaration on universal participation to have any binding force.

48. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that the General Assembly of the United Nations had entrusted to the Conference the great task of preparing a convention which would govern the vitally important problem of the conclusion of treaties among States. Since treaty relations were among the most important means of developing friendly relations among all States, such an instrument should naturally embody the principle of universality in the text itself. Unfortunately, that principle had not been included either in the substantive part of the convention or in the final provisions. The declaration on universal participation in the convention on the law of treaties, although a very important document in itself, could not compensate for the absence of any mention of the principle in the body of the convention and in the final provisions. The convention discriminated against a number of socialist States, and his delegation could not support it. His delegation was authorized to state that the Byelorussian Soviet Socialist Republic could not sign the convention in its present form.

49. Mr. MARESCA (Italy) said that his delegation would vote for the convention as a whole, in the belief that it marked a considerable advance along the difficult road of the codification of international law. Nevertheless, his delegation regretted that the sound legal guarantee of the compulsory jurisdiction of the International Court of Justice had not been extended to all the articles in Part V, particularly to article 52,⁶ on the coercion of a State by the threat or use of force. On the other hand, his delegation welcomed the solution of submitting to the International Court of Justice disputes arising under articles 53 and 64,⁷ on *jus cogens*, and also the extension of the system of compulsory conciliation to all the provisions of Part V.

50. Mr. FATTAL (Lebanon) said that some delegations could not support the convention because it went too far and others because it did not go far enough. But if too much and too little were weighed against each other, a balance was achieved. His delegation would vote for the draft convention, despite its many shortcomings, because Lebanon, which its geographical position, history and temperament made a natural mediator, regarded the golden mean as a cardinal virtue.

51. The PRESIDENT invited the Conference to vote on the draft convention on the law of treaties as a whole.

At the request of the Colombian representative, the vote was taken by roll-call.

Jamaica, having been drawn by lot by the President, was called upon to vote first.

In favour: Jamaica, Japan, Kenya, Kuwait, Lebanon, Liberia, Libya, Liechtenstein, Luxembourg, Madagascar, Malaysia, Mexico, Morocco, Nepal, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Portugal, Republic of Korea, San Marino, Saudi Arabia, Senegal, Sierra Leone, Singapore, Spain, Sudan, Sweden, Syria, Thailand,

⁶ Formerly article 49.

⁷ Formerly articles 50 and 61.

Trinidad and Tobago, Tunisia, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Yugoslavia, Zambia, Afghanistan, Algeria, Argentina, Austria, Belgium, Bolivia, Brazil, Cambodia, Canada, Ceylon, Chile, China, Colombia, Congo (Democratic Republic of), Costa Rica, Dahomey, Denmark, Ecuador, El Salvador, Ethiopia, Federal Republic of Germany, Finland, Ghana, Greece, Guatemala, Guyana, Holy See, Honduras, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast.

Against: France.

Abstaining: Monaco, Mongolia, Poland, Romania, South Africa, Switzerland, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, Australia, Burma, Byelorussian Soviet Socialist Republic, Cameroon, Central African Republic, Congo (Brazzaville), Czechoslovakia, Gabon, Hungary.

The draft convention on the law of treaties was adopted by 79 votes to 1, with 19 abstentions.

52. Mr. MOE (Barbados) said that his delegation had unfortunately been absent during the vote. If it had been present, it would have voted in favour of the Convention.

53. Mr. PHAM-HUY-TY (Republic of Viet-Nam) said that his delegation had also been absent during the vote; had it been present it would have voted in favour of the Convention.

54. Mr. ANDERSEN (Iceland) said it was clear that no delegation was completely satisfied with the text of the Convention that had just been adopted. From that point of view, it would have been quite reasonable for his delegation to have abstained in the vote, but so much work and patience had been devoted to achieving the results, such as they were, that it had seemed only fair to vote for the Convention. It was, of course, for Governments to take the final decision.

55. Although the Icelandic Government would have liked the principle of compulsory legal settlement to be carried further, it must be admitted that a step had been taken in the right direction. He wished to stress, however, that for smaller States such as his own, the greatest possible protection was the rule of law, the guardian of which should be the International Court of Justice.

56. Mr. SOLHEIM (Norway) said that his delegation had been among the sixty-one which had voted in favour of the "package deal" submitted by ten States (A/CONF.39/L.47 and Rev.1). The Norwegian Government strongly supported the principle of a compulsory system of third-party settlement of disputes, and the ten-State proposal was all that the Conference had left if it wanted some degree of compulsory procedure on certain provisions of the Convention. The article ultimately adopted was far from adequate, but in view of the circumstances in which it had come into being and of the alternative possibility of having no provision at all on settlement procedures, with the consequent danger of a large number of negative votes and abstentions, the end result could not be regarded as insignificant. In particular, the fact that the International Court of

Justice was again mentioned in the Convention was extremely gratifying and held out hopes for the future.

57. Thus, the Norwegian delegation, which had intended to abstain in the vote, had decided, in a spirit of goodwill, in view of the seriousness of the matter and in appreciation of the painstaking efforts of many delegations, to vote in favour of the Convention as a whole.

58. Mr. SECARIN (Romania) said that the problems of universality and procedure raised in the "package proposal" were of vital importance to the whole system of the Vienna Convention. As a "treaty on treaties", that Convention should be a landmark in the process of the codification and progressive development of international treaty law. Romania continued to regard the Convention as an instrument intended to promote the principles of law and justice in relations between States.

59. Nevertheless, the problem of the principle of universality had not been solved in the way which Romania had advocated throughout the Conference. The Convention should have embodied the right of all States to participate in multilateral treaties of universal application and should have been open to participation by all States. Moreover, the solution that the Conference had adopted on procedure represented such an extreme innovation that his delegation had been unable to take a decision on it without weighing the new formula against all the rules set out in Part V and considering all its implications with regard to the application of the Convention. The Romanian delegation had therefore abstained in the vote on the Convention as a whole.

60. Mr. TEYMOUR (United Arab Republic) said that, without prejudging his Government's later attitude towards the Convention in the light of the opportunity open to all States to make reservations, his delegation's abstention in the vote on the Convention as a whole should not be interpreted as evidence of a lack of goodwill. His delegation had abstained in order to allow its Government time for a closer study of all the changes that had been made in the Convention. Everyone must be aware of his Government's co-operation and of its positive contribution to the work of the International Law Commission, and of the efforts it had made to bring about a convention on the law of treaties. The United Arab Republic was fully aware of the importance of such a convention in the development of understanding and friendly relations among members of the international community. It therefore hoped that the Convention would eventually be open to all countries and that all obstacles to the recognition of the principle of universality would be overcome.

61. Mr. REDONDO-GOMEZ (Costa Rica) said that his delegation had voted in favour of the Convention as a whole because it was an instrument of positive progress in the codification of international law and, in particular, would facilitate the development of the international co-operation which mankind so greatly needed. Admittedly, the instrument did not fully satisfy the aspirations of all the countries represented at the Conference, but it was a step towards a more promising future in international relations.

62. With regard to the compatibility of the Convention with Costa Rica's legislation, his country would make the necessary effort to accommodate its constitutional system to the provisions that had been adopted, but its internal law would continue to prevail, particularly with regard to treaty ratification procedure and its connexion with the provisions of the Convention.

63. Lastly, he wished to make it clear that his delegation interpreted the Convention as having a residuary meaning in relation to the provisions and principles of the inter-American system to which Costa Rica belonged.

64. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said that his delegation's abstention in the vote should not be interpreted as opposition to the Convention as a whole. On the contrary, the Ukrainian SSR had supported a large majority of the provisions and principles set out in that instrument, such as the principles of observance of international obligations, equality and free consent, and sovereignty. The reasons for his delegation's abstention would be found in the statements it had made during the first and second sessions, which made it clear that the Ukrainian SSR could not support a convention which failed to reflect a basic principle of contemporary international law, the principle of universality, and consequently discriminated against certain socialist States. Nor had his delegation been able to support the principle of compulsory procedures for the settlement of disputes. It had therefore been authorized to declare that the Ukrainian Soviet Socialist Republic could not sign the Convention in its present form.

65. Mr. BILOA TANG (Cameroon) said that his delegation had refrained from voting against the Convention as a whole because that instrument was the result of so many years of painstaking work in the International Law Commission and in the Conference. Nevertheless, it considered that the Convention should have contained stronger guarantees in connexion with the settlement of disputes, and it did not regard the compromise solution as satisfactory. It had abstained in the vote, in the belief that that question should be studied further by Governments.

66. Mr. MUUKA (Zambia) said that his delegation associated itself with all those which had given their approval in principle to the Convention in its final form. In the course of the Conference there had been moments of such despair that, but for the resurgence of goodwill, such as had occurred on the previous day, much might have been lost and very little gained.

67. Although the Conference had not accomplished all that might have been desired, what had been gained constituted a landmark of unprecedented importance in international law. Now that the tumult was over, it was imperative that all Governments should work tirelessly towards closing the gap that still remained; in particular, he hoped that the General Assembly would recognize the principle of universality, since without that principle he feared that several States would not be in a position to ratify the Convention.

68. Mr. MOLINA ORANTES (Guatemala) said that his delegation shared the satisfaction of other delegations at the successful conclusion of the work of the Conference, culminating in the signing of a historic document which would constitute the first chapter in the codification of international law. His delegation also joined in the well-deserved tribute to the International Law Commission for its achievements during the past eighteen years; there could be no doubt that the sound juridical basis of the document prepared by it had contributed greatly to the success of the Conference.

69. His delegation had voted in favour of the Convention in the conviction that it represented an important step forward in the work of codifying international law. During the course of the debate, both in the Committee of the Whole and in the plenary Conference, his delegation had on various occasions referred to those provisions of the Guatemalan Constitution which prevented it from voting in favour of some of the articles of the Convention. Those articles included articles 11 and 12,⁸ which related to consent expressed by merely signing a treaty; article 25,⁹ which dealt with the provisional application of treaties; article 66,¹⁰ which established procedures for judicial settlement, arbitration and conciliation; and article 38,¹¹ which contained a norm concerning the application of customary law derived from treaty law, a norm which in the opinion of his delegation lacked validity in existing international law.

70. For those reasons, while approving the text of the Convention as a whole, his delegation wished to put on record that it was compelled to make express reservations with respect to the articles to which he had referred.

71. Mr. CONCEPCION (Philippines) said that his delegation had voted for the Convention, although it had abstained on the compromise proposal (A/CONF.39/L.47 and Rev.1) put to the vote at the 34th plenary meeting. His delegation's vote for the Convention did not mean that it had abandoned the position it had adopted with regard to the major issues raised in the course of the discussions. Although some of those issues had not been met to his delegation's satisfaction, the Convention as a whole constituted a step forward in the delicate task of drafting the law of treaties and promoting the codification and progressive development of international law, as well as strengthening the fabric of peace. Untiring efforts had been made by the Secretariat and by delegations to foster a spirit of conciliation and co-operation during the Conference, and he hoped that every possible encouragement would be given to further efforts at conciliation in the future.

72. Mr. REY (Monaco) said that he had explained at the previous meeting why his delegation had abstained in the vote on the compromise proposal. The same reasons, *mutatis mutandis*, had led it to abstain in the

⁸ Formerly articles 9 *bis* and 10.

⁹ Formerly article 22.

¹⁰ i.e. the new article adopted at the 34th plenary meeting.

¹¹ Formerly article 34.

vote on the Convention. Rather surprisingly, the text submitted to the vote had achieved practically unanimous support. It was a pity that it should have been a unanimity of dissatisfaction: the explanations of vote which he had just heard expressed reservations on the part of most delegations. However, in whatever way unanimity had been achieved, the optimists would find in it cause for satisfaction in the existing political context. He hoped that, as a result of the action taken by the United Nations, all States would strive to strengthen the rule of law for the greater happiness of mankind.

73. Mr. ROMERO LOZA (Bolivia) said that his delegation had voted for the Convention because it considered that any step, however imperfect, to improve international relations and mutual understanding should be supported. The Conference had succeeded in approving principles which constituted progress inspired by the principles of justice. The lack of an effective procedure to strengthen Part V, and above all the failure to make article 49 subject to compulsory arbitration, was one of the imperfections of the Convention, but he hoped that such imperfections were merely temporary interruptions in the forward march of humanity.

74. Mr. BRODERICK (Liberia) said that his delegation, in voting in favour of the Vienna Convention on the Law of Treaties, wished to point out first, that its Government did not consider itself in any way committed to vote in favour of the draft resolution submitted by Ghana, Ivory Coast, Kenya, Kuwait, Lebanon, Morocco, Nigeria, Sudan, Tunisia and the United Republic of Tanzania (A/CONF.39/L.47/Rev.1) which had been adopted by the Conference at its 34th plenary meeting by a roll-call vote of 61 in favour, 20 against and 26 abstentions, when it came before the United Nations General Assembly at its twenty-fourth session. Secondly, that his Government reserved the right to decide what action or course it would choose in the exercise of good faith and the *pacta sunt servanda* rule in respect of the new article on procedures for the adjudication, arbitration and conciliation of disputes other than those arising from peremptory norms of *jus cogens* which might be referred to the International Court of Justice or to arbitration.

75. It was his earnest hope that those delegations which had abstained in the vote, or had voted against the adoption of the Convention, would in time reconsider their decision and that their respective Governments would accede to and ratify the Convention.

**Tribute to the International Law Commission
Tribute to the Federal Government and the
people of the Republic of Austria**

76. Mr. SINCLAIR (United Kingdom) said he had the honour of introducing the draft resolutions paying tributes to the International Law Commission (A/CONF.39/L.50) and to the Federal Government and the people of the Republic of Austria (A/CONF.39/L.51). A small drafting amendment should be made to the

draft resolution concerning the International Law Commission, where the last phrase should read: "codification and progressive development of the law of treaties". He was sure that the entire Conference would wish to acknowledge the sterling efforts of the International Law Commission over a period of nearly twenty years which had culminated in 1966 in the final set of draft articles codifying the law of treaties. The real tribute to the International Law Commission was not the formal resolution before the Conference, but the fact that the Convention which had been adopted embodied so much of the Commission's original draft.

77. He took some pride in the fact that the four Special Rapporteurs on the topic had all been his countrymen and had contributed, each in his own inimitable way, to the progress of the work. While singling out Sir Humphrey Waldock for special mention, he recognized that every member of the International Law Commission had contributed to the task in hand. Many members of the Commission had participated actively in the work of the Conference and, in that connexion, he wished to pay a respectful tribute to the work done by the President of the Conference, by the Chairman of the Committee of the Whole, by the Rapporteur and by the Chairman of the Drafting Committee. On the pediment of St. Paul's Cathedral, the crowning achievement of the famous English architect, Sir Christopher Wren, was an inscription "*Si monumentum requiris circumspice*". The members of the Commission might justly take a similar pride in their achievement.

78. On behalf of the whole Conference, he wished to express his sincere appreciation of the generous hospitality of the Austrian Government and the warmth, friendliness and humour of its people.

79. The PRESIDENT said that, if there were no objection, he would consider the draft resolution paying a tribute to the International Law Commission (A/CONF.39/L.50) and the draft resolution paying a tribute to the Federal Government and the people of the Republic of Austria (A.CONF.39/L.51) as adopted.

It was so agreed.

Adoption of the Final Act

80. Mr. YASSEEN, Chairman of the Drafting Committee, introducing the draft Final Act (A/CONF.39/21) submitted by the Drafting Committee to the Conference in accordance with its instructions, said it had been modelled on the Final Acts of previous codification conferences. The brackets indicating an alternative, as in paragraphs 14 and 15, and the spaces left blank, as in paragraph 13, were due to the fact that the document had been drawn up before the end of the Conference. The matter would be dealt with by the Secretariat in accordance with the Conference's decisions.

81. The PRESIDENT said that, if there were no objection, he would consider the Final Act adopted.

It was so agreed.

Closure of the Conference

82. The PRESIDENT said that now that the Conference had reached the end of its work, he wished first to express his deep appreciation of the assistance which delegations had so generously given him in carrying out his difficult task.

83. Like many others, their Conference had had its high points and its low points, its moments of confident hope and its moments of discouragement. The previous day had again produced a situation which was not unprecedented — with its morning hours when everything had seemed to be lost and its evening hours when those hopes which refused to be dashed had been crowned with success.

84. Yet he did not think that it was possible, at the present time, to judge the true value of the work which had been accomplished. In that respect, the present Conference differed from many others, since the text which they had just adopted might represent a turning-point in the history of the law of nations. Certainly from now onwards the juridical basis for international contractual relations would take on a different aspect. A written law would be set up side by side with the old customary law; and he did not think that he was being too optimistic in expressing the view that that law would win acceptance throughout an ever widening circle of nations and would one day replace the old rules altogether. Moreover, the success of the Conference's work would provide an exceptional stimulus to the continuation of the work of codification in the other chapters of international law which had not yet been touched upon.

85. Those participating in the Conference had had many problems before them: legal problems and, what were even more complex, political problems. It was primarily the task of diplomats to attempt to solve the political problems and thus make possible the solution of questions of law. Now that the text had been adopted and had acquired its definitive character, he would like to express the hope that the many jurists who would study the articles of the Convention would help to make them clear and effective through their knowledge, their ingenuity and their farsightedness. He hoped that they would succeed in making of that product of a joint effort a living work, a body of rules which really answered the needs of modern life, a genuine contribution to the development — which everyone wished to see more intense, more specific and more closely knit — of the relations between the members of the international community.

86. At the final conclusion of the long-term task of codifying the law of treaties, his thoughts turned with deep appreciation to the number of learned British jurists, and in particular to Sir Humphrey Waldock, who had devoted their studies to that question. He was also grateful to Mr. Elias, who, after presiding with incomparable ability over the work of the Committee of the Whole, had proved himself irreplaceable up to the very last minute. Mr. Elias had also found support in others whom he would not mention at that time, but whose names were familiar to all. No less gratitude however, was due to Mr. Yasseen and to all the mem-

bers of the Drafting Committee over which he had presided with so much ability, firmness and devotion. He considered it a matter without precedent that all the amendments which had been proposed by that Committee had been adopted almost without discussion by the Conference. Equal gratitude was due to the Rapporteur of the Conference, Mr. Jiménez de Aréchaga. Much was also owed to the Secretariat and to the Legal Counsel, Mr. Stavropoulos.

87. Mr. TABIBI (Afghanistan), speaking on behalf of the Asian countries, the United Arab Republic, Libya and Morocco, said the President had guided the Conference's work to a successful conclusion with outstanding ability. The Nigerian representative had also played a distinguished part, while the contribution of the officers of the Conference and the Secretariat could not be overlooked. The Conference had achieved another great milestone in the field of codification and progressive development of international law, and he hoped that in the spirit of *pacta sunt servanda* the Convention would be properly applied for the good of mankind everywhere.

88. Mr. SUAREZ (Mexico) speaking on behalf of the Latin American group of delegations, said that the Conference had wisely chosen to preside over its discussions an eminent lawyer of wide and varied experience, who came from a country as outstanding in the field of law as in that of the arts. He had guided the Conference's work in a most masterly way.

89. Italian jurists had made a great contribution to every branch of law, and the Conference had paid them a well-merited tribute by including in the Convention the *pacta sunt servanda* rule. Like the other branches of law, international law, which derived not only its basic principles but its spirit from Roman law, was drawing further and further away from the parent stem of civil law and establishing its right to an independent existence. It would be too much to say that the Conference had erected a monument more lasting than bronze, but it was safe to say that the Convention which it had adopted would form a worthy part of the code of international law that was being prepared under the auspices of the United Nations.

90. Differences of view on important points had divided the Conference from the beginning and in order to reconcile them it had been necessary to accept the imperfect principles resulting from a compromise. It was possible that, at least in the immediate future, a number of countries might refrain from signing or ratifying the Convention. That, however, should not be considered a reason for discouragement. Search after truth was more important than truth itself, as Lessing had said, and to travel hopefully was a better thing than to arrive. More important than the Convention itself was the fact that all delegations had participated in a phase of the age-old effort to establish law, the noblest aspiration of humanity.

91. Sir Francis VALLAT (United Kingdom), on behalf of the group of west European and other States, Mr. USTOR (Hungary), on behalf of the group of socialist States, Mr. MUTUALE (Democratic Republic of the Congo), on behalf of Ethiopia, Ghana, Liberia,

Nigeria, Sierra Leone, the United Republic of Tanzania and Zambia, and Mr. YAPOBI (Ivory Coast), on behalf of Cameroon, Central African Republic, Congo (Brazzaville), Dahomey, Gabon, Madagascar and Senegal, all expressed their thanks to the President for his skilful and energetic guidance of the work of the Conference and paid tributes to the labours of the Vice-Presidents, the officers of the Committee of the Whole and the Drafting Committee, the Expert Consultant, the members of the International Law Commission and the Secretariat. They further expressed their great appreciation of the warmth and hospitality of the Austrian Government and people.

92. Mr. VEROSTA (Austria) said he associated his delegation with all that had been said by previous speakers in appreciation of the work of those who had contrib-

uted so much to make the Conference a success. His delegation was gratified that the Convention was to be entitled the Vienna Convention on the Law of Treaties and wished to thank all those who had spoken so kindly of the hospitality offered by his Government and the Austrian people.

93. The PRESIDENT said that he was profoundly moved by the speeches which had been made and thanked all those who had paid tribute to his work, a tribute which must be shared with the Vice-Presidents.

94. He declared closed the United Nations Conference on the Law of Treaties.

The meeting rose at 6.55 p.m.

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FOREWORD

In its *Millennium Declaration*, the General Assembly of the United Nations emphasized the need to strengthen the international rule of law, thus clearly highlighting a key area of focus for the United Nations in the new millennium. The Secretary-General of the United Nations has also reaffirmed his commitment to advancing the international rule of law. Treaties are the primary source of international law, and the Secretary-General is the main depository of multilateral treaties in the world. At present, over 550 multilateral treaties are deposited with the Secretary-General. In order to encourage wider participation in the multilateral treaties deposited with him, the Secretary-General has been inviting States to participate in annual Treaty Events since the initiative was first launched in 2000. In addition to the depository functions of the Secretary-General, the Secretariat has played a unique role in carrying out functions related to the registration and publication of treaties in accordance with Article 102 of the Charter of the United Nations in order to ensure that treaties in force are in the public domain.

This *Handbook*, prepared by the Treaty Section of the United Nations Office of Legal Affairs, is a practical guide to the depository practice of the Secretary-General and the registration practice of the Secretariat. It is intended as a contribution to the United Nations efforts to assist States in becoming party to the international treaty framework and in registering treaties with the Secretariat as required by Article 102 of the Charter. It is presented in a user-friendly format with diagrams and step-by-step instructions, and touches upon many aspects of treaty law and practice. This *Handbook* is designed for use by States, international organizations and other entities.

Aside from this *Handbook*, there are various other resources available in relation to the depository and registration practices applied within the United Nations. In particular, attention is drawn to the *Summary of Practice of the Secretary-General as Depository of Multilateral Treaties*, which contains a comprehensive overview of the main features of the depository practice of the Secretary-General, and the *Final Clauses of Multilateral Treaties Handbook*, which is a practical guide intended to assist those who are directly involved in multilateral treaty-making. The United Nations Treaty Collection website at <http://treaties.un.org>, maintained by the Treaty Section, includes, among many other things, an electronic copy of this *Handbook* and other publications. The website also includes a database containing the status of multilateral treaties deposited with the Secretary-General, as well as a database of treaties registered or filed and recorded and related treaty actions published in the United Nations *Treaty Series*.

Users of this Handbook are encouraged to make full use of the wealth of information contained therein and to contact the Treaty Section of the Office of Legal Affairs with any comments or questions. The Treaty Section provides advice and assistance on treaty law, the depositary practice of the Secretary-General, the registration of treaties, and the drafting of final clauses of multilateral treaties, either upon request or through its training seminars. The training seminars organized by the Treaty Section at United Nations Headquarters and at the regional level are focused not only on treaty law and practice, but also provide an opportunity to encourage, with the assistance of the substantive offices, greater awareness of the implementation of treaty provisions at the national level.



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Under-Secretary-General for Legal Affairs
The Legal Counsel

ABBREVIATIONS

This *Handbook* uses the following abbreviations:

Regulations	Regulations to give effect to Article 102 of the <i>Charter of the United Nations</i> , United Nations <i>Treaty Series</i> , volume 859, p. VIII (see General Assembly resolution 97 (I) of 14 December 1946, as amended by resolutions 364 B (IV) of 1 December 1949; 482 (V) of 12 December 1950; 33/141 of 19 December 1978; and 52/153 of 15 December 1997)
<i>Repertory of Practice</i>	<i>Repertory of Practice of United Nations Organs</i> (Volume V, New York, 1955) (see also Supplement No. 1, Volume II; Supplement No. 2, Volume III; Supplement No. 4, Volume II; Supplement No. 5, Volume V; Supplement No. 6, Volume VI; and Supplement No. 7, Volume VI)
Secretary-General	Secretary-General of the United Nations
<i>Summary of Practice</i>	<i>Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties</i> (ST/LEG/7/Rev.1)
Treaty Section	Treaty Section, Office of Legal Affairs of the United Nations
Vienna Convention 1969	<i>Vienna Convention on the Law of Treaties, 1969</i>
Vienna Convention 1986	<i>Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986</i>

1 INTRODUCTION

In his *Millennium Report* (A/54/2000), the Secretary-General of the United Nations noted that “[s]upport for the rule of law would be enhanced if countries signed and ratified international treaties and conventions”. He further noted that many countries are unable to participate fully in the international treaty framework due to “the lack of the necessary expertise and resources, especially when national legislation is needed to give force to international instruments”. In the same report, the Secretary-General called upon “... all relevant United Nations entities to provide the necessary technical assistance that will make it possible for every willing state to participate fully in the emerging global legal order”.

The Millennium Summit was held at United Nations Headquarters, in New York, from 6 to 8 September 2000. Further to his commitment to the rule of law expressed in the *Millennium Report*, the Secretary-General invited all Heads of State and Government attending the Millennium Summit to sign and ratify treaties deposited with him. The response to the Secretary-General’s invitation was positive. The Treaty Signature/Ratification Event was held during the Millennium Summit and a total of 84 countries, of which 59 were represented at the level of Head of State or Government, undertook 274 treaty actions (signature, ratification, accession, etc.) in relation to over 40 treaties deposited with the Secretary-General.

The Secretary-General is the depositary for over 550 multilateral treaties. The depositary functions relating to multilateral treaties deposited with the Secretary-General are discharged by the Treaty Section of the Office of Legal Affairs of the United Nations. The Section is also responsible for the registration and publication of treaties submitted to the Secretariat pursuant to Article 102 of the *Charter of the United Nations*. Article 102 provides that every treaty and every international agreement entered into by a Member of the United Nations, after entry into force of the Charter, shall be registered with and published by the Secretariat.

Further to the Secretary-General’s commitment to advancing the international rule of law, this *Handbook* has been prepared as a guide to the Secretary-General’s practice as a depositary of multilateral treaties, and to treaty law and practice in relation to the registration function. This *Handbook* is mainly designed for the use of Member States, secretariats of international organizations, and others involved in assisting governments on the technical aspects of participation in the multilateral treaties deposited with the Secretary-General, and the registration of treaties with the Secretariat under Article 102. It is intended to promote wider State participation in the multilateral treaty framework.

This *Handbook* commences with a description of the depositary function, followed by an overview of the steps involved in a State becoming a party to a treaty. The following section highlights the key events of a multilateral treaty, from deposit with the Secretary-General to termination. Section 5 outlines the registration and filing and recording functions of the Secretariat, and how a party may go about submitting a treaty for registration or filing and recording. The final substantive section, section 6, contains practical hints on contacting the Treaty Section on treaty matters, and flow charts for carrying out various common treaty actions. Several annexes appear towards the end of this *Handbook*, containing various sample instruments for reference in concluding

treaties or performing treaty actions. A glossary listing common terms and phrases of treaty law and practice, many of which are used in this *Handbook*, is also included.

Treaty law and its practice are highly specialized. Nevertheless, this publication attempts to avoid extensive legal analyses of the more complex areas of the depositary and registration practices. Many of the complexities involving the depositary practice are addressed in the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (ST/LEG/7/Rev.1). The *Repertory of Practice of United Nations Organs* (volume V, New York, 1955, and Supplements 1-7) is also a valuable guide to the two practices. This *Handbook* is not intended to replace the *Summary of Practice* or the *Repertory of Practice*.

Readers are encouraged to contact the Treaty Section of the Office of Legal Affairs of the United Nations with questions or comments about this *Handbook*. This publication may need further elaboration and clarification in certain areas, and the views of readers will be invaluable for future revisions.

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2 DEPOSITING MULTILATERAL TREATIES

(See the *Summary of Practice*, paras. 9-37.)

2.1 Secretary-General as depositary

The Secretary-General of the United Nations, at present, is the depositary for over 550 multilateral treaties. The Secretary-General derives this authority from:

- (a) Article 98 of the *Charter of the United Nations*;
- (b) Provisions of the treaties themselves;
- (c) General Assembly resolution 24 (I) of 12 February 1946; and
- (d) League of Nations resolution of 18 April 1946.

2.2 Depositary functions of the Secretary-General

The depositary of a treaty is responsible for ensuring the proper execution of all treaty actions relating to that treaty. The depositary's duties are international in character, and the depositary is under an obligation to act impartially in the performance of those duties.

The Secretary-General is guided in the performance of depositary functions by:

- (a) Provisions of the relevant treaty;
- (b) Resolutions of the General Assembly and other United Nations organs;
- (c) International law, including customary international law.

In practice, the Treaty Section of the United Nations Office of Legal Affairs carries out depositary functions on behalf of the Secretary-General.

2.3 Designation of depositary

(See section 6.5, which explains how to arrange with the Treaty Section for deposit of a multilateral treaty with the Secretary-General.)

The negotiating States to a multilateral treaty designate the depositary for that treaty either in the treaty itself or in some other manner, for example, through a separate decision adopted by the negotiating States. When a treaty is adopted within the framework of the United Nations or at a conference convened by the United Nations, the treaty normally includes a provision designating the Secretary-General as the depositary for that treaty. If a multilateral treaty has not been adopted within the framework of an international organization or at a conference convened by such an organization, it is customary for the treaty to be deposited with the State that hosted the negotiating conference.

When a treaty is not adopted within the framework of the United Nations or at a conference convened by the United Nations, it is necessary for negotiating States to seek the concurrence of the Secretary-General to be the depositary for the treaty before designating the Secretary-General as such. In view of the nature of the Secretary-General's role, the Secretary-General gives careful consideration to the request. In general, the Secretary-General's policy is to assume depositary functions only for:

- (a) Multilateral treaties of worldwide interest adopted by the General Assembly or concluded by plenipotentiary conferences convened by the appropriate organs of the United Nations that are open to wide participation; and
- (b) Regional treaties adopted within the framework of the regional commissions of the United Nations that are open to participation by the entire membership of the relevant commissions.

Final clauses are critical in providing guidance to the depositary in the performance of his depositary functions. In order to discharge those functions effectively, the depositary should be consulted in drafting them. Unclear final clauses may create difficulties in interpretation and implementation both for States parties and for the depositary. It is important to note that on 28 August 2001, the Secretary-General of the United Nations promulgated the bulletin "Procedures to be followed by departments, offices and regional commissions of the United Nations with regard to treaties and international agreements" (see ST/SGB/2001/7 of 28 August 2001 in annex 11). In section 4.2 of this bulletin, the Secretary-General of the United Nations expressly states that, in the case of multilateral treaties to be deposited with him, draft final clauses of such multilateral treaties shall be submitted by the relevant department, office or regional commission to the Treaty Section for review and comment prior to finalization.

3 PARTICIPATING IN MULTILATERAL TREATIES¹

3.1 Signature

3.1.1 Introduction

(See section 6.2, which illustrates how to arrange with the Treaty Section to sign a multilateral treaty.)

The first commonly used step to participate in a treaty is signing that treaty. As explained below, unless the treaty otherwise provides, a signatory does not become a party to a treaty through signature alone. Multilateral treaties contain signature provisions indicating the place of signature, date of opening for signature, period of signature, etc.

3.1.2 Open for signature

(See the *Summary of Practice*, paras. 1116-1119.)

Multilateral treaties often provide that they will be open for signature only until a specified date, after which signature will no longer be possible. Some multilateral treaties are open for signature indefinitely. Most multilateral treaties on human rights issues fall into this category, for example, the *International Covenant on Civil and Political Rights, 1966*; the *Convention on the Elimination of All Forms of Discrimination against Women, 1979*; and the *Convention on the Rights of Persons with Disabilities, 2006*.

Today, multilateral treaties deposited with the Secretary-General of the United Nations generally make provision for signature by all States. However, some multilateral treaties contain specific limitations on participation due to circumstances specific to them. For example:

- Article 2 of the *Agreement concerning the Establishing of Global Technical Regulations for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles, 1998*, limits participation to “[c]ountries that are members of the Economic Commission for Europe (UN/ECE), regional economic integration organizations that are set up by ECE member countries and countries that are admitted to the ECE in a consultative capacity”.

3.1.3 Simple signature

Multilateral treaties usually provide for signature subject to ratification, acceptance or approval – also called simple signature. In such cases, a signing State does not undertake positive legal obligations under the treaty upon signature. However, signature indicates the State’s intention to take steps to express its consent to be bound by the treaty at a later date. Signature also creates an obligation, in the period between signature and ratification, acceptance or approval, to refrain in good faith from acts that would defeat the object and purpose of the treaty (see article 18 of the Vienna Convention 1969).

See, for example, article 125 (2) of the *Rome Statute of the International Criminal Court, 1998*: “This Statute is subject to ratification, acceptance or approval by signatory States . . .”.

¹ For the sake of editorial convenience, the term “State”, as used in this *Handbook*, may include other entities with the competence under international law to enter into treaties.

3.1.4 Definitive signature

Some treaties provide that States can express their consent to be legally bound solely upon signature. This method is most commonly used in bilateral treaties and rarely used for multilateral treaties. In the latter case, the entry into force provision of the treaty expressly provides that a State can express consent to be bound by definitively signing the treaty, i.e., signing without reservation as to ratification, acceptance or approval.

Of the treaties deposited with the Secretary-General, this method is most commonly used in certain treaties negotiated under the auspices of the regional Economic Commissions, for example, article 4 (3) of the *Agreement concerning the Adoption of Uniform Conditions for Periodical Technical Inspections of Wheeled Vehicles and the Reciprocal Recognition of Such Inspections, 1997*:

Countries under paragraphs 1 and 2 of this Article may become Contracting Parties to the Agreement:

- By signing it without reservation to a ratification;
- By ratifying it after signing it subject to ratification;
- By acceding to it.

Also the *Agreement on International Railways in the Arab Mashreq, 2003*, provides in its article 5 (2) that members under paragraph 5 (1) may become parties by:

- Signature not subject to ratification, acceptance or approval (definitive signature);
- Signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or
- Accession.

3.2 Full powers

(See the *Summary of Practice*, paras. 101-115.)

3.2.1 Signature of a treaty without an instrument of full powers

(See section 6.2, which details how to arrange with the Treaty Section to sign a treaty.)

The Head of State, Head of Government or Minister for Foreign Affairs may sign a treaty on behalf of the State without an instrument of full powers.

3.2.2 Requirement of instrument of full powers

A person other than the Head of State, Head of Government or Minister for Foreign Affairs may sign a treaty only if that person possesses a valid instrument of full powers. This instrument of full powers empowers the specified representative to sign a given treaty. This is a legal requirement reflected in article 7 of the Vienna Convention 1969. It is designed to protect the interests of all States that can participate in a treaty as well as the integrity of the depository. Typically, full powers are issued for the signature of a specified treaty, but may also be issued to empower a specific representative to sign more than one treaty.

Some countries have deposited general full powers with the Secretary-General. General full powers do not specify the treaty to be signed, but rather authorize a specified representative to sign all treaties deposited with the Secretary-General.

3.2.3 Form of instrument of full powers

(See the model instrument of full powers in annex 3.)

As depositary, the Secretary-General requires proper full powers for the person (other than a Head of State, Head of Government or Minister for Foreign Affairs) seeking to sign a treaty. Signature of a treaty without proper full powers is not acceptable. Full powers not containing a legible signature from one of the above-mentioned authorities are also not acceptable (for example, a telexed message). There is no specific form for an instrument of full powers, but it must include the following information:

1. The instrument of full powers must be **signed** by one of the three above-mentioned authorities and must unambiguously empower a specified person to sign the treaty. Full powers may also be issued by a person exceptionally exercising the power of one of the above-mentioned three authorities of State *ad interim*. This should be stated clearly on the instrument.
2. Full powers are usually limited to one specific treaty and must indicate the **title of the treaty**. If the title of the treaty is not yet agreed, the full powers must indicate the subject matter and the name of the conference or the international organization where the negotiations are taking place.
3. Full powers must state the **full name and title of the representative** authorized to sign. They are individual and cannot be transferred to the "permanent representative ...". Due to the individual character of the full powers, it is prudent to name at least two representatives, in case one is hindered by some unforeseen circumstance from performing the designated act.
4. **Date and place of signature** must be indicated.
5. **Official seal**. This is optional and it cannot replace the signature of one of the three authorities of State.

(See Note Verbale from the Legal Counsel of the United Nations of 3 February 2010, LA41TR/221/Full Powers Guidelines/2010 (extracted in annex 1)).

The following is an example of an instrument of full powers:

- I have the honour to inform you that I (name), President of the Republic of (name of State), have given full powers to the Honourable Ms (name), Secretary of State for the Interior and Religious Affairs, to sign on behalf of (name of State) the United Nations Convention against Transnational Organized Crime and the following two Protocols to be opened for signature in Palermo, Italy, from 12th to 15th December 2000:
- i. Protocol against the smuggling of migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime.
 - ii. Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime.

This note constitutes the full powers empowering the Honourable (name) to sign the above-stated Convention and Protocols.

The Hon. (name), President of the Republic of (name of State)

[Signature]

Full powers are legally distinct from credentials, which authorize representatives of a State to participate in a conference and sign the Final Act of the conference.

3.2.4 Appointment with the depositary for affixing signature

(See section 6.2, which details how to arrange with the Treaty Section to sign a multilateral treaty and to have an instrument of full powers reviewed.)

As custodian of the treaty, the depositary verifies all full powers prior to signature. If the Secretary-General of the United Nations is the depositary for the treaty in question, the State wishing to sign the treaty should make an appointment for signature with the Treaty Section and submit to the Treaty Section for verification a copy of the signed instrument of full powers well in advance of signature (facsimiles and e-mails are acceptable for this purpose). The representative empowered to sign on behalf of his/her Government would normally hand over the original instrument of full powers at the time of signature. However, in accordance with the depositary practice, a signature by a representative could be accepted on the basis of a copy of the full powers on condition that they are in proper and due form, but this requires that the State provide the Treaty Section with the original full powers as soon as possible (by hand or mail).

3.3 Consent to be bound

(See the *Summary of Practice*, paras. 120-143.)

3.3.1 Introduction

(See section 6.3, which details how to arrange with the Treaty Section to deposit an instrument of ratification, acceptance, approval or accession to a treaty.)

In order to become a party to a multilateral treaty, a State must demonstrate, through a concrete act, its willingness to undertake the legal rights and obligations contained in the treaty. In other words, it must express its consent to be bound by the treaty. A State can express its consent to be bound in several ways, in accordance with the final clauses of the relevant treaty. The most common ways, as discussed below, are:

- (a) Definitive signature (see section 3.1.4);
- (b) Ratification;
- (c) Acceptance or approval; and
- (d) Accession.

The act by which a State expresses its consent to be bound by a treaty is distinct from the treaty's entry into force (see section 4.2). Consent to be bound is the act whereby a State demonstrates its willingness to undertake the legal rights and obligations under a treaty through definitive signature or the deposit of an instrument of ratification, acceptance, approval or accession. Entry into force of a treaty with regard to a State is the moment the treaty becomes legally binding for the State, that is, the moment at which that State becomes party to the treaty. Each treaty normally contains provisions dealing with both aspects.

3.3.2 Ratification

(See the model instrument of ratification in annex 4.)

Most multilateral treaties expressly provide for States to express their consent to be bound by signature subject to ratification, acceptance or approval.

Providing for signature subject to ratification allows States time to seek approval for the treaty at the domestic level and to enact any legislation necessary to implement the treaty domestically, prior to undertaking the legal obligations under the treaty at the international level. Once a State has become party to a treaty at the international level, its international responsibility is engaged. Generally, there is no time limit within which a State is requested to ratify a treaty which it has signed. Upon entry into force of the treaty for a State, that State becomes legally bound under the treaty.

Ratification at the international level, which indicates to the international community a State's commitment to undertake the obligations under a treaty, should not be confused with ratification at the national level, which a State may be required to undertake in accordance with its own constitutional provisions before it expresses consent to be bound internationally. Ratification at the national level is inadequate to establish a State's intention to be legally bound at the international level. The required action at the international level, i.e., the deposit of the instrument of ratification, must also be undertaken.

Some multilateral treaties impose specific limitations or conditions on ratification. For example, when a State deposits with the Secretary-General an instrument of ratification, acceptance or approval of, or accession to the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 1980*, it must at the same time notify the Secretary-General of its consent to be bound by any two or more of the protocols related to the Convention. In the case of the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000*, when a State deposits an instrument of ratification, approval, etc., it must at the same time also deposit a binding declaration under article 3 (2) in which it sets forth the minimum age at which that State will permit voluntary recruitment into its national armed forces and a description of the safeguards that it has adopted to ensure that such recruitment is not forced or coerced.

3.3.3 Acceptance or approval

(See the model instrument of acceptance or approval in annex 4.)

Acceptance or approval of a treaty following signature has the same legal effect as ratification, and the same rules apply, unless the treaty provides otherwise (see article 14 (2) of the Vienna Convention 1969).

Most treaties deposited with the Secretary-General provide for acceptance or approval with prior signature, for example, the *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008*, and the *International Cocoa Agreement, 2010*.

3.3.4 Accession

(See the model instrument of accession in annex 5.)

A State may generally express its consent to be bound by a treaty by depositing an instrument of accession with the depositary (see article 15 of the Vienna Convention 1969). Accession has the same legal effect as ratification, acceptance or approval. However, unlike ratification, acceptance or approval, which are preceded by signature to create binding legal obligations under international law, accession requires only one step, namely, the deposit of an instrument of accession. The Secretary-General, as depositary, treats instruments of ratification that have not been preceded by signature as instruments of accession, and the States concerned are advised accordingly.

Most multilateral treaties today provide for accession as, for example, article 16 of the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997*. Some treaties provide for States to accede from the day after the treaty closes for signature. Many environmental treaties are open for accession from the day after the treaty closes for signature, as, for example, article 24 (1) of the *Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997*. Other treaties, such as disarmament treaties, provide for States to accede from the day after the treaty enters into force as, for example, article XIII of the *Comprehensive Nuclear-Test-Ban Treaty, 1996*.

3.3.5 Practical considerations

Form of instrument of ratification, acceptance, approval or accession

(See the model instrument of ratification, acceptance or approval in annex 4 and the model instrument of accession in annex 5.)

When a State wishes to ratify, accept, approve or accede to a treaty, it must execute an instrument of ratification, acceptance, approval or accession, signed by one of three specified authorities, namely the Head of State, Head of Government or Minister for Foreign Affairs. There is no mandated form for the instrument, but it must include the following:

1. Title, date and place of conclusion of the treaty concerned;
2. Full name and title of the person signing the instrument, i.e., the Head of State, Head of Government or Minister for Foreign Affairs or any other person acting in such a position for the time being or with full powers for that purpose issued by one of the above authorities;
3. An unambiguous expression of the intent of the Government, on behalf of the State, to consider itself bound by the treaty and to undertake faithfully to observe and implement its provisions;
4. Date and place where the instrument was issued; and
5. Signature of the Head of State, Head of Government or Minister for Foreign Affairs (the official seal only is not adequate) or any other person acting in such a position for the time being or with full powers for that purpose issued by one of the above authorities.

Delivery to the Secretary-General

An instrument of ratification, acceptance, approval or accession becomes effective only when it is deposited with the Secretary-General of the United Nations at United Nations Headquarters in New York. The date of deposit is normally recorded as that on which the instrument is received at Headquarters.

States are advised to deliver such instruments to the Treaty Section of the United Nations directly to ensure the action is promptly processed. The individual who delivers the instrument of ratification does not require full powers. In addition to delivery by hand, instruments may also be mailed to the Treaty Section. In accordance with the depositary practice, if a State initially faxes or sends by e-mail a signed copy of an instrument, such copy may be accepted for deposit but that State must also provide the original as soon as possible thereafter to the Treaty Section.

Translations

It is recommended that, where feasible, States provide courtesy translations in English or French of instruments in other languages submitted for deposit with the Secretary-General. This facilitates the prompt processing of the relevant actions.

3.4 Provisional application

(See the *Summary of Practice*, para. 240.)

Some treaties provide for provisional application, either before or after their entry into force. For example, article 7 (1) of the *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994*, provides “If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force”. The *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995*, also provides for provisional application, ceasing upon its entry into force. Article 56 of the *International Cocoa Agreement, 2010*, also provides for provisional application with effect from the entry into force of the Agreement or, if it is already in force, at a specified date.

A State provisionally applies a treaty that has entered into force when it unilaterally undertakes, in accordance with its provisions, to give effect to the treaty obligations provisionally, even though its domestic procedural requirements for international ratification, approval, acceptance or accession have not yet been completed. The intention of the State would generally be to ratify, approve, accept or accede to the treaty once its domestic procedural requirements have been met. The State may unilaterally terminate such provisional application at any time unless the treaty provides otherwise (see article 25 of the Vienna Convention 1969). In contrast, a State that has consented to be bound by a treaty through ratification, approval, acceptance, accession or definitive signature is governed by the rules on withdrawal or denunciation specified in the treaty as discussed in section 4.5 (see articles 54 and 56 of the Vienna Convention 1969).

3.5 Reservations

(See section 6.4, which shows how to arrange with the Treaty Section to make a reservation or declaration. See also the *Summary of Practice*, paras. 161-216.)

3.5.1 What are reservations?

In certain cases, States make statements upon signature, ratification, acceptance, approval or accession to a treaty. Such statements may be entitled “reservation”, “declaration”, “understanding”, “interpretative declaration” or “interpretative statement”. However phrased or named, any such statement purporting to exclude or modify the legal effect of a treaty provision with regard to the declarant is, in fact, a reservation (see article 2 (1) (d) of the Vienna Convention 1969). A reservation may enable a State to participate in a multilateral treaty in which the State would otherwise be unwilling or unable to participate.

3.5.2 Vienna Convention 1969

Article 19 of the Vienna Convention 1969 specifies that a State may, when signing, ratifying, accepting, approving or acceding to a treaty, make a reservation unless:

- (a) The reservation is prohibited by the treaty;
- (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) In cases not falling under the above two categories, the reservation is incompatible with the object and purpose of the treaty.

In some cases, treaties specifically prohibit reservations. For example, article 120 of the *Rome Statute of the International Criminal Court, 1998*, provides: “No reservations may be made to this Statute”. Similarly, reservations are prohibited in many environmental treaties (see, for example, article 37 of the *Convention on Biological Diversity, 1992* and article 37 of the *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994*). Other treaties permit certain reservations or are silent about reservations.

3.5.3 Time for formulating reservations

Formulating reservations upon signature, ratification, acceptance, approval or accession

Article 19 of the Vienna Convention 1969 provides for reservations to be made at the time of signature or when depositing an instrument of ratification, acceptance, approval or accession. If a reservation is made upon simple signature (i.e., signature subject to ratification, acceptance or approval), it is merely declaratory and must be formally confirmed in writing when the State expresses its consent to be bound.

Formulating reservations after ratification, acceptance, approval or accession

Where the Secretary-General, as depositary, receives a reservation after the deposit of the instrument of ratification, acceptance, approval or accession that meets all the necessary requirements, the Secretary-General circulates the text of the reservation to all

the States concerned. The Secretary-General accepts the reservation in deposit only if no State informs him that it does not wish him to consider the reservation to have been accepted for deposit. This is a situation where the Secretary-General's practice deviates from the strict requirements of the Vienna Convention 1969. On 4 April 2000, in a letter addressed to the Permanent Representatives to the United Nations, the Legal Counsel advised that the time limit for objecting to such a late reservation would be 12 months from the date of the depositary notification. The same principle has been applied by the Secretary-General, as depositary, where a reserving State to a treaty has withdrawn an initial reservation but has substituted it with a new or modified reservation (LA41TR/221 (23-1) (extracted in annex 2)).

3.5.4 Form of reservations

(See the model instrument of a reservation in annex 6.)

Normally, when a reservation is formulated, it must be included in the instrument of ratification, acceptance, approval or accession or be annexed to it and (if annexed) must be separately signed by the Head of State, Head of Government or Minister for Foreign Affairs or a person having full powers for that purpose issued by one of the above authorities.

3.5.5 Notification of reservations by the depositary

Where a treaty expressly prohibits reservations

Where a treaty expressly prohibits reservations, as in the case of the *Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997*, for example, the Secretary-General, as depositary, may have to make a preliminary legal assessment as to whether a given statement constitutes a reservation. If the statement has no bearing on the State's legal obligations, the Secretary-General circulates the statement to the States concerned.

If a statement on its face, however phrased or named (see article 2 (1) (d) of the Vienna Convention 1969), unambiguously purports to exclude or modify the legal effects of provisions of the treaty in their application to the State concerned, contrary to the provisions of the treaty, the Secretary-General will refuse to accept that State's signature, ratification, acceptance, approval or accession in conjunction with the statement. The Secretary-General will draw the attention of the State concerned to the issue and will not circulate the unauthorized reservation. This practice is followed only in instances where, *prima facie*, there is no doubt that the reservation is unauthorized and that the statement constitutes a reservation.

Where such a *prima facie* determination is not possible, and doubts remain, the Secretary-General may request a clarification from the declarant on the real nature of the statement. If the declarant formally clarifies that the statement is not a reservation but only a declaration, the Secretary-General will formally receive the instrument in deposit and notify all States concerned accordingly.

The Secretary-General, as depositary, is not required to request such clarifications automatically; rather, it is for the States concerned to raise any objections they may have to statements they consider to be unauthorized reservations.

For example, articles 309 and 310 of the *United Nations Convention on the Law of the Sea, 1982*, provide that States may not make reservations to the Convention (unless expressly permitted elsewhere in the Convention) and that declarations or statements, however phrased or named, may only be made if they do not purport to exclude or modify the legal effect of the provisions of the Convention in their application to the reserving State.

Where a treaty expressly authorizes reservations

Where a State formulates a reservation that is expressly authorized by the relevant treaty, the Secretary-General, as depositary, informs the States concerned by depositary notification. A reservation of this nature does not require any subsequent acceptance by the States concerned, unless the treaty so provides (see article 20 (1) of the Vienna Convention 1969).

Where a treaty is silent on reservations

Where a treaty is silent on reservations and a State formulates a reservation consistent with article 19 of the Vienna Convention 1969, the Secretary-General, as depositary, informs the States concerned of the reservation by depositary notification. Generally, human rights treaties do not contain provisions relating to reservations.

3.5.6 Objections to reservations

Time for making objections to reservations

Where a treaty is silent on reservations and a reservation is formulated upon expression of consent to be bound and subsequently circulated, States concerned have 12 months to object to the reservation, beginning on the date of the depositary notification or the date on which the State expressed its consent to be bound by the treaty, whichever is later (see article 20 (5) of the Vienna Convention 1969).

Where a State concerned lodges an objection to a treaty with the Secretary-General after the end of the 12-month period, the Secretary-General circulates it as a "communication".

Many States have formulated reservations to the International Covenant on Civil and Political Rights, 1966, and the Convention on the Elimination of All Forms of Discrimination against Women, 1979, subjecting their obligations under the treaty to domestic legal requirements. These reservations, in turn, have attracted a wide range of objections from States parties (see chapter IV, at <http://treaties.un.org/pages/ParticipationStatus.aspx>).

Effect of objection on entry into force of reservations

An objection to a reservation "... does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State" (article 20 (4) (b) of the Vienna Convention 1969). Normally, to avoid uncertainty, an objecting State specifies whether its objection to the reservation precludes the entry into force of the treaty between itself and the reserving State. The Secretary-General circulates such objections.

See, for example, the objection by a State to a reservation that another State made upon its accession to the Convention on the *Elimination of All Forms of Discrimination against Women, 1979* (depository notification C.N.506.2007.TREATIES-19):

The Government (name of State) has examined the reservations made by the Government of (name of State) upon accession to the Convention on the Elimination of All Forms of Discrimination against Women regarding Article 9, paragraph 2 and those provisions of the Convention that may be contrary to the Constitution of (name of State) ... The Government of (name of State) therefore objects to the aforesaid reservations made by the Government of (name of State) to the Convention. This objection shall not preclude the entry into force of the Convention between (name of State) and (name of State). The Convention enters into force in its entirety between (name of State) and (name of State), without (name of State) benefiting from its reservation.

If a State does not object to a reservation made by another State, the first State is deemed to have tacitly accepted the reservation (article 21 (1) of the Vienna Convention 1969).

3.5.7 *Withdrawal of reservations*

(See the model instrument of withdrawal of reservation(s) in annex 8.)

A State may, unless the treaty provides otherwise, withdraw its reservation or objection to a reservation completely or partially at any time. In such a case, the consent of the States concerned is not necessary for the validity of the withdrawal (articles 22-23 of the Vienna Convention 1969). The withdrawal must be formulated in writing and signed by the Head of State, Head of Government or Minister for Foreign Affairs or a person having full powers for that purpose issued by one of the above authorities. The Secretary-General, as depositary, circulates a notification of a withdrawal to all States concerned.

Article 22 (3) of the Vienna Convention 1969 provides that the withdrawal of a reservation becomes operative in relation to another State only when that State has been notified of the withdrawal. Similarly, the withdrawal of an objection to a reservation becomes operative when the reserving State is notified of the withdrawal.

3.5.8 *Modifications to reservations*

(See the model instrument of modification of reservation(s) in annex 7.)

An existing reservation may be modified so as to result in a partial withdrawal or to create new exemptions from, or modifications of, the legal effects of certain provisions of a treaty. A modification of the latter kind has the nature of a new reservation. The Secretary-General, as depositary, circulates such modifications and grants the States concerned a specific period within which to object to them. In the absence of any objection, the Secretary-General accepts the modification in deposit.

In the past, the Secretary-General's practice as depositary had been to stipulate 90 days as the period within which the States concerned could object to such a modification. However, since the modification of a reservation could involve complex issues of law and policy, the Secretary-General decided that this time period was inadequate. Therefore, on 4 April 2000, the Secretary-General advised that the time provided for

objections to modifications would be 12 months from the date of the depository notification containing the modification (LA 41 TR/221 (23-1) (extracted in annex 2)).

See, for example, the modification of a reservation made by a State upon its accession to the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 1989* (depository notification C.N.1338.2003.TREATIES-11):

In keeping with the depository practice followed in similar cases, the Secretary-General proposes to receive the modification in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged, within a period of 12 months from the date of the present depository notification. In the absence of any such objection, the above modification will be accepted for deposit upon the expiration of the above-stipulated 12-month period, that is on 1 December 2004.

3.6 **Declarations**

(See the *Summary of Practice*, paras. 217-220.) (See the model instrument of a declaration in annex 6.)

3.6.1 *Interpretative declarations*

A State may make a declaration about its understanding of a matter contained in or the interpretation of a particular provision in a treaty. Interpretative declarations of this kind, unlike reservations, do not purport to exclude or modify the legal effects of a treaty. The purpose of an interpretative declaration is to clarify the meaning of certain provisions or of the entire treaty.

Some treaties specifically provide for interpretative declarations. For example, when signing, ratifying or acceding to the *United Nations Convention on the Law of the Sea, 1982*, a State may make declarations with a view to harmonizing its laws and regulations with the provisions of that convention, provided that such declarations or statements do not purport to exclude or modify the legal effect of the provisions of the convention in their application to that State.

3.6.2 *Optional and mandatory declarations*

Treaties may provide for States to make optional and/or mandatory declarations. These declarations are legally binding on the declarants.

Optional declarations

Many human rights treaties provide for States to make optional declarations that are legally binding upon them. In most cases, these declarations relate to the competence of human rights commissions or committees (see section 4.3). See, for example, article 41 of the *International Covenant on Civil and Political Rights, 1966*:

A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant.

Declarations related to the settlement of disputes are also generally optional. They may be made upon signature, ratification, accession or at any time thereafter.

See, for example, article 11 (3) of the *Vienna Convention for the Protection of the Ozone Layer, 1985*:

When ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 or paragraph 2 above, it accepts one or both of the following means of dispute settlement as compulsory.

Other optional declarations related to the settlement of disputes are considered authorized reservations under the treaty. See, for example, article 66 (3) and (4) of the *United Nations Convention Against Corruption, 2003*:

3. Each State Party may, at the time of signature, ratification, acceptance or approval or accession to this Convention, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.
4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Mandatory declarations

Where a treaty requires States becoming party to it to make a mandatory declaration, the Secretary-General, as depositary, seeks to ensure that they make such declarations. Some disarmament and human rights treaties provide for mandatory declarations, as, for example, article 3 of the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1992*. Article 3 (2) of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2000*, provides:

Each State Party shall deposit a binding declaration upon ratification of or accession to this Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards that it has adopted to ensure that such recruitment is not forced or coerced.

Mandatory declarations also appear in some treaties on the law of the sea. For example, when an international organization signed the *United Nations Convention on the Law of the Sea, 1982* (UNCLOS), or the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995* (1995 Agreement), it had to make a declaration specifying the matters governed by UNCLOS in respect of which the organization's member States have conferred competence on the organization, and the nature and extent of that competence. The States conferring such competence must be signatories to UNCLOS. Where an international organization has competence over all matters governed by the 1995 Agreement, it must make a declaration to that effect upon signature or accession, and its member States may not become States parties to the 1995 Agreement except in respect of any of their territories for which the international organization has no responsibility.

3.6.3 Time for formulating declarations

Declarations are usually deposited at the time of signature or at the time of deposit of the instrument of ratification, acceptance, approval or accession. Sometimes, a declaration may be lodged subsequently.

3.6.4 Form of declarations

Since an interpretative declaration does not have a legal effect similar to that of a reservation, it need not be signed by a formal authority as long as it clearly emanates from the State concerned. However, since a doubt could arise about whether a declaration in fact constitutes a reservation, a declaration should preferably be signed by the Head of State, Head of Government or Minister for Foreign Affairs or a person having full powers for that purpose issued by one of the above authorities.

Optional and mandatory declarations impose legal obligations on the declarant and therefore must be signed by the Head of State, Head of Government or Minister for Foreign Affairs or by a person having full powers for that purpose issued by one of the above authorities.

3.6.5 Notification of declarations by the depositary

The Secretary-General, as depositary, reviews all declarations to treaties that prohibit reservations to ensure that they are *prima facie* not reservations (see the discussion on prohibited reservations in section 3.5.5). Where a treaty is silent on or authorizes reservations, the Secretary-General makes no determination about the legal status of declarations relating to that treaty. The Secretary-General simply communicates the text of the declaration to all States concerned by depositary notification, allowing those States to draw their own legal conclusions as to its status.

3.6.6 Objections to declarations

Objections to declarations where the treaty is silent on reservations

States sometimes object to declarations relating to a treaty that is silent on reservations. The Secretary-General, as depositary, circulates any such objection.

Objections to declarations generally focus on whether the statement is merely an interpretative declaration or is in fact a true reservation sufficient to modify the legal effects of the treaty. If the objecting State concludes that the declaration is a reservation and/or incompatible with the object and purpose of the treaty, the objecting State may prevent the treaty from entering into force between itself and the reserving State. However, if the objecting State intends this result, it should specify it in the objection. Normally, objecting States specify that the objection does not preclude the entry into force of the treaty between them and the reserving State.

See, for example, the objection by a State to a declaration made by another State upon its accession to the *Convention on the Rights of Persons with Disabilities, 2006* (depositary notification C.N.486.2010.TREATIES-18):

The (name of State) has examined the declaration made by the (name of State) upon its accession to the Convention on the Rights of Persons with Disabilities (hereinafter the 'Convention') on October 23, 2009. The (name of State) points out that the title of a statement intended to modify

or exclude the legal effects of certain provisions of a treaty does not alone determine the status of such statement as a reservation or declaration. The (name of State) is of the opinion that the declaration made by the (name of State) constitutes, in fact, a reservation. The (name of State) finds that the reservation does not make it clear to what extent the (name of State) is willing to honour its obligations under the Convention, since 'it does not consider itself bound by any provisions of the Convention which may be incompatible with its applicable rules'. The (name of State) believes that this reservation is incompatible with the object and purpose of the Convention. According to Article 46, paragraph 1 of the Convention and customary international law codified in the Vienna Convention on the Law of Treaties, such reservations should not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. The (name of State), therefore, objects to the aforesaid reservation made by the (name of State) and considers the reservation null and void. This objection shall not preclude the entry into force of the Convention between the (name of State) and the (name of State), without the (name of State) benefiting from its reservation.

An objecting State sometimes requests that the declarant "clarify" its intention. In such a situation, if the declarant agrees that it has formulated a reservation, it may either withdraw its reservation or confirm that its statement is only a declaration.

3.7 Notifications

Notifications normally provide information as required under a treaty. They usually relate to designation of authorities or designation of languages, or the establishment of jurisdiction required under the treaty provisions. See, for example, notifications under articles 6 (3), 44 (6) (a) and 46 (13) and (14) of the *United Nations Convention against Corruption, 2003*; and articles 5 (3), 16 (5), 18 (13) and (14), and 31 (6) of the *United Nations Convention against Transnational Organized Crime, 2000*.

For example, under article 18 (13) of the *United Nations Convention against Transnational Organized Crime, 2000*, and article 46(13) of the *United Nations Convention against Corruption, 2003*, States are required to notify the Secretary-General at the time of the deposit of the instrument of ratification, acceptance, approval of or accession to the Convention of the central authority for purposes of receiving mutual legal assistance requests. Article 9 (3) of the *International Convention for the Suppression of Acts of Nuclear Terrorism, 2005*, requires a State to notify the Secretary-General upon ratifying, accepting, approving or acceding to the Convention of the jurisdiction it has established as required by the Convention.

Some notifications can be deposited upon signature, ratification or accession or at any time thereafter, for example, notifications nominating conciliators and arbitrators pursuant to Annexes V and VII to the *United Nations Convention on the Law of the Sea, 1982*.

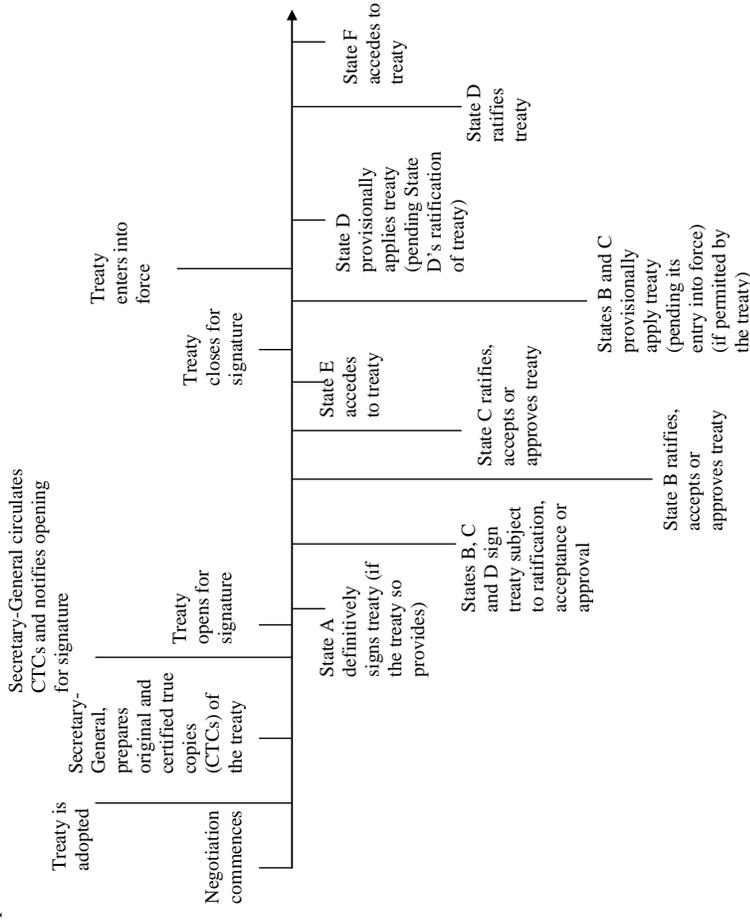
In the case of derogations from the *International Covenant on Civil and Political Rights, 1966*, in time of public emergency, a State must immediately inform other States, through the intermediary of the Secretary-General of the United Nations, of the provisions of the Covenant from which it has derogated and of the reasons by which it was actuated. The Secretary-General must also be informed of an extension or cessation of a state of emergency.

Since a notification does not have a legal effect similar to a declaration or reservation, it does not need to be signed by one of the three authorities.

4 KEY EVENTS IN A MULTILATERAL TREATY

4.1 Overview

This section outlines what happens to a treaty after it is adopted. The timeline below shows a possible sequence of events as a treaty enters into force and States become parties to it.



4.2 Entry into force

(See the *Summary of Practice*, paras. 221-247.)

4.2.1 Definitive entry into force

Typically, the provisions of a multilateral treaty determine the date upon which the treaty enters into force. Where a treaty does not specify a date or provides another method for its entry into force, the treaty is presumed to be intended to come into force as soon as all negotiating States have consented to be bound by the treaty. All multilateral treaties deposited with the Secretary-General that are concluded nowadays specify when they will enter into force.

Treaties, in general, may enter into force:

- (a) Upon a certain number of States depositing instruments of ratification, approval, acceptance or accession with the depositary.

See, for example, article VIII of the *Protocol relating to the Status of Refugees, 1967*:

The present Protocol shall come into force on the day of deposit of the sixth instrument of accession.

- (b) A specific time after a certain percentage, proportion or category of States deposited instruments of ratification, approval, acceptance or accession with the depositary.

See, for example, article XIV of the *Comprehensive Nuclear-Test-Ban Treaty, 1996*:

This Treaty shall enter into force 180 days after the date of deposit of the instruments of ratification by all States listed in Annex 2 to this Treaty, but in no case earlier than two years after its opening for signature.

- (c) A specific time after a certain number of States have deposited instruments of ratification, acceptance, approval or accession with the depositary.

See, for example, article 126 (1) of the *Rome Statute of the International Criminal Court, 1998*:

This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

- (d) On a specific date after certain conditions are fulfilled.

See, for example, article 39 (1) of the *International Tropical Timber Agreement, 2006*:

This Agreement shall enter into force definitively on 1 February 2008 or on any date thereafter, if 12 Governments of producers holding at least 60 per cent of the total votes as set out in Annex A to this Agreement and 10 Governments of consumers as listed in Annex B and accounting for 60 per cent of the global import volume of tropical timber in the reference year

2005 have signed this Agreement definitively or have ratified, accepted or approved it pursuant to article 36, paragraph 2, or article 37. 2. If this Agreement has not entered into force definitively on 1 February 2008, it shall enter into force provisionally on that date or on any date within six months thereafter if 10 Governments of producers holding at least 50 per cent of the total votes as set out in Annex A to this Agreement and seven Governments of consumers as listed in Annex B and accounting for 50 per cent of the global import volume of tropical timber in the reference year 2005 have signed this Agreement definitively or have ratified, accepted or approved it pursuant to article 36, paragraph 2 or have notified the depositary under article 38 that they will apply this Agreement provisionally.

Once a treaty has entered into force, if the number of parties subsequently falls below the minimum number specified for entry into force, the treaty remains in force unless the treaty itself provides otherwise (see article 55 of the Vienna Convention 1969).

4.2.2 *Entry into force for a State*

Where a State definitively signs or ratifies, accepts, approves or accedes to a treaty that has already entered into force, the treaty enters into force for that State according to the relevant provisions of the treaty. Treaties often provide for entry into force for a State in these circumstances:

- (a) At a specific time after the date the State definitively signs or deposits its instrument of ratification, acceptance, approval or accession.
- See, for example, article 126 (2) of the *Rome Statute of the International Criminal Court, 1998*:
- For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.
- (b) On the date the State definitively signs or deposits its instrument of ratification, acceptance, approval or accession.
- See, for example, article VIII of the *Protocol relating to the Status of Refugees, 1967*:

For each State acceding to the Protocol after the deposit of the sixth instrument of accession, the Protocol shall come into force on the date of deposit by such State of its instrument of accession.

4.2.3 *Provisional entry into force*

It is noted, nevertheless, that some treaties include provisions for their provisional entry into force. This enables States that are ready to implement the obligations under a treaty to do so among themselves, without waiting for the minimum number of ratifications necessary for its formal entry into force, if this number is not obtained within a given period.

See, for example, article 57 (2) of the *International Cocoa Agreement, 2010*:

This Agreement shall enter into force provisionally on 1 January 2011 if by such date Governments representing at least five exporting countries accounting for at least 80 per cent of the total exports of countries listed in annex A and Governments representing importing countries having at least 60 per cent of total imports as set out in annex B have deposited their instruments of ratification, acceptance, approval or accession, or have notified the Depositary that they will apply this Agreement provisionally when it enters into force. Such Governments shall be provisional Members.

Once a treaty has entered into force provisionally, it creates obligations for the parties that agreed to bring it into force in that manner.

4.3 *Dispute resolution and compliance mechanisms*

Many treaties contain detailed dispute resolution provisions, but some contain only general provisions. Where a dispute, controversy or claim arises out of a treaty (for example, due to breach, error, fraud, performance issues, etc.) these provisions become extremely important. If a treaty does not provide a dispute resolution mechanism, article 66 of the Vienna Convention 1969 may apply.

Treaties may provide various dispute resolution mechanisms, such as negotiation, consultation, conciliation, use of good offices, panel procedures, arbitration, judicial settlement, reference to the International Court of Justice, etc. See, for example, article 119 (2) of the *Rome Statute of the International Criminal Court, 1998*:

Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

In some recently concluded treaties, detailed compliance mechanisms are included. Many disarmament treaties and some environmental treaties provide compliance mechanisms, for example, by imposing monitoring and reporting requirements. See, for example, article 8 of the *Montreal Protocol on Substances that Deplete the Ozone Layer, 1987*, which provides that the parties "... shall consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance". During the Fourth Meeting of the Parties to the *Montreal Protocol on Substances that Deplete the Ozone Layer* (Copenhagen, 1992), the parties adopted a detailed non-compliance procedure (*Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, 1992* (UNEP/OzL.Pro.4/15), decision IV/5, and annexes IV and V; see <http://www.uneep.org>).

Many human rights treaties provide for independent committees to oversee the implementation of their provisions, for example, the *Convention on the Elimination of All Forms of Discrimination against Women, 1979*, the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999*; and the *International Covenant on Civil and Political Rights, 1966*.

4.4 Amendments

(See the *Summary of Practice*, paras. 248-255.)

4.4.1 Amending treaties that have entered into force

The text of a treaty may be amended in accordance with the amendment provisions in the treaty itself or in accordance with Part IV of the Vienna Convention 1969. If the treaty does not specify any amendment procedures, the parties may negotiate a new treaty or agreement amending the existing treaty.

An amendment procedure within a treaty may contain provisions governing the following:

(a) Proposal of amendments

See, for example, article 15 of the *Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006*:

Any State Party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties; with a request to be notified whether they favour a meeting of States Parties for the purpose of considering and deciding upon the proposals.

(b) Circulation of proposals of amendments

Normally, the relevant treaty secretariat circulates proposals of amendments. The treaty secretariat is in the best position to provide administrative support and assist with any necessary consultation between negotiating States. The treaty itself may detail the secretariat's role in this regard. In the absence of circulation of the amendment by the treaty body, the Secretary-General, as depositary, may perform this function.

(c) Adoption of amendments

Amendments may be adopted by States parties at a conference or by an executive body, such as the executive arm of the treaty. See, for example, article 13 (4) of the *Convention on Cluster Munitions, 2008*:

Any amendment to this Convention shall be adopted by a majority of two-thirds of the States Parties present and voting at the Amendment Conference. The Depositary shall communicate any amendment so adopted to all States.

(d) Parties' consent to be bound by amendments

Treaties normally specify that a party must formally consent to be bound by an amendment, following adoption, by depositing an instrument of ratification, acceptance or approval of the amendment. See, for example, article 39 (3) of the *United Nations Convention against Transnational Organized Crime, 2000*:

An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

(e) Entry into force of amendments

An amendment enters into force in accordance with the amendment provisions that are built into the treaty, for example:

- (i) Upon elapse of a specified time period following deposit of a specified number or percentage of instruments of ratification, acceptance, etc.; or
- (ii) Within a certain period of time following its circulation, provided none of the parties to the treaty objects.

See, for example, article 20 (4) of the *Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997*:

Instruments of acceptance in respect of an amendment shall be deposited with the Depositary. An amendment adopted in accordance with paragraph 3 above shall enter into force for those Parties having accepted it on the ninetieth day after the date of receipt by the Depositary of an instrument of acceptance by at least three fourths of the Parties to this Protocol.

(f) Effect of amendments: two approaches

Depending on the treaty provisions, an amendment to a treaty may, upon its entry into force, bind:

- (i) Only those States that formally accepted the amendment (see paragraph (d) above); or
- (ii) In some cases, all States parties to the treaty.

(g) States that become parties after the entry into force of an amendment

The provisions of the treaty determine which States are bound by the amendment. See, for example, article 13 (5) of the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997*:

An amendment to this Convention shall enter into force for all States Parties to this Convention, which have accepted it, upon the deposit with the Depositary of instruments of acceptance by a majority of States Parties. Thereafter it shall enter into force for any remaining State Party on the date of deposit of its instrument of acceptance.

4.4.2 Amending treaties that have not entered into force

Where a treaty has not entered into force, it is not possible to amend the treaty pursuant to its own provisions. Where States agree that the text of a treaty needs to be revised, subsequent to the treaty's adoption, but prior to its entry into force, signatories and contracting States may meet to adopt additional agreements or protocols to address the problem. While contracting States and signatories play an essential role in such negotiations, it is not unusual for all interested States to participate. See, for example, the *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994*.

4.4.3 Determining the date on which an amendment enters into force

The Secretary-General, as depositary, is guided by the amendment provisions of a treaty in determining when an amendment to the treaty enters into force. Some treaties specify that an amendment enters into force upon a specified period following the deposit of a specified number of ratifications, acceptances or approvals. However, where the amendment provision specifies that entry into force occurs when a certain proportion of the parties to a treaty have ratified, accepted or approved the amendment, then the determination of the time of entry into force becomes less certain. For example, if an amendment is to enter into force after two-thirds of the parties have expressed their consent to be bound by it, does this mean two-thirds of the parties to the treaty at the time the amendment is adopted or two-thirds of the parties to the treaty at any given point in time following such adoption?

In these cases, it is the Secretary-General's practice to apply the latter approach, sometimes called the current time approach. Under this approach, the Secretary-General, as depositary, determines the time an amendment enters into force by counting all parties at any given time following the adoption of the amendment. Accordingly, States that become parties to a treaty after the adoption of an amendment, but before its entry into force, are also counted. As far back as 1973, the Secretary-General, as depositary, applied the current time approach to the amendment of Article 61 of the *Charter of the United Nations*.

4.5 Withdrawal and denunciation

(See the *Summary of Practice*, paras. 157-160.)

In general terms, a party may withdraw from or denounce a treaty:

- (a) In accordance with any provisions of the treaty enabling withdrawal or denunciation (see article 54 (a) of the Vienna Convention 1969);
- (b) With the consent of all parties after consultation with all contracting States (see article 54 (b) of the Vienna Convention 1969); or
- (c) In the case of a treaty that is silent on withdrawal or denunciation, by giving at least 12 months' notice, and provided that:
 - (i) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or
 - (ii) A right of denunciation or withdrawal may be implied by the nature of the treaty (see article 56 of the Vienna Convention 1969).

States wishing to invoke article 56 of the Vienna Convention 1969 (see (c) (i) and (ii) above) carry the burden of proof.

Some treaties, including human rights treaties, do not contain withdrawal provisions. See, for example, the *International Covenant on Civil and Political Rights, 1966*. The Secretary-General, as depositary, has taken the view that it would not appear possible for a party to withdraw from such a treaty except in accordance with article 54 or 56 of the Vienna Convention 1969 (see depositary notification C.N.467.1997.TREATIES-10).

Where a treaty contains provisions on withdrawal, the Secretary-General is guided by those provisions. For example, article 12 (1) of the *Optional Protocol to the International Covenant on Civil and Political Rights, 1966*, provides for denunciation by States parties as follows:

Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General.

This provision has been used by a State to notify the Secretary-General of its intention to denounce the Protocol.

4.6 Termination

(See the *Summary of Practice*, paras. 256-262.)

Treaties may include a provision regarding their termination. Article 42 (2) of the Vienna Convention 1969 states that a treaty may only be terminated as a result of the application of the provisions of the treaty itself or of the Vienna Convention 1969 (for example, articles 54, 56, 59-62 and 64). A treaty can be terminated by a subsequent treaty to which all the parties of the former treaty are also party.

5 REGISTERING OR FILING AND RECORDING TREATIES

5.1 Article 102 of the Charter of the United Nations

(See the *Repertory of Practice*, Article 102, para. 1.)

Article 102 of the *Charter of the United Nations* provides that:

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
2. No party to any such treaty or international agreement, which has not been registered in accordance with the provisions of paragraph 1 of this Article, may invoke that treaty or agreement before any organ of the United Nations.

Thus, States Members of the United Nations have a legal obligation to register treaties and international agreements with the Secretariat, and the Secretariat is mandated to publish registered treaties and international agreements. Within the Secretariat, the Treaty Section is responsible for these functions.

Registration, not publication, is the prerequisite set up in the *Charter of the United Nations* for a treaty or international agreement to be capable of being invoked before the International Court of Justice or any other organ of the United Nations.

The objective of Article 102, which can be traced back to article 18 of the *Covenant of the League of Nations*, is to ensure that all treaties and international agreements remain in the public domain and thus assist in eliminating secret diplomacy. The *Charter of the United Nations* was drafted in the aftermath of the Second World War. At that time, secret diplomacy was believed to be a major cause of international instability.

5.2 Regulations to give effect to Article 102

(See the *Repertory of Practice*, Article 102, para. 2, and the annex to the General Survey.)

Recognizing the need for the Secretariat to have uniform guidelines for implementing Article 102 of the *Charter of the United Nations*, the General Assembly adopted certain Regulations to give effect to Article 102 (see the Abbreviations section for the source of the Regulations). The Regulations treat the act of registration and the act of publication as two distinct operations. Parts one and two of the Regulations (articles 1-11) deal with registration and filing and recording. Part three of the Regulations (articles 12-14) relates to publication.

5.3 Meaning of "treaty" and "international agreement" under Article 102

5.3.1 Role of the Secretariat

(See the *Repertory of Practice*, Article 102, para. 15.)

When the Secretariat receives instruments for the purpose of registration, the Treaty Section examines the instruments to determine whether they are capable of being registered. The Secretariat generally respects the view of the party submitting an instrument for registration that, in so far as that party is concerned, the instrument is a treaty or an international agreement within the meaning of Article 102. However, the Secretariat examines each instrument to satisfy itself that it, *prima facie*, constitutes a treaty. The Secretariat has the discretion to refrain from taking action if, in its view, an instrument submitted for registration does not constitute a treaty or an international agreement or does not meet all the requirements for registration stipulated by the Regulations (see section 5.6).

Where an instrument submitted fails to comply with the requirements under the Regulations or is unclear, the Secretariat places it in a "pending" file. The Secretariat then requests clarification or additional documents, in writing, from the submitting party. The Secretariat will not process the instrument until it receives such clarification or additional documents.

Where an instrument is registered with the Secretariat, this does not imply a judgement by the Secretariat on the nature of the instrument, the status of a party, or any similar question. Thus, the Secretariat's acceptance for registration of an instrument does not confer on the instrument the status of a treaty or an international agreement if it does not already possess that status. Similarly, registration does not confer on a party to a treaty or international agreement a status that it would not otherwise have.

5.3.2 Form

(See the *Repertory of Practice*, Article 102, paras. 18-30.)

The *Charter of the United Nations* does not define the terms "treaty" or "international agreement". Article 1 of the Regulations provides guidance on what comprises a treaty or international agreement by adding the phrase "whatever its form and descriptive name". Therefore, the title and form of a document submitted to the Secretariat for registration are less important than its content in determining whether it is a treaty or international agreement. An exchange of notes or letters, a protocol, an accord, a memorandum of understanding and even a unilateral declaration may be registrable under Article 102.

5.3.3 Parties

A treaty or international agreement under Article 102 must be concluded between at least two parties possessing treaty-making capacity. Thus, a sovereign State or an international organization with treaty-making capacity can be a party to a treaty or international agreement.

Many international organizations established by treaty or international agreement have been specifically or implicitly conferred treaty-making capacity. Similarly, some treaties recognize the treaty-making capacity of certain international organizations, such as the European Union. However, an international entity established by treaty or international agreement may not necessarily have the capacity to conclude treaties.

5.3.4 *Intention to create legal obligations under international law*

A treaty or international agreement must impose on the parties legal obligations binding under international law, as opposed to mere political commitments. It must be clear on the face of the instrument, whatever its form, that the parties intend to be legally bound under international law.

In one instance, the Secretariat concluded that an instrument submitted for registration, which contained a framework for creating an association of parliamentarians, was not registrable under Article 102. Accordingly, the instrument was not registered. The Secretariat determined that the document submitted was not a treaty or international agreement among international juridical persons to create rights and obligations enforceable under international law.

5.4 Types of registration, filing and recording

5.4.1 *Registration with the Secretariat*

(See the *Repertory of Practice*, Article 102, paras. 43-44, 55-57 and 67-70, and article 1 of the Regulations in the annex to the General Survey.)

Under Article 102 of the *Charter of the United Nations* (see section 5.1), treaties and international agreements of which at least one party is a Member of the United Nations must be registered with the Secretariat. The treaty or international agreement has to be in force between at least two of the parties and the other requirements for registration have to be met (article 1 of the Regulations) (see section 5.6).

As mentioned above, Member States of the United Nations are obliged to register, under Article 102, all treaties and international agreements concluded after the coming into force of the *Charter of the United Nations*. Thus, the onus to register rests with Member States of the United Nations. Although this obligation is mandatory for Member States of the United Nations, it does not preclude international organizations with treaty-making capacity or non-Member States from submitting for registration treaties or international agreements entered into with a Member State.

A specialized agency is permitted to register with the Secretariat a treaty or international agreement that is subject to registration in the following cases (article 4 (2) of the Regulations):

- (a) Where the constituent instrument of the specialized agency provides for such registration;
- (b) Where the treaty or agreement has been registered with the specialized agency pursuant to the terms of its constituent instrument;

- (c) Where the specialized agency has been authorized by the treaty or agreement to effect registration.

In accordance with article 1 (3) of the Regulations, which provides for registration to be effected "by any party" to a treaty or international agreement, the specialized agency may also register those treaties and international agreements to which it itself is a party.

5.4.2 *Filing and recording by the Secretariat*

(See the *Repertory of Practice*, Article 102, paras. 71-81, and article 10 of the Regulations in the annex to the General Survey.)

The Secretariat files and records treaties or international agreements voluntarily submitted to the Secretariat and not subject to registration under Article 102 of the *Charter of the United Nations* or the Regulations. The requirements for registration outlined in section 5.6 in relation to submission of treaties and international agreements for registration apply equally to submission of treaties and international agreements for filing and recording.

Article 10 of the Regulations provides for the Secretariat to file and record the following categories of treaties and international agreements where they are not subject to registration under Article 102:

- (a) Treaties or international agreements entered into by the United Nations or by one or more of the specialized agencies. This covers treaties and international agreements between:
 - (i) The United Nations and non-member States;
 - (ii) The United Nations and specialized agencies or international organizations;
 - (iii) Specialized agencies and non-member States;
 - (iv) Two or more specialized agencies; and
 - (v) Specialized agencies and international organizations.

Although not expressly provided for in the Regulations, it is also the practice of the Secretariat to file and record treaties or international agreements between two or more international organizations other than the United Nations or a specialized agency.

- (b) Treaties or international agreements transmitted by a Member of the United Nations which were entered into before the coming into force of the *Charter of the United Nations*, but which were not included in the treaty series of the League of Nations; and
- (c) Treaties or international agreements transmitted by a party not a member of the United Nations, which were entered into before or after the coming into force of the *Charter of the United Nations* and which were not included in the treaty series of the League of Nations.

5.4.3 *Ex officio* registration by the United Nations

(See the *Repertory of Practice*, Article 102, paras. 45-54, and article 4 (1) of the Regulations in the annex to the General Survey.)

Article 4 (a) of the Regulations provides that every treaty or international agreement that is subject to registration and to which the United Nations is a party shall be registered *ex officio*. *Ex officio* registration is the act whereby the United Nations unilaterally registers all treaties or international agreements to which it is a party. Although not expressly provided for in the Regulations, it is the practice of the Secretariat to register *ex officio* subsequent actions relating to a treaty or international agreement that the United Nations has previously registered *ex officio*.

Where the Secretary-General is the depositary of a multilateral treaty or agreement, the United Nations also registers *ex officio* the treaty or international agreement and subsequent actions to it after the relevant treaty or international agreement has entered into force (see article 4 (c) of the Regulations).

5.5 Types of agreements registered or filed and recorded

5.5.1 *Multilateral treaties*

A multilateral treaty is an international agreement concluded between three or more subjects of international law, each possessing treaty-making capacity (see section 5.3.3).

5.5.2 *Bilateral treaties*

The majority of treaties registered pursuant to Article 102 of the *Charter of the United Nations* are bilateral treaties. A bilateral treaty is an international agreement concluded between two subjects of international law, each possessing treaty-making capacity (see section 5.3.3). In some situations, several States or organizations may join together to form one party. There is no standard form for a bilateral treaty.

An essential element of a bilateral treaty is that both parties have reached agreement on its content. Accordingly, reservations and declarations are generally inapplicable to bilateral agreements. However, where the parties to a bilateral treaty have made reservations or declarations, or agreed on some other interpretative document, such instrument must be registered together with the treaty submitted for registration under Article 102 of the *Charter of the United Nations* (see article 5 of the Regulations).

5.5.3 *Unilateral declarations*

(See the *Repertory of Practice*, Article 102, para. 24.)

Unilateral declarations that constitute interpretative, optional or mandatory declarations (see sections 3.6.1 and 3.6.2) may be registered with the Secretariat by virtue of their relation to a previously or simultaneously registered treaty or international agreement.

Unlike interpretative, optional and mandatory declarations, some unilateral declarations may be regarded as having the character of international agreements in their own right and are registered as such. An example is a unilateral declaration made under Article 36 (2) of the *Statute of the International Court of Justice*, recognizing as compulsory the

jurisdiction of the International Court of Justice. These declarations are registered *ex officio* (see section 5.4.3) when deposited with the Secretary-General.

A political statement lacking legal content and not expressing an understanding relating to the legal scope of a provision of a treaty or international agreement cannot be registered with the Secretariat.

5.5.4 *Subsequent actions, modifications and agreements*

(See the *Repertory of Practice*, Article 102, and article 2 of the Regulations in the annex to the General Survey.)

Subsequent actions effecting a change in the parties to, or the terms, scope or application of, a treaty or international agreement previously registered must be registered with the Secretariat. For example, such actions may involve ratifications, accessions, prolongations, extensions to territories, or denunciations. In the case of bilateral treaties, it is generally the party responsible for the subsequent action that registers it with the Secretariat. However, any other party to such agreement may assume this role. In the case of a multilateral treaty or agreement, the depositary usually effects registration of such actions (see section 5.4.3 in relation to treaties or international agreements deposited with the Secretary-General).

Where a new instrument modifies the scope or application of a parent agreement, such new instrument must also be registered with the Secretariat. It is clear from article 2 of the Regulations that for the subsequent treaty or international agreement to be registered, the prior treaty or international agreement to which it relates must first be registered. In order to maintain organizational continuity, the registration number that has been assigned for the registration of the parent treaty or international agreement is also assigned to the subsequent treaty or international agreement.

5.6 Requirements for registration

(See the *Repertory of Practice*, Article 102, article 5 of the Regulations in the annex to the General Survey and annex 10.)

Before preparing documents for registration, the following points should be taken into account:

- (a) Whether the treaty or international agreement has already been registered with the Secretariat. If the treaty or international agreement has already been registered, it does not have to be submitted for registration.
- (b) Provisions in a treaty may invoke other agreements that form a part of the treaty and are essential for the application and implementation of the treaty. If those agreements are not yet registered, they should also be submitted for registration.

Treaties and international agreements that have already been registered could be searched on the United Nations Treaty Series database (<http://treaties.un.org>).

An instrument submitted for registration must meet the following general requirements:

1. Treaty or international agreement within the meaning of Article 102
As mentioned above, the Secretariat reviews each document submitted for registration to ensure that it falls within the meaning of a treaty or international agreement under Article 102 of the *Charter of the United Nations* (see section 5.3).
2. Certifying statement
(See the model certifying statement in annex 9.)
Article 5 of the Regulations requires that a party or specialized agency registering a treaty or international agreement certify that “the text is a true and complete copy thereof and includes all reservations made by parties thereto”. The certifying statement must include:
 - (a) The title of the agreement;
 - (b) The place and date of conclusion;
 - (c) The date and method of entry into force for each party; and
 - (d) The authentic languages in which the agreement was drawn up.
3. Copy of treaty or international agreement
A party must submit ONE certified true and complete copy of **all** authentic text(s) in paper format and, if available, ONE electronic copy to the Secretariat for registration purposes. Most treaties or international agreements are concluded in more than one language. A paper and electronic copy of the treaty or international agreement in all the languages in which it was concluded must be submitted. As all registered treaties will subsequently be published in the United Nations *Treaty Series*, it is imperative that the hard copy version is clear, legible and capable of being reproduced in the United Nations *Treaty Series* (see updated publication requirements at <http://treaties.un.org/doc/source/guidelines.pdf>. The General Assembly has urged States to provide English and/or French translations of treaties submitted for registration with the United Nations Secretariat where feasible. Courtesy translations in English and French, or any of the other official languages of the United Nations, greatly assist in the timely and cost-effective publication of the United Nations *Treaty Series*.
4. Copy of attachments
A party must submit ONE certified true and complete copy of all attachments in paper format and, if available, ONE electronic copy of them. Since the text of a treaty or an international agreement submitted for registration must be “complete”, a copy of all enclosures, such as protocols, exchanges of notes, authentic texts, annexes, etc., to the treaty or international agreement forming an integral part thereof must be

5. Copy of reservations, declarations, objections (particularly for multilateral treaties)
A party must submit ONE certified true and complete copy in paper format and, if available, ONE electronic copy of all reservations, declarations and objections, if any, in the language(s) in which they were formulated and English and French translations, if possible.
6. List of contracting States or organizations (for multilateral treaties)
In the case of a multilateral treaty, a list of contracting States or organizations must be provided, with the date of deposit of the instruments, the type of instruments (ratification, accession, etc.) and the date of entry into force of the treaty indicated for each contracting State or organization.
7. Date and method of entry into force, place and date of conclusion, names of signatories
The documentation submitted must specify the date and method of entry into force, as well as the date and place of conclusion of the treaty or international agreement. The names of the signatories should be specified unless they are in typed form as part of the signature block. All these types of information can be provided in the certifying statement (see section 5.6.2).
8. Subsequent agreements
Any treaty or international agreement concluded in relation to a previously registered or filed and recorded treaty or international agreement (such as a protocol amending the original treaty) must be submitted in accordance with the requirements mentioned above.
9. Subsequent actions
All subsequent actions to a treaty or an international agreement must be registered or filed and recorded with the Secretariat. In case a subsequent action is accompanied by an instrument, for example, a reservation or a declaration, ONE certified true and complete copy thereof must also be submitted in paper format and, if available, ONE electronic copy of the instrument. The copy to be provided should be in the language(s) in which it was formulated, accompanied by English and French translations, if possible. The documentation submitted must specify the date of notification and the date of effect of the treaty action.

5.7 Outcome of registration or filing and recording

5.7.1 Database and record

(See the *Repertory of Practice*, Article 102, and article 8 of the Regulations in the annex to the General Survey.)

The database of instruments registered and the record of instruments filed and recorded are kept in English and French. The database and record contain the following information, in respect of each treaty or international agreement:

- (a) Date of receipt of the instrument by the Secretariat of the United Nations;
- (b) Registration number or filing and recording number;
- (c) Title of the instrument;
- (d) Names of the parties;
- (e) Date and place of conclusion;
- (f) Date of entry into force;
- (g) Existence of any attachments, including reservations and declarations;
- (h) Languages in which it was drawn up;
- (i) Name of the party or specialized agency registering the instrument or submitting it for filing and recording; and
- (j) Date of registration or filing and recording.

5.7.2 Date of effect of registration

(See the *Repertory of Practice*, Article 102, and article 6 of the Regulations in the annex to the General Survey.)

Under article 6 of the Regulations, the date the Secretariat of the United Nations receives all the specified information relating to the treaty or international agreement is deemed to be the date of registration. A treaty or international agreement registered *ex officio* by the United Nations is deemed to be registered on the date on which the treaty or international agreement comes into force between two or more of the parties thereto. However, if the Secretariat receives the treaty or international agreement after the date of its entry into force, the date of registration is the first available date of the month of receipt.

In accordance with article 1 of the Regulations, registration is effected by a party and not by the Secretariat. The Secretariat makes every effort to complete registration as soon as possible following receipt of the registration submission. However, due to certain factors, including volume of instruments deposited, need for translations, etc., a certain amount of time may elapse between the receipt of a treaty or international agreement and its processing.

Registering parties have an important obligation to ensure that documents submitted for registration are complete, accurate and legible in order to avoid delays in the registration and publication processes. In cases where submissions are incomplete or defective, the date of registration of the treaty or international agreement is deemed to be the date of receipt of all of the required documentation and information and not the date of the original submission.

5.7.3 Certificate of registration

(See the *Repertory of Practice*, Article 102, and article 7 of the Regulations in the annex to the General Survey.)

Once a treaty or international agreement is registered, the Secretariat issues to the registering party a certificate of registration signed by the Secretary-General or a representative of the Secretary-General. Upon request, the Secretariat will provide such a certificate to all signatories and parties to the treaty or international agreement. According to established practice, the Secretariat does not issue certificates of registration in respect of treaties or international agreements that are registered *ex officio* (see section 5.4.3) or filed and recorded (see section 5.4.2), and subsequent actions (see section 5.5.4).

5.7.4 Publication

(See the *Repertory of Practice*, Article 102, paras. 82-107, and articles 12-14 of the Regulations in the annex to the General Survey.)

Monthly Statement of Treaties and International Agreements

(See the *Repertory of Practice*, Article 102, and articles 13-14 of the Regulations in the annex to the General Survey.)

The Secretariat publishes a *Monthly Statement of the Treaties and International Agreements* registered, or filed and recorded (see article 13 of the Regulations). The *Monthly Statement* does not contain the texts of treaties or international agreements, but provides certain attributes, in English and French, of the treaties or international agreements registered or filed and recorded, such as the:

- (a) Registration number or filing and recording number;
- (b) Title of the instrument;
- (c) Names of the parties between whom it was concluded;
- (d) Date and place of conclusion;
- (e) Date and method of entry into force;
- (f) Existence of any attachments, including reservations and declarations;
- (g) Languages in which it was drawn up;
- (h) Name of the party or specialized agency registering the instrument or submitting it for filing and recording; and
- (i) Date of registration or filing and recording.

The *Monthly Statement* is divided into two parts. Part I lists the treaties registered. Part II lists the treaties filed and recorded. In addition, the *Monthly Statement* lists in its annexes A and B subsequent actions (for example, ratifications or accessions) and subsequent agreements relating to treaties or international agreements registered or filed and recorded. Annex C lists subsequent actions relating to treaties or international agreements registered with the League of Nations.

United Nations Treaty Series

Article 12 of the Regulations provides that the Secretariat shall publish, as soon as possible, in a single series every treaty or international agreement that is registered, or filed and recorded. Treaties are published in the United Nations *Treaty Series* in their authentic languages, followed by translations in English and French, as required. Subsequent actions are published in the same manner. The Secretariat requires clear copies of treaties and international agreements for publication purposes as it publishes in electronic format the text of the treaty as submitted.

Limited publication

Originally, article 12 of the Regulations required the Secretariat to publish in full all treaties and international agreements registered or filed and recorded with the Secretariat. The General Assembly modified this framework in its resolution 33/141 of 19 December 1978 in light of the substantial increase in treaty-making on the international plane and the publication backlog that existed at that time (Report of the Secretary-General, A/33/258, 2 October 1978, paras. 3-7).

According to article 12 (2) of the Regulations, as amended in 1978, the Secretariat is no longer required to publish *in extenso*, i.e., in full, bilateral treaties falling within one of the following categories:

- (a) Assistance and cooperation agreements of limited scope concerning financial, commercial, administrative or technical matters;
- (b) Agreements relating to the organization of conferences, seminars or meetings;
- (c) Agreements that are to be published otherwise than in the [United Nations *Treaty Series*] by the United Nations Secretariat or by a specialized or related agency.

In 1997, the General Assembly extended the limited publication policy to multilateral treaties, so that the Secretariat now has discretion not to publish *in extenso* bilateral and multilateral treaties or agreements falling within one of the categories listed under article 12 (2) (a) to (c) (General Assembly resolution 52/153 of 15 December 1997):

The General Assembly ...

7. Invites the Secretary-General to apply the provisions of article 12, paragraph 2, of the Regulations to give effect to Article 102 of the Charter of the United Nations to multilateral treaties falling within the terms of article 12, paragraph 2 (a) to (c): ...

Lengthy lists of products attached to bilateral or multilateral trade agreements also fall within the limited publication policy. In addition, agreements of the European Union are published only in English and French.

Today, approximately 25 per cent of the treaties registered are subject to the limited publication policy. An example of a multilateral treaty or agreement falling under the extended scope of article 12 (2) is the *Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of these Prescriptions, 1958*. Due to the highly technical nature of this Agreement, which contains over 100 annexed regulations, all of which are subject to amendments on a regular basis, the Secretariat does not publish this Agreement in full in the United Nations *Treaty Series*.

In determining whether or not a treaty or international agreement should be published *in extenso*, the Secretariat is guided by the letter and spirit of the *Charter of the United Nations* and article 12 (3) of the Regulations. The primary criterion in making this determination is the requirement that the Secretariat shall:

... duly take into account, *inter alia*, the practical value that might accrue from *in extenso* publication.

Under article 12 (3) of the Regulations, the Secretariat may reverse a decision not to publish *in extenso* at any time.

Where the Secretariat exercises the limited publication option in relation to treaties or international agreements registered or filed and recorded, their publication is limited to the following information in accordance with article 12 (5) of the Regulations:

- (a) Registration number or filing and recording number;
- (b) Title of the instrument;
- (c) Names of the parties between whom it was concluded;
- (d) Date and place of conclusion;
- (e) Date and method of entry into force;
- (f) Duration of the treaty or international agreement (where appropriate);
- (g) Languages in which it was concluded;
- (h) Name of the party or specialized agency registering the instrument or submitting it for filing and recording;
- (i) Date of registration or filing and recording; and
- (j) Where appropriate, reference to publications in which the complete text of the treaty or international agreement is reproduced.

Treaties and international agreements that the Secretariat does not publish *in extenso* are identified as such in the *Monthly Statement* with an asterisk.

6 CONTACTS WITH THE TREATY SECTION: PROCEDURAL INFORMATION

6.1 General information

6.1.1 Contacting the Treaty Section

Treaty Section Telephone: 212 963 5047
 Office of Legal Affairs Facsimile: 212 963 3693
 United Nations Website: <http://treaties.un.org>
 New York, NY 10017
 USA

6.1.2 Functions of the Treaty Section

As mentioned in the Introduction to this *Handbook*, the Treaty Section of the Office of Legal Affairs of the United Nations discharges the responsibility for the depositary functions of the Secretary-General of the United Nations and the registration and publication of treaties submitted to the Secretariat. This section sets out some steps to follow in contacting the Treaty Section in relation to certain treaty actions.

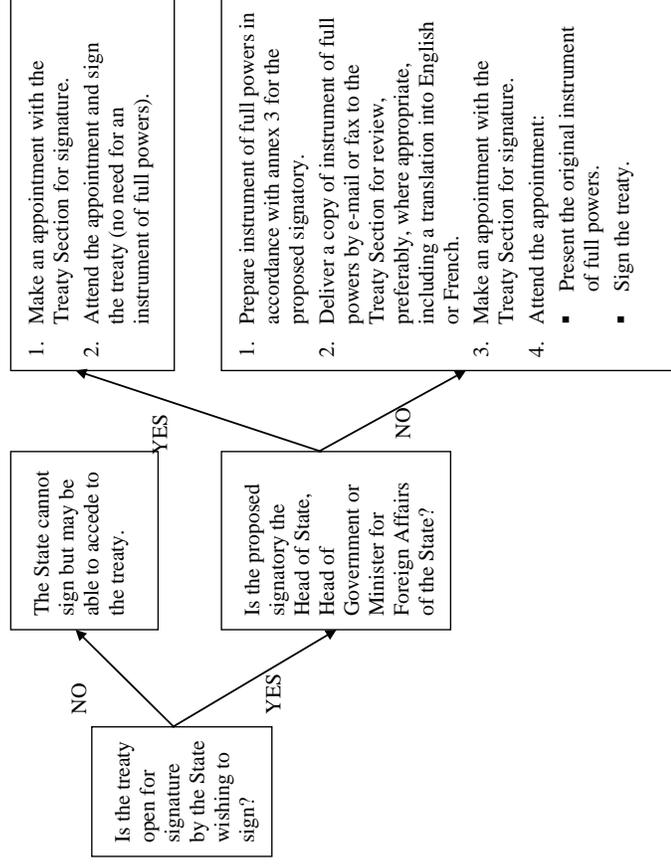
6.1.3 Delivery of documents for deposit

Most treaty actions become effective only upon deposit of the relevant instrument. States are advised to deliver instruments for deposit directly to the Treaty Section to ensure they are promptly processed. The date of deposit is normally recorded as that on which the instrument is received at Headquarters, unless the instrument is subsequently deemed unacceptable. Persons who are merely delivering instruments (rather than, for example, signing a treaty) do not require full powers.

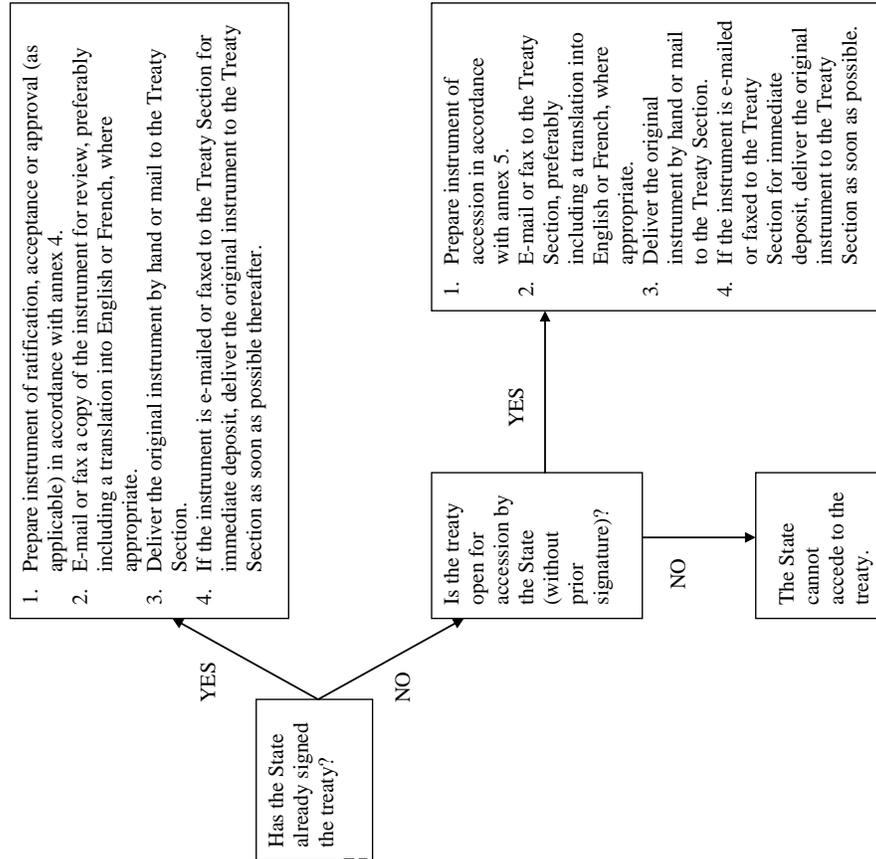
6.1.4 Translations

States are encouraged to provide courtesy translations, where feasible, in English or French of any instruments in other languages that are submitted to the Treaty Section. This facilitates the prompt processing of the relevant actions.

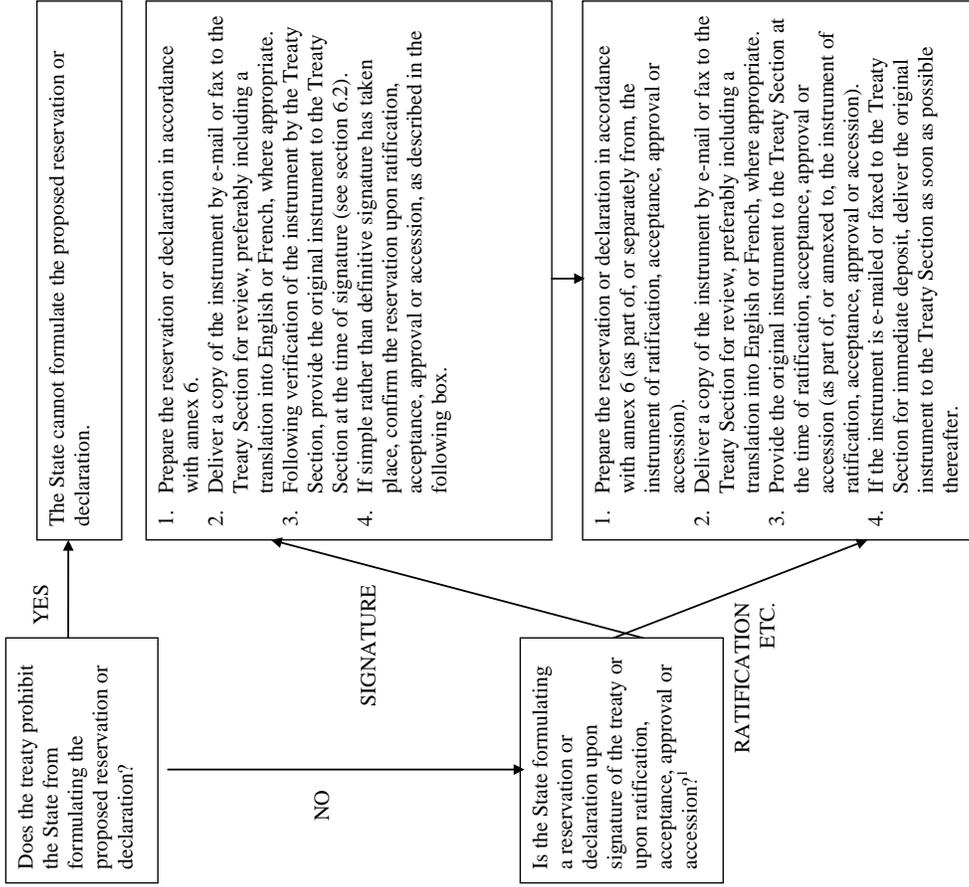
6.2 Signing a multilateral treaty



6.3 Ratifying, accepting, approving or acceding to a multilateral treaty



6.4 Making a reservation or declaration to a multilateral treaty

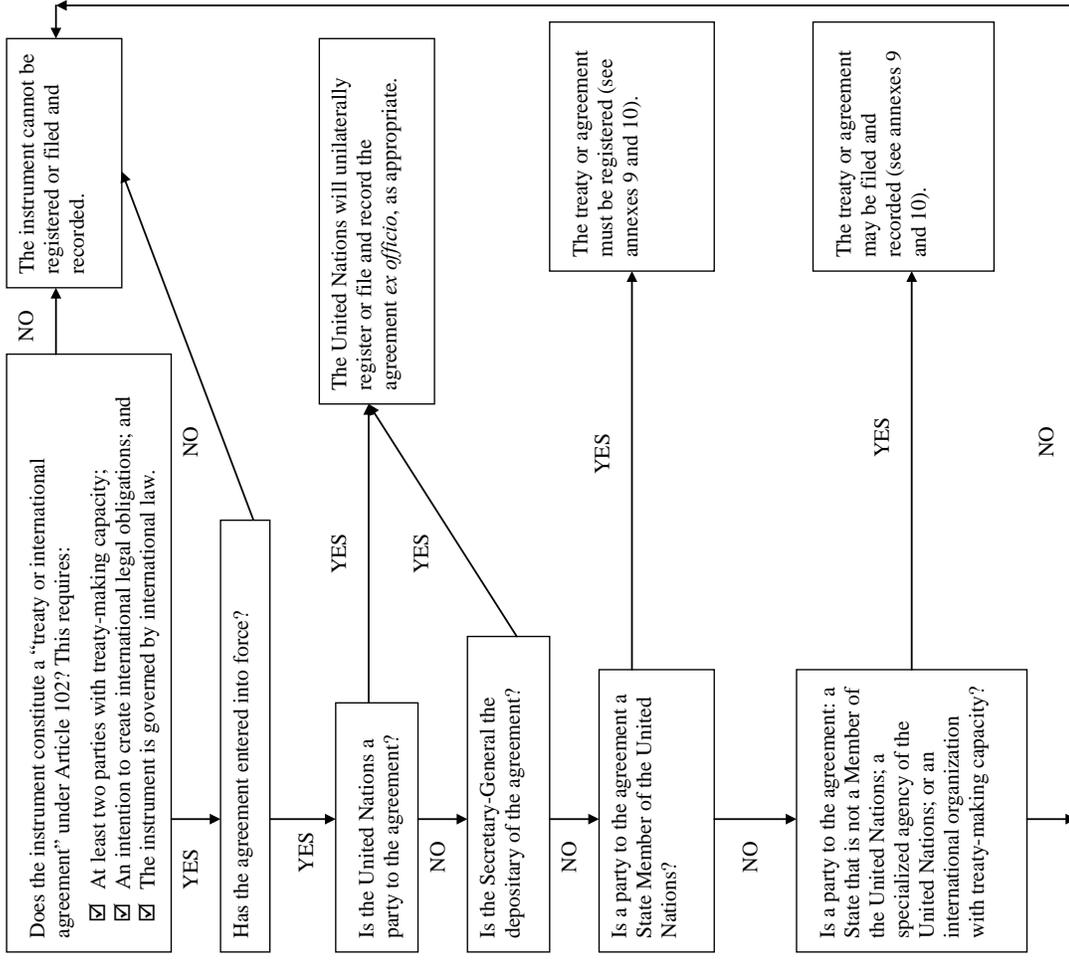


¹ The Secretary-General may accept reservations or declarations other than upon signature, ratification, acceptance, approval or accession on exceptional occasions.

6.5 Depositing a multilateral treaty with the Secretary-General

1. Well before the treaty is adopted, contact the Treaty Section, including on the question of the Secretary-General acting as depositary and on the final clauses (see ST/SGB/2001/7 of 28 August 2001 in annex 11).
2. Deliver a copy of the treaty (in particular, the draft final clauses of the treaty) to the Treaty Section for review, in the authentic languages of the treaty.
3. Following adoption, deposit the original treaty in all authentic languages with the Treaty Section. In order for the Treaty Section to prepare authentic texts and certified true copies in time for signature, provide pdf and Word versions of the treaty as adopted (hard copy and electronic format – Microsoft Word).

6.6 Registering or filing and recording a treaty with the Secretariat



ANNEX 1 – NOTE VERBALE FROM THE LEGAL COUNSEL (FULL POWERS), 2010

REFERENCE: LA41TR/221/Full Powers Guidelines/2010

The Legal Counsel presents her compliments to the Permanent Representatives to the United Nations and has the honour to communicate the following in relation to full powers for the signing of treaties deposited with the Secretary-General as depositary of multilateral treaties.

With a view to assisting States in increasing participation in the multilateral treaty framework, the Treaty Section of the Office of Legal Affairs, which discharges the functions of the Secretary-General in his capacity as depositary of multilateral treaties, has prepared the attached Guidelines. These Guidelines address the Secretary-General's requirements, consistent with treaty law, applicable to instruments of full powers.

Additional information regarding full powers may be obtained from the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (ST/LEG/7/Rev.1) and the *Treaty Handbook* published by the Treaty Section. Please also refer to the *Treaty Handbook* for a model instrument of full powers. Both publications are available in the United Nations Treaty Collection at the following address:
<http://treaties.un.org>

The Legal Counsel of the United Nations avails herself of this opportunity to renew to the Permanent Representatives to the United Nations the assurances of her highest consideration.

3 February 2010

P.O'B.

FULL POWERS GUIDELINES

Only heads of States or Government or Ministers for Foreign Affairs, or a person acting, ad interim, in one of the above positions may execute treaty actions by virtue of their functions. All other individuals must be in the possession of appropriate full powers. Proper full powers are required by all persons seeking to sign a treaty deposited with the Secretary-General, sign an instrument of ratification, acceptance, approval or accession; a binding declaration or notification; or a reservation relating to a treaty deposited with the Secretary-General. Full powers however, are not required to deposit a duly signed instrument of ratification, acceptance, approval or accession with the Secretary-General.

Secretary-General's requirements applicable to full powers:

1. Signature by the Head of State, Head of Government or Minister for Foreign Affairs or a person acting, ad interim, in one of the above positions;
2. Title of the treaty;
3. Express authorization to sign the treaty or undertake the treaty action concerned;
4. Full name and title of the person duly authorized to sign;
5. Date and place of signature of the instrument of full powers; and
6. Official seal. This is optional and cannot replace the signature of one of the three authorities of State.

Please note:

- Where general full powers have been issued to a named person and have been deposited with the Secretariat in advance, specific full powers are not required.
- Full powers must be submitted for verification to the Treaty Section in advance of the intended date of signature or treaty action.
- Copies of signed instruments of full powers may be faxed to the Treaty Section for verification in advance of the signature or treaty action, provided that the original promptly follows (Fax: 1 212 963 3693). The depositary will also accept a scanned copy of a signed instrument of full powers transmitted by electronic mail to the following e-mail address: depositiarycn@un.org. You can always contact the Treaty Section if you need additional information at 1 212 963 5047.

**ANNEX 2 – NOTE VERBALE FROM THE LEGAL COUNSEL
(EXTENSION OF TIME LIMITS TO LODGE OBJECTIONS
TO LATE RESERVATIONS), 2000**

REFERENCE: LA 41 TR/221 (23-1)

The Legal Counsel of the United Nations presents his compliments to the Permanent Representatives to the United Nations and has the honour to communicate the following relating to the practice followed by the Secretary-General as depositary in respect of communications from States, which seek to modify their existing reservations to multilateral treaties deposited with the Secretary-General or which may be understood to seek to do so.

The current practice of the Secretary-General is to stipulate a period of 90 days as the length of time within which parties must object to a communication of this nature if they wish the Secretary-General not to accept that communication in deposit.

The Legal Counsel notes in this regard that 90 days is the period, which has been traditionally set by the Secretary-General in his capacity as depositary, for the purpose of assuming tacit consent to a juridical act or proposition.

However, the Secretary-General's attention has been drawn to the complex questions of law and policy, which may fail to be considered by the parties to a treaty, and the necessity that might arise for consultations among them, in deciding what, if any, action should be taken in respect of such a communication. It is his understanding that the 90-day period may be inadequate for this purpose.

Mindful of these considerations, the Legal Counsel is pleased to advise the Permanent Representatives that the Secretary-General as depositary intends henceforth to stipulate a period of twelve months as that within which parties must inform him if they wish him not to accept in deposit a communication by a State party which seeks to modify, or may be understood to seek to modify, an existing reservation to a treaty.

In coming to this decision, the Secretary-General has been mindful of the provisions of the Convention on the Law of Treaties, done at Vienna on 23 May 1969. Since a communication, which seeks to modify an existing reservation, is aimed at creating new exemptions from, or modifications of, the legal effects of certain provisions of the treaty in question in their application to the State concerned, such a communication possesses the nature of a new reservation. In determining the period within which parties must inform him if they wish him not to accept in deposit a communication, which is or might be understood to be of such a character, the Secretary-General has accordingly been guided by Article 20, paragraph 5, of the Convention, which indicates a period of twelve months to be appropriate for Governments to analyse and assess a reservation that

has been formulated by another State and to decide upon what action, if any, should be taken in respect of it.

By the same token, the Secretary-General as depositary will in future, when circulating a reservation which a State may seek to formulate subsequently to having established its consent to be bound by a treaty, stipulate twelve months as the period within which other parties must inform him if they do not wish him to consider them to have accepted that reservation.

The Legal Counsel of the United Nations avails himself of this opportunity to renew to the Permanent Representatives to the United Nations the assurances of his highest consideration.

4 April 2000

H.C.

ANNEX 3 – MODEL INSTRUMENT OF FULL POWERS

**ANNEX 4 – MODEL INSTRUMENT OF RATIFICATION,
ACCEPTANCE OR APPROVAL**

(To be signed by the Head of State, Head of Government
or Minister for Foreign Affairs)

(To be signed by the Head of State, Head of Government
or Minister for Foreign Affairs)

FULL POWERS

[RATIFICATION / ACCEPTANCE / APPROVAL]

I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs],

WHEREAS the [title of treaty, convention, agreement, etc.] was [concluded, adopted, opened for signature, etc.] at [place] on [date],

HEREBY AUTHORIZE [name and title] to [sign *, ratify, denounce, effect the following declaration in respect of, etc.] the [title and date of treaty, convention, agreement, etc.] on behalf of the Government of [name of State].

AND WHEREAS the said [treaty, convention, agreement, etc.] has been signed on behalf of the Government of [name of State] on [date].

Done at [place] on [date].

NOW THEREFORE I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs] declare that the Government of [name of State], having considered the above-mentioned [treaty, convention, agreement, etc.], [ratifies, accepts, approves] the same and undertakes faithfully to perform and carry out the stipulations therein contained.

[Signature]

IN WITNESS WHEREOF, I have signed this instrument of [ratification, acceptance, approval] at [place] on [date].

[Signature]

* Subject to the provisions of the treaty, one of the following alternatives is to be chosen: [subject to ratification] or [without reservation as to ratification]. Reservations made upon signature must be authorized by the full powers granted to the signatory.

ANNEX 5 – MODEL INSTRUMENT OF ACCESSION

(To be signed by the Head of State, Head of Government
or Minister for Foreign Affairs)

ACCESSION

WHEREAS the [title of treaty, convention, agreement, etc.] was [concluded, adopted, opened for signature, etc.] at [place] on [date],

NOW THEREFORE I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs] declare that the Government of [name of State], having considered the above-mentioned [treaty, convention, agreement, etc.], accedes to the same and undertakes faithfully to perform and carry out the stipulations therein contained.

IN WITNESS WHEREOF, I have signed this instrument of accession at [place] on [date].

[Signature]

**ANNEX 6 – MODEL INSTRUMENT OF
RESERVATION/DECLARATION**

(To be signed by the Head of State, Head of Government
or Minister for Foreign Affairs)

[RESERVATION / DECLARATION]

I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs],

HEREBY DECLARE that the Government of [name of State] makes the following [reservation / declaration] in relation to article(s) [---] of the [title and date of adoption of the treaty, convention, agreement, etc.]:

[Substance of reservation / declaration]

IN WITNESS WHEREOF, I have hereunto set my hand and seal.

Done at [place] on [date].

[Signature and title]

**ANNEX 7 – MODEL INSTRUMENT OF MODIFICATION
OF RESERVATION(S)**

(To be signed by the Head of State, Head of Government
or Minister for Foreign Affairs)

MODIFICATION OF RESERVATION

WHEREAS the Government of [name of State] [ratified, approved, accepted, acceded to] the [title and date of adoption of the treaty, convention, agreement, etc.] on [date],

AND WHEREAS, upon [ratification, approval, acceptance of / accession to] the [treaty, convention, agreement, etc.], the Government of [name of State] made (a) reservation(s) to article(s) [----] of the [treaty, convention, agreement, etc.],

NOW THEREFORE I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs], declare that the Government of [name of State], having reviewed the said reservation(s), hereby modifies the same as follows:

[Substance of modification]

IN WITNESS WHEREOF, I have hereunto set my hand and seal.

Done at [place] on [date].

[Signature and title]

**ANNEX 8 – MODEL INSTRUMENT OF WITHDRAWAL OF
RESERVATION(S)**

(To be signed by the Head of State, Head of Government
or Minister for Foreign Affairs)

WITHDRAWAL OF RESERVATION (S)

WHEREAS the Government of [name of State] [ratified, approved, accepted, acceded to] the [title and date of adoption of the treaty, convention, agreement, etc.] on [date],

AND WHEREAS, upon [ratification, approval, acceptance of / accession to] the [treaty, convention, agreement, etc.], the Government of [name of State] made (a) reservation(s) to article(s) [---] of the [treaty, convention, agreement, etc.],

NOW THEREFORE I, [name and title of the Head of State, Head of Government or Minister for Foreign Affairs], declare that the Government of [name of State], having reviewed the said reservation(s), hereby withdraws the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal.

Done at [place] on [date].

[Signature and title]

**ANNEX 9 – MODEL CERTIFYING STATEMENT FOR REGISTRATION
OR FILING AND RECORDING**

(Model for the certifying statement required under the General Assembly Regulations to give effect to Article 102 of the Charter)¹

CERTIFYING STATEMENT

I, THE UNDERSIGNED [name of the authority], hereby certify that the attached text is a true and complete copy of [title of the agreement, name of the Parties, date and place of conclusion], that [it includes all reservations made by Signatories or Parties thereto], and that it was concluded in the following languages: [...]. *I further certify that the additional copy of this Agreement submitted on electronic media is a true and complete copy of [title of the agreement].*²

I FURTHER CERTIFY that the Agreement came into force on [date] by [method of entry into force], in accordance with [article or provision in the agreement], and that it was signed by [...] and [...].³

[Place and date of signature of certifying statement]
[Signature and title of certifying authority]

¹ For the text of the Regulations adopted by General Assembly resolution 97 (I) of 14 December 1946 and later amended by General Assembly resolutions 364B (IV) of 1 December 1949, 482 (V) of 12 December 1950 and 33/141 of 19 December 1978, see United Nations *Treaty Series*, vol. 859/860, p. VIII, 1973. See also General Assembly resolution 52/153 of 15 December 1997; *Repertory of Practice of United Nations Organs* (vol. V, New York, 1955, Articles 92-111, and Supplements 1 to 7).

² The language in italics must be included when additional copies of a treaty are provided on an electronic medium.

³ For multilateral agreements, a complete list of contracting States or organizations with the date of deposit of the instruments of ratification, accession, etc., and the date of entry into force of the agreement for each party must be provided.

ANNEX 10 – CHECKLIST FOR REGISTRATION

Requirements for submission of treaties and international agreements for registration and publication in accordance with Article 102 of the *Charter of the United Nations* and the Regulations:

PRELIMINARY CHECKS	
<ul style="list-style-type: none"> Has the treaty already been registered with the Secretariat? (If so, it does not have to be submitted.) Provisions in a treaty may invoke other agreements that form a part of the treaty and are essential for the application and implementation of the treaty. Are those agreements already registered? (If not, all those agreements should also be submitted in the format specified below.) 	
DOCUMENTATION TO BE PROVIDED	FORMAT / TYPE OF INFORMATION
1. Treaty / Agreement	<ul style="list-style-type: none"> ONE certified true and complete and legible copy of all authentic text(s) and, if available, ONE electronic copy on electronic media
2. All attachments (annexes, minutes, procès-verbaux, etc.)	<ul style="list-style-type: none"> ONE certified true and complete and legible copy of all authentic text(s) and, if available, ONE electronic copy on electronic media
3. Text of reservations, declarations, objections (particularly for multilateral treaties)	<ul style="list-style-type: none"> ONE certified true and complete and legible copy of all authentic text(s) and, if available ONE electronic copy on electronic media
4. Translations of 1 to 3 above into English and/or French (if available)	One paper copy and one electronic copy, if available, where necessary
5. List of contracting States/organizations (for multilateral treaties)	<ul style="list-style-type: none"> Please provide, for each contracting State or organization: <ul style="list-style-type: none"> Date of deposit of the instrument Nature of the instrument (ratification, accession, etc.) Date of entry into force of the Treaty/Agreement
6. Maps (if applicable)	<ul style="list-style-type: none"> ONE certified true and complete copy of the original document in its original scale and, if available, ONE high resolution (400-600 dpi) scanned digital file
7. Certifying statement	<ul style="list-style-type: none"> Statement of true and complete copy (for both paper and electronic copy) Title of Treaty / Agreement Date and place of conclusion Date of entry into force Method of entry into force (signature, ratification, approval, accession, etc.) Authentic languages Names of signatories

Secretary-General’s bulletin

**Procedures to be followed by the departments,
offices and regional commissions of the United Nations
with regard to treaties and
international agreements**

The Secretary-General, for the purpose of establishing procedures to be followed by the departments, offices and regional commissions of the United Nations with regard to treaties and international agreements, promulgates the following:

**Part I
Treaties and international agreements concluded by the United Nations**

**Section 1
Drafts of treaties and international agreements**

Drafts of treaties and international agreements to be concluded by the United Nations shall be submitted by the relevant department, office or regional commission to the Office of Legal Affairs for review and comment prior to finalization.

**Section 2
Registration or filing and recording**

All treaties and international agreements concluded by the United Nations shall be forwarded by the relevant department, office or regional commission to the Treaty Section of the Office of Legal Affairs (Treaty Section), upon their entry into force, for registration pursuant to Article 102 of the Charter of the United Nations, or filing and recording. Such instruments shall remain in the custody of the Treaty Section unless special arrangements have been approved in advance by the Treaty Section.

**Part II
Instruments relating to treaty actions by the United Nations**

**Section 3
Instruments requiring consultations**

Where the United Nations intends to undertake a treaty action for which purpose full powers, an act of formal confirmation or an instrument of acceptance, approval or accession are required, the relevant department, office or regional commission shall consult with the Office of Legal Affairs in advance of such action.

**Part III
Treaties and international agreements to be deposited with the Secretary-General**

**Section 4
Drafts of treaties and international agreements**

4.1 All draft treaties and international agreements intended to be deposited with the Secretary-General of the United Nations shall be submitted by the relevant department, office or regional commission to the Office of Legal Affairs for review and comment prior to finalization.

4.2 Draft final clauses of such treaties and international agreements shall be submitted by the relevant department, office or regional commission to the Treaty Section for review and comment prior to finalization.

4.3 Every endeavour shall be made to ensure that the texts of treaties and international agreements to be deposited with the Secretary-General of the United Nations are concluded only in the official languages of the United Nations.

**Section 5
Adopted texts of treaties and international agreements**

5.1 Following the formal adoption of the texts of treaties and international agreements to be deposited with the Secretary-General of the United Nations, the adopted texts shall be submitted by the relevant department, office or regional commission, in both paper and electronic formats, to the Treaty Section, in all the authentic languages, for purposes of preparing the originals of such agreements, and for performing the requisite depositary functions. In general, a period of four weeks should be allowed between the dates of adoption and the dates on which the treaties or international agreements are opened for signature to enable the preparation of the originals of the treaties or international agreements and the distribution of the certified true copies.

5.2 Following the formal adoption of such texts, no further changes shall be made to the texts by any department, office or regional commission, except in consultation with the Treaty Section.

**Section 6
Designation of the Secretary-General as depositary of treaties and international agreements**

6.1 When it is intended that the Secretary-General discharge the depositary functions relating to treaties and international agreements, such treaties or international agreements shall confer the depositary functions on the Secretary-General only and not on any other official of the United Nations. The Secretary-General shall not be designated as a co-depositary.

6.2 When it is intended that the Secretary-General be designated the depositary, the relevant department, office or regional commission shall consult the Treaty Section in advance.

6.3 All treaties and international agreements deposited with the Secretary-General and open for signature shall remain in the custody of the Treaty Section. Any exceptions to this rule shall be arranged in advance with the Treaty Section.

Section 7 Full powers

All instruments of full powers received by any department, office or regional commission authorizing representatives to sign treaties and international agreements deposited with the Secretary-General shall be forwarded to the Treaty Section for verification, prior to signature of such treaties and international agreements. Any exceptions to this rule shall be arranged in advance with the Treaty Section.

Section 8 Ceremony of signature

When it is arranged for States to sign a treaty or international agreement deposited with the Secretary-General on the same occasion, the Office of Legal Affairs shall be informed in advance by the relevant department, office or regional commission. Arrangements for the ceremony at which the signatures are to be affixed, including provision for the discharge of the depositary functions, shall be made in consultation with the Treaty Section.

Section 9

Instruments and notifications to be deposited with the Secretary-General

Instruments of ratification, acceptance, approval, accession, succession or any similar instruments and notifications relating to treaties and international agreements deposited with the Secretary-General which are received by any department, office or regional commission shall be forwarded to the Treaty Section.

Part IV

Final provisions

Section 10

Final provisions

10.1 The present bulletin shall enter into force on 1 October 2001.

10.2 Administrative instruction AI/52 of 25 June 1948 is hereby abolished.

(Signed) Kofi A. Annan
Secretary-General

GLOSSARY

This section provides a guide to terms commonly used in relation to treaties and employed in the practice of the Secretary-General as depositary of multilateral treaties, as well as in the Secretariat's registration function. Where applicable, a reference to relevant provisions of the Vienna Convention 1969 is included.

acceptance

See ratification.

accession

Accession is the act whereby a State that has not signed a treaty expresses its consent to become a party to that treaty by depositing an "instrument of accession" (see annex 5). Accession has the same legal effect as ratification, acceptance or approval. The conditions under which accession may occur and the procedure involved depend on the provisions of the relevant treaty. Accession is generally employed by States wishing to express their consent to be bound by a treaty where the deadline for signature has passed. However, many modern multilateral treaties provide for accession even during the period that the treaty is open for signature. See articles 2 (1) (b) and 15 of the Vienna Convention 1969.

adoption

Adoption is the formal act by which negotiating parties establish the form and content of a treaty. The treaty is adopted through a specific act expressing the will of the States and the international organizations participating in the negotiation of that treaty, for example, by voting on the text, initialling, signing, etc. Adoption may also be the mechanism used to establish the form and content of amendments to a treaty, or regulations under a treaty.

Treaties that are negotiated within an international organization are usually adopted by resolution of the representative organ of that organization. For example, treaties negotiated under the auspices of the United Nations, or any of its bodies, are adopted by a resolution of the General Assembly of the United Nations.

Where an international conference is specifically convened for the purpose of adopting a treaty, the treaty can be adopted by a vote of two thirds of the States present and voting, unless they have decided by the same majority to apply a different rule.

See article 9 of the Vienna Convention 1969.

amendment

Amendment, in the context of treaty law, means the formal alteration of the provisions of a treaty by its parties. Such alterations must be effected with the same formalities that attended the original formation of the treaty. Multilateral treaties typically provide specifically for their amendment. In the absence of such provisions, the adoption and entry into force of amendments require the consent of all the parties. See articles 39 and 40 of the Vienna Convention 1969.

- approval**
See ratification.
- authentication**
Authentication is the procedure whereby the text of a treaty is established as authentic and definitive. Once a treaty has been authenticated, its provisions cannot be modified except by formal amendment. If procedures for authentication have not been specifically agreed, the treaty will usually be authenticated by signature, or initialling, by the representatives of those States. It is this authenticated text that the depositary uses to establish the original text. See article 10 of the Vienna Convention 1969.
- authentic language**
A treaty typically specifies its authentic languages—the languages in which the meaning of its provisions is to be determined.
- authentic or authenticated text**
The authentic or authenticated text of a treaty is the version of the treaty that has been authenticated by the parties.
See treaty.
- bilateral treaty**
- certified true copy**
certified true copy for depositary purposes
A certified true copy for depositary purposes means an accurate duplication of an original treaty, prepared in all authentic languages, and certified as such by the depositary of the treaty. The Secretary-General of the United Nations circulates certified true copies of each treaty deposited with the Secretary-General to all States and entities that may become parties to the treaty. For reasons of economy, the Secretary-General, as depositary, normally provides only two certified true copies to each prospective participant in the treaty. States are expected to make any additional copies required to fulfil their domestic needs. See article 77 (1) (b) of the Vienna Convention 1969.
- certified true copy for registration purposes**
A certified true copy for registration purposes means an accurate duplication of a treaty submitted to the Secretariat of the United Nations for registration. The registering party must certify that the text submitted is a true and complete copy of the treaty and that it includes all reservations made by the parties. The date and place of adoption, the date and the method whereby the treaty has come into force, and the authentic languages must be included. See article 5 of the Regulations.
- certifying statement**
A certifying statement is the statement accompanying the certified true copy of a treaty or a treaty action for registration purposes, certifying that it is such a copy (see section 5.6 and annex 9).
See depositary notification.
- C.N.**

- consent to be bound**
A State expresses its consent to be bound by a treaty under international law by some formal act, i.e., definitive signature, ratification, acceptance, approval or accession. The treaty normally specifies the act or acts by which a State may express its consent to be bound. See articles 11-18 of the Vienna Convention 1969.
- contracting State**
A contracting State is a State that has expressed its consent to be bound by a treaty where the treaty has not yet entered into force or where it has not entered into force for that State. See article 2 (1) (f) of the Vienna Convention 1969.
- convention**
Whereas in the twentieth century the term “convention” was regularly employed for bilateral agreements, it is now generally used for formal multilateral treaties with a broad number of parties. Conventions are normally open for participation by the international community as a whole, or by a large number of States. Usually instruments negotiated under the auspices of an international organization are entitled to conventions. The same holds true for instruments adopted by an organ of an international organization.
- correction**
Correction of a treaty is the remedying of an error in its text. If, after the authentication of a text, the signatory and contracting States agree that an error exists, those States can correct the error by:
- (a) Initialling the corrected treaty text;
 - (b) Executing or exchanging an instrument containing the correction; or
 - (c) Executing the corrected text of the whole treaty by the same procedure by which the original text was executed.
- If there is a depositary, the depositary must communicate the proposed corrections to all signatory and contracting States. In the practice of the United Nations, the Secretary-General, as depositary, informs all States of the error and the proposal to correct it. If, on the expiry of a specified time limit, no signatory or contracting State objects, the Secretary-General circulates a procès-verbal of rectification and causes the corrections to be effected in the authentic text(s) *ab initio*. States have 90 days to object to a proposed correction. This period can be shortened if necessary.
See article 79 of the Vienna Convention 1969.
- credentials**
Credentials take the form of a document issued by a State authorizing a delegate or delegation of that State to attend a conference, including, where necessary, for the purpose of negotiating and adopting the text of a treaty. A State may also issue credentials to enable signature of the Final Act of a conference. Credentials are distinct from full powers. Credentials permit a delegate or delegation to adopt the text of a treaty and/or sign the Final Act, while full powers permit a person to undertake any given treaty action (in particular, signature of

date of effect

treaties).

The date of effect of a treaty action (such as signature, ratification, acceptance of an amendment, etc.), in the depositary practice of the Secretary-General of the United Nations, is the time when the action is undertaken with the depositary. For example, the date of effect of an instrument of ratification is the date on which the relevant instrument is deposited with the Secretary-General.

The date of effect of a treaty action by a State or an international organization is not necessarily the date that action enters into force for that State or international organization. Multilateral agreements often provide for their entry into force for a State or international organization after the lapse of a certain period of time following the date of effect.

(See annex 6.)

declaration***interpretative declaration***

An interpretative declaration is a declaration by a State as to its understanding of some matter covered by a treaty or its interpretation of a particular provision. Unlike reservations, declarations merely clarify a State's position and do not purport to exclude or modify the legal effect of a treaty.

The Secretary-General, as depositary, pays specific attention to declarations to ensure that they do not amount to reservations. Usually, declarations are made at the time of signature or at the time of deposit of an instrument of ratification, acceptance, approval or accession. Political declarations usually do not fall into this category as they contain only political sentiments and do not seek to express a view on legal rights and obligations under a treaty.

mandatory declaration

A mandatory declaration is a declaration specifically required by the treaty itself. Unlike an interpretative declaration, a mandatory declaration is binding on the State making it.

optional declaration

An optional declaration is a declaration that a treaty specifically provides for, but does not require. Unlike an interpretative declaration, an optional declaration is binding on the State making it.

depositary

The depositary of a treaty is the custodian of the treaty and is entrusted with the functions specified in article 77 of the Vienna Convention 1969. The Secretary-General, as depositary, accepts notifications and documents related to treaties deposited with the Secretary-General, examines whether all formal requirements are met, deposits them, registers them subject to Article 102 of the *Charter of the United Nations* and notifies all relevant acts to the parties concerned. Some treaties describe depositary functions. This is considered unnecessary

in view of the detailed provision of article 77 of the Vienna Convention 1969.

A depositary can be one or more States, an international organization, or the chief administrative officer of the organization, such as the Secretary-General of the United Nations. The Secretary-General does not share depositary functions with any other depositary. In certain areas, such as dealing with reservations, amendments and interpretation, the Secretary-General's depositary practice, which has developed since the establishment of the United Nations, has evolved further since the conclusion of the Vienna Convention 1969. The Secretary-General is not obliged to accept the role of depositary, especially for treaties negotiated outside the auspices of the United Nations. It is the usual practice to consult the Treaty Section prior to designating the Secretary-General as depositary. The Secretary-General, at present, is the depositary for over 550 multilateral treaties. See articles 76 and 77 of the Vienna Convention 1969.

depositary notification (C.N.)

A depositary notification (usually referred to as a C.N.—an abbreviation for circular notification) is a formal notice that the Secretary-General sends to all Member States, non-member States, the specialized agencies of the United Nations, and the relevant secretariats, organizations and United Nations offices, as depositary of a particular treaty. The notification provides information on that treaty, including actions undertaken. Such notifications are typically distributed by e-mail on the day that they are processed. Notifications with bulky attachments are transmitted in paper form.

entry into force***definitive entry into force***

Entry into force of a treaty is the moment in time when a treaty becomes legally binding on the parties to the treaty. The provisions of the treaty determine the moment of its entry into force. This may be a date specified in the treaty or a date on which a specified number of ratifications, approvals, acceptances or accessions have been deposited with the depositary. The date when a treaty deposited with the Secretary-General enters into force is determined in accordance with the treaty provisions.

entry into force for a State

A treaty that has already entered into force may enter into force in a manner specified in it for a State or international organization that expresses its consent to be bound by it after its entry into force. See article 24 of the Vienna Convention 1969.

provisional entry into force

Provisional entry into force may be allowed by the terms of a treaty, for example, in commodity agreements. Provisional entry into force of a treaty may also occur when a number of parties to a treaty that has

not yet entered into force decide to apply the treaty as if it had entered into force. Once a treaty has entered into force provisionally, it creates obligations for the parties that agreed to bring it into force in that manner. See article 25 (1) of the Vienna Convention 1969.

exchange of letters or notes

An exchange of letters or notes may embody a bilateral treaty commitment. The basic characteristic of this procedure is that the signatures of both parties appear not on one letter or note but on two separate letters or notes. The agreement therefore lies in the exchange of these letters or notes, each of the parties retaining one letter or note signed by the representative of the other party. In practice, the second letter or note (usually the letter or note in response) will reproduce the text of the first. In a bilateral treaty, the parties may also exchange letters or notes to indicate that they have completed all domestic procedures necessary to implement the treaty. See article 13 of the Vienna Convention 1969.

filing and recording

Filing and recording is the procedure by which the Secretariat records certain treaties that are not subject to registration under Article 102 of the *Charter of the United Nations*.

Final Act

A Final Act is a document summarizing the proceedings of a diplomatic conference. It is normally the formal act by which the negotiating parties bring the conference to a conclusion. It is usually part of the documentation arising from the conference, including the treaty, the resolutions and interpretative declarations made by participating States. There is no obligation to sign the Final Act, but signature may permit participation in subsequent mechanisms arising from the conference, such as preparatory committees. Signing the Final Act does not normally create legal obligations or bind the signatory State to sign or ratify the treaty attached to it.

final clauses

Final clauses are provisions typically found at the end of a treaty, dealing with such topics as signature, ratification, acceptance, approval, accession, denunciation, amendment, reservation, entry into force, settlement of disputes, depositary matters and authentic texts. In the case of multilateral treaties to be deposited with the Secretary-General, parties should submit for review draft final clauses to the Treaty Section well in advance of the adoption of the treaty (see section 6.5).

full powers

instrument of full powers

Full powers take the form of a solemn instrument issued by the Head of State, Head of Government or Minister for Foreign Affairs, empowering a named representative to undertake given treaty actions (see annex 3).

The Secretary-General's practice in relation to full powers may differ in certain respects from that of other depositaries. The Secretary-

General does not accept full powers transmitted by telex or powers that are not signed.

The Head of State, Head of Government and Minister for Foreign Affairs are considered as representing their State for the purpose of all acts relating to the signature of, and the consent to be bound by, a treaty. Accordingly, they need not present full powers for those purposes.

See articles 2 (1) (c) and 7 of the Vienna Convention 1969.

instrument of general full powers

An instrument of general full powers authorises a named representative to execute certain treaty actions, such as signatures, relating to treaties of a certain kind (for example, all treaties adopted under the auspices of a particular organization).

See declaration.

interpretative declaration

See declaration.

mandatory declaration

memorandum of understanding (M.O.U.)

The term memorandum of understanding (M.O.U.) is often used to denote a less formal international instrument than a typical treaty or international agreement. It often sets out operational arrangements under a framework international agreement. It is also used for the regulation of technical or detailed matters. An M.O.U. typically consists of a single instrument and is entered into among States and/or international organizations. For example, the United Nations usually concludes M.O.U.s with Member States in order to organize its peacekeeping operations or to arrange United Nations conferences. The United Nations considers such M.O.U.s concluded by the United Nations to be binding and registers them *ex officio*.

modification

Modification, in the context of treaty law, refers to the variation of certain provisions of a treaty only as between particular parties to that treaty. As between other parties, the original provisions apply. If a treaty is silent as to modifications, they are allowed only to the extent that they do not affect the rights or obligations of the other parties to the treaty and do not contravene the object and purpose of the treaty. See article 41 of the Vienna Convention 1969.

Monthly Statement

The Monthly Statement is the statement published by the United Nations Secretariat on a monthly basis detailing the treaties and international agreements registered or filed and recorded during a particular month (see section 5.7.4).

multilateral treaty

See treaty.

optional declaration

See declaration.

party

A party to a treaty is a State or other entity with treaty-making capacity that has expressed its consent to be bound by that treaty by an act of ratification, acceptance, approval or accession, etc., where that treaty has entered into force for that particular State. This means that the State is bound by the treaty under international law. See article 2 (1) (g) of the Vienna Convention 1969.

plenipotentiary

A plenipotentiary, in the context of full powers, is the person authorized by an instrument of full powers to undertake a specific treaty action.

protocol

A protocol, in the context of treaty law and practice, has the same legal characteristics as a treaty. The term protocol is often used to describe agreements of a less formal nature than those entitled treaty or convention. Generally, a protocol amends, supplements or clarifies a multilateral treaty. A protocol is normally open to participation by the parties to the parent agreement. However, in recent times States have negotiated a number of protocols that do not follow this principle. The advantage of a protocol is that, while it is linked to the parent agreement, it can focus on a specific aspect of that agreement in greater detail.

provisional application***provisional application of a treaty that has entered into force***

Provisional application of a treaty that has entered into force may occur when a State unilaterally undertakes to give legal effect to the obligations under a treaty on a provisional and voluntary basis. The State would generally intend to ratify, accept, approve or accede to the treaty once its domestic procedural requirements for international ratification have been satisfied. The State may terminate this provisional application at any time. In contrast, a State that has consented to be bound by a treaty through ratification, acceptance, approval, accession or definitive signature generally can only withdraw its consent in accordance with the provisions of the treaty or, in the absence of such provisions, other rules of treaty law. See article 24 of the Vienna Convention 1969.

provisional application of a treaty that has not entered into force

Provisional application of a treaty that has not entered into force may occur when a State notifies the signatory States to a treaty that has not yet entered into force that it will give effect to the legal obligations specified in that treaty on a provisional and unilateral basis. Since this is a unilateral act by the State, subject to its domestic legal framework, it may terminate this provisional application at any time.

A State may continue to apply a treaty provisionally, even after the treaty has entered into force, until the State has ratified, approved,

accepted or acceded to the treaty. A State's provisional application terminates if that State notifies the other States among which the treaty is being applied provisionally of its intention not to become a party to the treaty.

See article 25 of the Vienna Convention 1969.

See entry into force.

provisional entry into force

Ratification, acceptance and approval all refer to the act undertaken on the international plane, whereby a State establishes its consent to be bound by a treaty. Ratification, acceptance and approval all require two steps:

- (a) The execution of an instrument of ratification, acceptance or approval by the Head of State, Head of Government or Minister for Foreign Affairs, expressing the intent of the State to be bound by the relevant treaty; and
- (b) For multilateral treaties, the deposit of the instrument with the depositary; and for bilateral treaties, the exchange of the instruments between parties.

The instrument of ratification, acceptance or approval must comply with certain international legal requirements (see section 3.3.5 and annex 4).

Ratification, acceptance or approval at the international level indicates to the international community a State's commitment to undertake the obligations under a treaty. This should not be confused with the act of ratification at the national level, which a State may be required to undertake in accordance with its own constitutional provisions, before it consents to be bound internationally. Ratification at the national level is inadequate to establish the State's consent to be bound at the international level.

See articles 2 (1) (b), 11, 14 and 16 of the Vienna Convention 1969.

Registration refers to the obligation by Member States of the United Nations to submit their treaties and international agreements to the Secretariat of the United Nations in accordance with Article 102 of the *Charter of the United Nations* (see section 5).

registration

A reservation is a statement made by a State by which it purports to exclude or alter the legal effect of certain provisions of a treaty in their application to that State. A reservation may enable a State to participate in a multilateral treaty that it would otherwise be unable or unwilling to participate in. States can make reservations to a treaty when they sign, ratify, accept, approve or accede to it. When a State makes a reservation upon signing, it must confirm the reservation upon ratification, acceptance or approval. Since a reservation purports to modify the legal obligations of a State, it must be signed by the

reservation

Head of State, Head of Government or Minister for Foreign Affairs (see annex 6). Reservations cannot be contrary to the object and purpose of the treaty. Some treaties prohibit reservations or only permit specified reservations. See articles 2 (1) (d) and 19-23 of the Vienna Convention 1969.

**revision/
review**

Revision/review basically means amendment. However, some treaties provide for revisions/reviews separately from amendments (see, for example, Article 109 of the *Charter of the United Nations*). In that case, revision/review typically refers to an overriding adaptation of a treaty to changed circumstances, whereas the term amendment refers to changes to specific provisions.

signature

definitive signature (signature not subject to ratification)

Definitive signature occurs where a State expresses its consent to be bound by a treaty by signing the treaty without the need for ratification, acceptance or approval. A State may definitively sign a treaty only when the treaty so permits. A number of treaties deposited with the Secretary-General permit definitive signature. See article 12 of the Vienna Convention 1969.

simple signature (signature subject to ratification)

Simple signature applies to most multilateral treaties. This means that when a State signs the treaty, the signature is subject to ratification, acceptance or approval. The State has not expressed its consent to be bound by the treaty until it ratifies, accepts or approves it. In that case, a State that signs a treaty is obliged to refrain, in good faith, from acts that would defeat the object and purpose of the treaty. Signature alone does not impose on the State obligations under the treaty. See articles 14 and 18 of the Vienna Convention 1969.

treaty

Treaty is a generic term embracing all instruments binding under international law, regardless of their formal designation, concluded between two or more international juridical persons. Thus, treaties may be concluded between:

- (a) States;
- (b) International organizations with treaty-making capacity and States; or
- (c) International organizations with treaty-making capacity.

The application of the term treaty, in the generic sense, signifies that the parties intend to create rights and obligations enforceable under international law.

The Vienna Convention 1969 defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation” (article 2 (1) (a)). Accordingly, conventions, agreements, protocols

and exchange of letters or notes may all constitute treaties. A treaty must be governed by international law and is normally in written form. Although the Vienna Convention 1969 does not apply to non-written agreements, its definition of a treaty states that the absence of writing does not affect the legal force of international agreements.

No international rules exist as to when an international instrument should be entitled a treaty. However, usually the term treaty is employed for instruments of some gravity and solemnity.

See article 2 (1) (a) of the Vienna Convention 1969. See generally Vienna Convention 1969 and Vienna Convention 1986.

Bilateral treaty

A bilateral treaty is a treaty between two subjects of international law.

Multilateral treaty

A multilateral treaty is a treaty between more than two subjects of international law.

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Handbook
United Nations, 2003

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Handbook

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HANDBOOK

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United Nations

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Foreword

In its resolution 36/112 of 10 December 1981 on the “Review of the multilateral treaty-making process”, the General Assembly of the United Nations emphasized the importance of multilateral treaties as a primary source of international law. At the same time, it recognized the burden that multilateral treaty-making places upon Governments, the United Nations and the international community in general. Against this background, the Assembly requested the Secretary-General of the United Nations, *inter alia*, to prepare and publish a new edition of the Handbook of Final Clauses, taking into account relevant new developments and practices in that respect. The previous edition had been published in 1957.

Unfortunately, due to serious resource constraints, the Secretariat of the United Nations was not in a position to act on this request for many years. However, the need for a new edition of the Handbook remained. It has now finally become possible to fulfil the request of the General Assembly.

This new edition of the Handbook has been prepared by the Treaty Section of the United Nations Office of Legal Affairs, which discharges the depositary functions of the Secretary-General of the United Nations under multilateral treaties. The Handbook incorporates recent developments in the practice of the Secretary-General as depositary of multilateral treaties with regard to matters normally included in the final clauses of these treaties. Many of these developments reflect considered responses by the Office of Legal Affairs of the United Nations to concerns expressed by the international community.

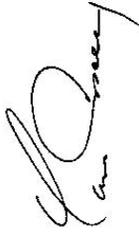
The Handbook is a practical guide, intended to assist those who are directly involved in multilateral treaty-making. In particular, its purpose is to help States with scarce resources and limited technical proficiency in treaty law and practice to participate fully in the multilateral treaty-making process.

Provisions of multilateral treaties deposited with the Secretary-General of the United Nations are quoted in full in the Handbook. Additional examples are provided in footnotes. Finally, patterns are set and good practices recommended.

In addition to paper copies of this Handbook, an electronic copy is available at the United Nations web site at <http://untreaty.un.org>.

Users of this Handbook are encouraged to contact the Treaty Section of the Office of Legal Affairs by e-mail at treaty@un.org with any comments or questions.

FINAL CLAUSES OF MULTILATERAL TREATIES HANDBOOK



Hans Corell
Under-Secretary-General for Legal Affairs
The Legal Counsel

Explanatory note

United Nations General Assembly resolution 36/112 of 10 December 1981 requested the Secretary-General of the United Nations to prepare a new Handbook of Final Clauses. The Treaty Section of the United Nations published the last edition of the Handbook of Final Clauses in 1957.

The purpose of the present Handbook is to provide an updated reference tool for drafting final clauses of multilateral treaties, taking into account new developments, including the practice of the Secretary-General of the United Nations as depository of multilateral treaties. It is important to note that the practice of the Secretary-General of the United Nations in this regard has evolved in certain respects in the past few years. For example, on 28 August 2001, the Secretary-General of the United Nations promulgated the bulletin "Procedures to be followed by departments, offices and regional commissions of the United Nations with regard to treaties and international agreements" that reflects some of these developments (see Annex: ST/SGB/2001/7). In section 4.2 of this bulletin the Secretary-General of the United Nations expressly states that, in the case of treaties and multilateral agreements to be deposited with him, "[d]raft final clauses of such treaties and international agreements shall be submitted by the relevant department, office or regional commission to the Treaty Section of the United Nations for review and comment prior to finalization."

In the present Handbook, the term "treaty" means a multilateral agreement. Unless the context otherwise indicates, the term "State" may also apply to an international organization or any other entity that is entitled, under the provisions of the treaty, to become party thereto. The treaties discussed in this Handbook are almost exclusively multilateral treaties deposited with the Secretary-General of the United Nations. Since over 500 multilateral treaties are deposited with the Secretary-General of the United Nations, precedents and practices established by and in relation to those treaties have had an important influence in developments in this area.

Treaty Handbook in this publication refers only to the version reprinted in 2002 and the electronic version available on the Internet.

It is noted that the *Vienna Convention on the Law of Treaties, 1969*, is primarily concerned with treaties between States (article 1), and treaties which are constitutive instruments of international organizations and treaties adopted within

an international organization (article 5). The *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986*¹, deals with treaties between one or more States and one or more international organizations, and treaties between international organizations.

This Handbook follows the order in which the final clauses most frequently appear in multilateral treaties deposited with the Secretary-General of the United Nations.

¹ Not yet in force.

INTRODUCTION

A multilateral treaty may be drafted in different forms. However, the common practice is for a treaty to consist of one instrument that is comprised of a title, preamble, main text, final clauses, testimonium and signature block, and annexes (if appropriate). The final clauses of a multilateral treaty generally include articles on the settlement of disputes, amendment and review, the status of annexes, signature, ratification, accession, entry into force, withdrawal and termination, reservations, designation of the depositary, and authentic texts. In addition, articles may be included that address the relationship of the treaty to other treaties, its duration, provisional application, territorial application, and registration.

Once adopted, a multilateral treaty produces certain legal effects. Even if the treaty has not yet entered into force, some of its provisions, in particular the final clauses, are, by their nature and objective, immediately applicable (provisions on modalities of authentication of the text, establishment of the consent of States to be bound by the treaty, entry into force, reservations, functions of the depositary, etc.). These become applicable to the functions of the depositary. As article 24 (4) of the *Vienna Convention on the Law of Treaties, 1969*, states:

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

From a technical point of view, the drafting of final clauses has undergone a number of changes and refinements over the years and these are reflected in this publication. Treaty law has gained in precision with these developments. The views expressed by the Secretary-General of the United Nations as depositary of multilateral treaties have had a significant impact on these developments.

In general, the final clauses of a treaty relate to procedural aspects rather than to substantive aspects of the treaty. However, well-drafted final clauses allow for the easy operation of the treaty and facilitate implementation by the parties and the depositary. They can have a significant impact on substance as well. Accordingly, precision in drafting the final clauses becomes important.

I. CONCLUSION OF TREATIES

A. ADOPTION AND AUTHENTICATION OF THE TEXT OF A TREATY

The adoption and authentication of an agreed text constitute the successful outcome of a treaty negotiation process.

In accordance with customary international law, as codified by the *Vienna Convention on the Law of Treaties, 1969* (hereinafter the “Vienna Convention, 1969”), the text of a multilateral treaty may be adopted by consensus of all States participating in the negotiations or voted upon by the appropriate body at an international conference. In the latter case, where the States have not agreed on a voting rule for that body, a treaty at an international conference is deemed to be adopted by the votes of two-thirds of the States present and voting, unless, by the same majority, they decide to apply a different rule (see article 9 of the *Vienna Convention, 1969*).

Once adopted, the text of a treaty is settled. The adopted text requires authentication. Authentication may occur in several ways (see article 10 of the *Vienna Convention, 1969*): for example, by signing *ad referendum* (affixing the signature of the representatives of those States participating in the negotiation of the text, subject to further confirmation by their governments) or by initialling the treaty or the Final Act incorporating the adopted text (affixing the initials of the negotiators) or by adopting the text by a resolution of the relevant body. The General Assembly of the United Nations (hereinafter the “General Assembly”) has adopted by resolution texts negotiated under the auspices of bodies established by it on many occasions. Signature of the original of the treaty may be the mechanism used for authentication of the text of the treaty.

B. THE DEPOSITARY

In the past, when a multilateral treaty provided for its subsequent ratification, accession, etc., the States concerned, as in the case of bilateral agreements, exchanged the appropriate instruments. But the proliferation of multilateral treaties and the increase in the number of parties have resulted in the development of the institution of the depositary.

Initially, only States were depositaries. Then, particularly since the establishment of the League of Nations and later, the United Nations and its specialized agencies, international organizations have been increasingly entrusted with depositary functions. The Secretary-General of the United Nations (hereinafter

the “Secretary-General”) is the depositary of over 500 multilateral treaties spanning the spectrum of human activity.

The depositary of a treaty is any State, organization or institution to whom the custody of that treaty is entrusted. The functions of the depositary are elaborated in articles 76 and 77 of the *Vienna Convention, 1969*.

(See also paragraphs 9 to 37 of the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (hereinafter the “*Summary of Practice*”),³ and sections 2 and 6 of the *Treaty Handbook* prepared by the Treaty Section of the United Nations (hereinafter the “Treaty Section”).

1. Designation of the depositary

a. Normally, the treaty itself clearly designates the depositary in a separate provision. For the sake of clarity and certainty this would clearly be the preferred approach. The *Stockholm Convention on Persistent Organic Pollutants, 2001*, provides in article 29:

Depositary

The Secretary-General of the United Nations shall be the depositary of this Convention.⁴

Also article 53 of the *International Cocoa Agreement, 2001*, states:

The Secretary-General of the United Nations is hereby designated as the depositary of this Agreement.⁵

b. Some treaties have adopted a more indirect approach to designating the depositary. The *International Convention for the Suppression of the Financing of Terrorism, 1999*, provides in article 28:

The original of this Convention, of which the Arabic, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations who shall send certified copies thereof to all States.⁶

A parenthetical reference to the depositary (which is not recommended) is found in the *Terms of Reference of the International Copper Study Group, 1989*. Article 22(a) provides:

Entry into force

22. (a) These terms of reference shall enter into force definitively when States together accounting for at least 80 per cent of trade in copper, as set out in the annex to these terms of reference, have notified the Secretary-General of the United Nations (hereinafter referred to as “the depositary”) pursuant to subparagraph (c) below of their definitive acceptance of these terms of reference.

The articles providing for ratification, accession and entry into force may also refer to the deposit of instruments with the depositary. The *Agreement Establishing the Terms of Reference of the International Jute Study Group, 2001*, article 23 (a) reads:

Entry into force

(a) These Terms of Reference shall enter into force when States, the European Community or any intergovernmental organization referred to in paragraph 5 above together accounting for 60 per cent of trade (imports and exports combined) in jute and jute products, as set out in Annex A to these Terms of Reference, have notified the Secretary-General of the United Nations (hereinafter referred to as “the depositary”) pursuant to subparagraph (b) below of their provisional application or definitive acceptance of these Terms of Reference.

The *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the 2000 United Nations Convention against Transnational Organized Crime, 2000*, states, in article 21 (3) and (4):

3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one

² ST/LEG/7 Rev.1.

³ See also the *Convention on the Rights of the Child, 1989* (article 53); the *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998* (article 29); the *International Convention on Arrest of Ships, 1999* (article 11); and the *United Nations Convention Against Transnational Organized Crime, 2000* (article 41).

⁴ See also the *Food Aid Convention, 1999* (article XXI).

⁵ See, for a similar provision, the *International Coffee Agreement, 2000* (article 55).

member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

2. Transfer of depositary functions

Depositary functions initially entrusted to one depositary have occasionally been transferred subsequently to another depositary. For example, the functions exercised by the French Government under the *International Agreement for the Suppression of the White Slave Traffic* and the *International Convention for the Suppression of the White Slave Traffic, both of 1910*, and the *Agreement for the Repression of Obscene Publications, 1910*, were transferred to the Secretary-General in accordance with Economic and Social Council resolution 82 (V) of 14 August 1947.

3. Joint depositaries

Exceptionally, several depositaries are designated as joint depositaries. Article IX (2) of the *Treaty on the Non-Proliferation of Nuclear Weapons, 1968*, reads:

2. This Treaty shall be subject to ratification by signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics and the United States of America, which are hereby designated the Depositary Governments.

During the cold war, this approach was adopted in certain treaties where the negotiating parties sought universal participation but were unable to acknowledge certain governments for political reasons.

The *Convention on the Privileges and Immunities of the Specialized Agencies, 1947*, in section 42 provides for the deposit of instruments, either with the Secretary-General or with the head of the relevant agency:

Each specialized agency concerned shall communicate the text of this Convention together with the relevant annexes to those of its members that are not Members of the United Nations and shall invite them to accede thereto in respect of that agency by depositing an instrument of accession to this Convention in respect thereof either with the Secretary-

General of the United Nations or with the executive head of the specialized agency.

In practice, the only time the provision in the *Convention on the Privileges and Immunities of the Specialized Agencies, 1947*, was applied was when Nepal, prior to becoming a member of the United Nations, deposited an instrument in respect of the World Health Organization.

The Secretary-General has since taken the view that such a joint exercise of depositary functions was not desirable since, apart from the duplication of work, it might also lead to unnecessary complications resulting from possible differences in the depositary practices. Consistent with this approach, the Secretary-General refuses to be designated as co-depositary. In ST/SGB/2001/7, section 6.1, states:

When it is intended that the Secretary-General discharge the depositary functions relating to treaties and international agreements, such treaties or international agreements shall confer the depositary functions on the Secretary-General only and not on any other official of the United Nations. The Secretary-General shall not be designated as a co-depositary.

(See also paragraphs 15 to 19 of the *Summary of Practice*.)

4. Designation of the Secretary-General of the United Nations as depositary

When it is intended that the Secretary-General be designated the depositary of a treaty, the Treaty Section should be consulted as soon as possible once the negotiations on the relevant multilateral treaty have commenced. The Secretary-General's acceptance of depositary functions is not automatic. He must be able to assume this role in the case of a particular treaty consistent with the considerations elaborated in ST/SGB/2001/7 and his practice as depositary of multilateral treaties.

In principle, the Secretary-General's policy is to accept the role of depositary for:

- (a) open multilateral treaties of worldwide interest, usually adopted by the General Assembly or concluded by plenipotentiary conferences convened by the appropriate organs of the United Nations; and

(b) treaties negotiated under the auspices of the United Nations regional commissions.⁶

The reasons for this policy include: (a) the inability of the Secretary-General to accept the role of depositary for all multilateral treaties due to limited staff and other resources; (b) the United Nations should not replace the other specialized agencies and other international organizations as depositary of multilateral treaties concerning their specialized fields; (c) in the case of restricted multilateral treaties where the depositary responsibilities are so closely linked to the application of the substantive clauses that they could hardly be exercised by an entity other than a party to the treaty or an organ established by the treaty; (d) considerations relating to United Nations policies; (e) the precedent that would be set; and (f) it might create the impression that the Secretary-General would perform the role of depositary in each such case.

5. Functions of the depositary

a. Articles 76 and 77 of the *Vienna Convention, 1969*, provide that:

Article 76

Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.
2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary

⁶ Although it is unusual for the Secretary-General to accept the role of depositary for a treaty that does not fall within this framework, exceptions do exist. See the *Agreement on Succession Issues, 2001*, among Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Slovenia and the Federal Republic of Yugoslavia (today, Serbia and Montenegro). This Agreement was accepted in deposit on an exceptional basis, taking into consideration the political circumstances of that time, including:

- (a) the *Agreement on Succession Issues, 2001*, was negotiated under the auspices the United Nations and as part of a coherent United Nations-led effort to bring stability to the region;
- (b) during its negotiation process, the Office of Legal Affairs of the United Nations was consulted extensively;
- (c) the political significance of the treaty; and
- (d) the enormous investment that the United Nations and the international community made to achieve peace in the Balkan region.

with regard to the performance of the latter's functions shall not affect that obligation.

Article 77

Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:
 - (a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;
 - (b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;
 - (c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;
 - (d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;
 - (e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;
 - (f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;
 - (g) registering the treaty with the Secretariat of the United Nations;
 - (h) performing the functions specified in other provisions of the present Convention.
2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

b. Some treaties designate the depositary and have specified in detail the functions of the depositary. Article 20 of the *Vienna Convention on the Protection of the Ozone Layer, 1985*, states:

Depositary

1. The Secretary-General of the United Nations shall assume the functions of depositary of this Convention and any protocols.
2. The Depositary shall inform the Parties, in particular, of:
 - (a) The signature of this Convention and of any protocol, and the deposit of instruments of ratification, acceptance, approval or accession in accordance with articles 13 and 14;
 - (b) The date on which the Convention and any protocol will come into force in accordance with article 17;
 - (c) Notifications of withdrawal made in accordance with article 19;
 - (d) Amendments adopted with respect to the Convention and any protocol, their acceptance by the parties and their date of entry into force in accordance with article 9;
 - (e) All communications relating to the adoption and approval of annexes and to the amendment of annexes in accordance with article 10;
 - (f) Notifications by regional economic integration organizations of the extent of their competence with respect to matters governed by this Convention and any protocols, and of any modifications thereof;
 - (g) Declarations made in accordance with article 11, paragraph 3.

The inclusion of a provision of this nature, listing the functions of the depositary (or some of them), is superfluous, in view of the provisions of the *Vienna Convention, 1969*, and established practice, unless, of course, additional duties are added. It could also give rise to misinterpretations. The Secretary-General discourages negotiating parties from adding new duties inconsistent with his role as depositary. Since the depositary functions are well established and codified in article 77 of the *Vienna Convention, 1969*, it is adequate simply to designate a depositary. It would be understood that the duties would be performed in accordance with treaty law and established practice.

6. Limits of the functions of the Secretary-General of the United Nations as depositary

The responsibility of the Secretary-General, as depositary, should be limited to his established depositary functions and should not include administrative duties that may be performed by the Secretary-General in a different capacity.

Some treaties assign administrative functions to the Secretary-General that are not depositary functions *stricto sensu*. See the provisions on the transmittal to the parties of communications concerning the final outcome of proceedings brought in respect of crimes under article 2 of the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973*. These functions are, in actual fact, performed by an administrative unit in the Secretariat of the United Nations (hereinafter the "Secretariat"), in this case the Office of Legal Affairs, and not by the Secretary-General, in his capacity as depositary.

Similarly, other units of the Secretariat are responsible for dealing with communications under various conventions. The Division for the Advancement of Women plays an important role in assisting States Parties to fulfil their reporting requirements under the Committee on the Elimination of Discrimination against Women created under article 17 of the *Convention on the Elimination of Discrimination against Women, 1979*. The Division for the Advancement of Women also aids the Committee by researching substantive matters, disseminating information, and establishing functional procedures.

The *United Nations Convention on the Law of the Sea, 1982*, requires the Secretary-General to perform a mix of depositary and administrative functions. Following internal consultations within the Secretariat, it has been agreed that the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs would perform the administrative functions under this Convention while the Treaty Section would perform the depositary functions.

In the case of the *Agreement concerning the Establishing of Global Technical Regulations for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles, 1998*, the Legal Counsel of the United Nations took the view that the notification functions for both the Compendium of Candidate Global Technical Regulations and the Registry of Global Technical Regulations created by this Agreement constituted administrative functions related to the implementation of the Agreement and not depositary functions. Accordingly, the Secretary-General could only undertake such administrative responsibilities in his capacity as the chief administrative officer of the Organization and not as the depositary. In accordance with Secretary-General's bulletin ST/SGB/1998/3, entitled "Organization of the Secretariat of the

Economic Commission for Europe”, such administrative functions should be performed by the Secretariat of the Economic Commission for Europe.

C. PARTICIPATION IN MULTILATERAL TREATIES

Treaties generally specify in their final clauses the categories of States, organizations or other entities that may become a party thereto. The *United Nations Convention on the Law of the Sea, 1982*, lists in article 305 the entities that may become parties to the Convention and contains an annex concerning participation by international organizations. Articles 305 (1), 306 and 307 read:

Article 305

Signature

1. This Convention shall be open for signature by:

- (a) all States;
- (b) Namibia, represented by the United Nations Council for Namibia;⁷
- (c) all self-governing associated States which have chosen that status in an act of self-determination supervised and approved by the United Nations in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters;
- (d) all self-governing associated States which, in accordance with their respective instruments of association, have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters;

⁷ The Council for Namibia was established as a subsidiary organ of the General Assembly by resolution 2248 (S-V) of 19 May 1967. Unlike other subsidiary organs, the Council functioned in a dual capacity: as a policy-making organ of the General Assembly and as the legal Administering Authority of a Trust Territory. This latter characteristic of the Council distinguished it from other United Nations subsidiary organs. As the legal Administering Authority, the Council was expressly endowed by the General Assembly with certain competences and functions to be exercised on behalf of Namibia in terms comparable to that of a Government, *inter alia*, to represent Namibia internationally. Even though South Africa exercised de facto control over the Territory, the Council had the *de jure* competence to enact any necessary laws and recognitions. Indeed, the Council became a party to many treaties deposited with the Secretary-General, such as the *United Nations Convention on the Law of the Sea, 1982*, and the constituent acts of the Food and Agriculture Organization, the International Labour Organization and the United Nations Educational, Scientific and Cultural Organization. By resolution S-18/1 of 23 April 1990 the General Assembly admitted Namibia to membership in the United Nations.

(e) all territories which enjoy full internal self-government, recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters;

(f) international organizations, in accordance with annex IX.

Article 306

Ratification and formal confirmation

This Convention is subject to ratification by States and the other entities referred to in article 305, paragraph 1(b), (c), (d) and (e), and to formal confirmation, in accordance with Annex IX, by the entities referred to in article 305, paragraph 1(f). The instruments of ratification and of formal confirmation shall be deposited with the Secretary-General of the United Nations.

Article 307

Accession

This Convention shall remain open for accession by States and the other entities referred to in article 305. Accession by the entities referred to in article 305, paragraph 1(f), shall be in accordance with Annex IX. The instruments of accession shall be deposited with the Secretary-General of the United Nations.⁸

1. The “all States formula”

Treaties may be open to participation by “all States” or “any State”. The “all States formula” has been used often in multilateral treaties that seek universal participation (see those treaties relating to disarmament, human rights, penal matters and environment.)

The *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997*, article 15, provides:

This Convention, done at Oslo, Norway, on 18 September 1997, shall be open for signature at Ottawa, Canada, by all States from 3 December

⁸ See also for similar wording the *Vienna Convention on Consular Relations, 1963* (articles 74 through 76).

1997, and at the United Nations Headquarters in New York from 5 December 1997 until its entry into force.⁹

The *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 1990, article 86, states:

1. The present Convention shall be open for signature by all States. It is subject to ratification.
2. The present Convention shall be open to accession by any State.
3. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.¹⁰

The *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, 1973, specifies in articles 14 to 16 that:

Article 14

This Convention shall be opened for signature by all States, until 31 December 1974, at United Nations Headquarters in New York.

Article 15

This Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 16

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-

⁹ See also the *Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques*, 1976 (article 9); the *Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II, and III)*, 1980 (article 3); the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, 1992 (article 18); and the *Comprehensive Nuclear-Test-Ban Treaty*, 1996 (article 11).

¹⁰ See also the *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 1973 (article 13); the *Convention on the Elimination of All Forms of Discrimination against Women*, 1979 (article 25); the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984 (article 25); the *International Convention against Apartheid in Sports*, 1985 (article 16); the *Convention on the Rights of the Child*, 1989 (article 46); and *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 1990 (article 86).

General of the United Nations.¹¹

The *Stockholm Convention on Persistent Organic Pollutants*, 2001, article 24 provides:

This Convention shall be open for signature at Stockholm by all States and regional economic integration organizations on 23 May 2001, and at the United Nations Headquarters in New York from 24 May 2001 to 22 May 2002.¹²

The “all States formula” has its drawbacks as it has given rise to the question whether certain territories or entities whose status as sovereign States was unclear would be permitted to participate in a treaty under this formula.

Practice of the Secretary-General

The Secretary-General, as depositary, stated on a number of occasions that it would fall outside his competence to determine whether a territory or other such entity would fall within the “any State” or “all States” formula.¹³

On 14 December 1973, the General Assembly issued a general understanding¹⁴ stating that:

The Secretary-General, in discharging his functions as a depositary of a convention with an ‘all States’ clause, will follow the practice of the Assembly in implementing such a clause and, whenever advisable, will request the opinion of the Assembly before receiving a signature or an instrument of ratification or accession.¹⁵

Since 1973 the General Assembly has, on occasion, given guidance on whether it considered a particular territory or entity a State.¹⁶

¹¹ See also the *International Convention against the taking of hostages*, 1979 (article 17); the *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, 1989 (article 18); the *Convention on the Safety of United Nations and Associated Personnel*, 1994 (article 24); the *International Convention for the Suppression of Terrorist Bombings*, 1997 (article 21); the *Rome Statute of the International Criminal Court*, 1998 (article 125); the *International Convention for the Suppression of the Financing of Terrorism*, 1999 (article 25); the *United Nations Convention against Transnational Organized Crime*, 2000 (article 36); and *Agreement on the Privileges and Immunities of the International Criminal Court*, 2002 (article 34).

¹² See also the *Convention on Biological Diversity*, 1992 (article 33); and the *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, 1998 (article 24).

¹³ *Official Records of the General Assembly, Eighteenth Session*, 1258th plenary meeting (A/PV.1258).

¹⁴ *Official Records of the General Assembly, Twenty-eighth Session, Supplement No.30 (A/90/30)*.

¹⁵ See *United Nations Juridical Yearbook, 1973* (United Nations publication, Sales No. E.75.V.1), p. 79, note 9, and *ibid.*, 1974 (United Nations publication, Sales No. E.76.V.1), p. 157.

¹⁶ See resolution 3067 (XXVIII) of 16 November 1973 in relation to Guinea-Bissau and the Democratic Republic of Viet-Nam.

The Secretary-General follows the advice of the General Assembly when he receives instruments relating to a treaty from an entity whose claim to being a State raises questions for the United Nations. It is not uncommon for the Secretariat (the appropriate unit would be the Office of Legal Affairs) to be consulted by negotiating parties when a difficulty in this respect is anticipated. Given the requirements of ST/SGB/2001/7, the Office of Legal Affairs is now in a position to draw the attention of the negotiating parties to any likely difficulty in this regard.

For example, regarding the Taiwan Province of China, the Secretary-General follows the General Assembly's guidance incorporated in resolution 2758 (XXVI) of the General Assembly of 25 October 1971 on the restoration of the lawful rights of the People's Republic of China in the United Nations. The General Assembly decided to recognize the representatives of the Government of the People's Republic of China as the only legitimate representatives of China to the United Nations. Hence, instruments received from the Taiwan Province of China will not be accepted by the Secretary-General in his capacity as depositary.

(See also paragraphs 81 to 87 of the *Summary of Practice*.)

2. The "Vienna formula"

The "Vienna formula" was developed to overcome the uncertainties of the "all States formula". The "Vienna formula" attempts to identify in detail the entities eligible to participate in a treaty. The "Vienna formula" permits participation in a treaty by Member States of the United Nations, Parties to the Statute of the International Court of Justice and States Members of specialized agencies or, in certain cases, by any other State invited by the General Assembly to become a party.

During the cold war, in the case of treaties open to "all States", certain differences arose over whether certain entities were to be recognized as States and whether they had the capability of becoming parties to a treaty.¹⁷ To avoid such disputes essentially based on cold war politics, the "Vienna formula" was employed in many treaties. For technical reasons some States, which were not members of the United Nations, were allowed to be members of the United Nations specialized agencies. However, since the General Assembly adopted the general understanding of 14 December 1973, this practice became unnecessary (see "all States formula" above). The *Vienna Convention, 1969*, stipulates in articles 81 to 83:

Article 81

Signature

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention.[...]

Article 82

Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 83

Accession

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 81. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

See also the *United Nations Framework Convention on Climate Change, 1992*, article 20:

This Convention shall be open for signature by States Members of the United Nations or of any of its specialized agencies or that are Parties to the Statute of the International Court of Justice and by regional economic integration organizations at Rio de Janeiro, during the United Nations Conference on Environment and Development, and thereafter at United Nations Headquarters in New York from 20 June 1992 to 19 June 1993.

Since 1992 the situation of the Federal Republic of Yugoslavia posed difficulties with respect to its participation in the United Nations and in multilateral treaties. The application of the "Vienna formula" in relation to the *United Nations Framework Convention on Climate Change, 1992*, was a case in point (see below "The Federal Republic of Yugoslavia").

¹⁷ Examples include the German Democratic Republic, North Korea and North Vietnam.

3. The Federal Republic of Yugoslavia (as of 4 February 2003 “Serbia and Montenegro”)

The former Socialist Federal Republic of Yugoslavia (hereinafter the “former Yugoslavia”) was an original Member of the United Nations, the Charter having been signed and ratified on its behalf on 26 June 1945, and 19 October 1945, respectively. The following republics constituting the former Yugoslavia declared their independence on the dates indicated: Slovenia (25 June 1991), the former Yugoslav Republic of Macedonia (17 September 1991), Croatia (8 October 1991), and Bosnia and Herzegovina (6 March 1992). The Federal Republic of Yugoslavia (hereinafter “Yugoslavia”) came into being on 27 April 1992 following the promulgation of its constitution on that day. Yugoslavia nevertheless advised the Secretary-General on 27 April 1992 that it would continue the international legal personality of the former Yugoslavia. Yugoslavia accordingly claimed to be a member of those international organizations of which the former Yugoslavia had been a member. It also claimed that all those treaty acts that had been performed by the former Yugoslavia were directly attributable to it, as being the same State.¹⁸ Bosnia and Herzegovina, Croatia, Slovenia and the Former Yugoslav Republic of Macedonia, all of which had applied for and were admitted to membership in the United Nations, in accordance with Article 4 of the Charter¹⁹, objected to this claim.

The General Assembly, in its resolution 47/1 of 22 September 1992, acting upon the recommendation contained in the Security Council resolution 777 of 19 September 1992, considered that Yugoslavia could not continue automatically the membership of the former Yugoslavia in the United Nations, and decided that it should accordingly apply for membership in the Organization. It also decided that Yugoslavia could not participate in the work of the General Assembly. The Legal Counsel took the view, however, that this resolution of the General Assembly neither terminated nor suspended the membership of the former Yugoslavia in the United Nations. At the same time, the Legal Counsel expressed the view that the admission of a new Yugoslavia to membership in the United Nations, in accordance with Article 4 of the Charter of the United Nations, would terminate the situation that had been created by General Assembly resolution 47/1.²⁰ General Assembly resolution 47/1 did not specifically address the question of the status of either the former Yugoslavia or of Yugoslavia with regard to multilateral treaties that were deposited with the Secretary-General. The Legal Counsel took the view in this regard that the Secretary-General was not in a position, as depositary, either to reject or to disregard the claim of Yugoslavia that it continued the legal personality of the former Yugoslavia, absent any decision to

¹⁸ S/23877 and A/46/915.

¹⁹ See General Assembly resolutions 46/237 adopted on 22 May 1992, 46/238 adopted on 22 May 1992, 46/236 adopted on 22 May 1992, and 47/225 adopted on 8 April 1993.

²⁰ A/47/485.

the contrary either by a competent organ of the United Nations directing him in the exercise of his depositary functions, or by a competent treaty organ created by a treaty, or by the contracting States to a treaty directing him in the exercise of his depositary functions with regard to that particular treaty, or by a competent organ representative of the international community of States as a whole on the general issue of continuity and discontinuity of statehood to which the claim of Yugoslavia gave rise.

Consistent with the claim of Yugoslavia to continue the international legal personality of the former Yugoslavia, the Secretary-General, as depositary, continued to list treaty actions that had been performed by the former Yugoslavia in status lists in the publication *Status of Multilateral Treaties Deposited with the Secretary-General*²¹ using for that purpose the short-form name “Yugoslavia”, which was used at that time to refer to the former Yugoslavia. Between 27 April 1992 and 1 November 2000, Yugoslavia undertook numerous treaty actions with respect to treaties deposited with the Secretary-General. Consistent with the claim of Yugoslavia to continue the international legal personality of the former Yugoslavia, these treaty actions were also listed in status lists against the name “Yugoslavia”. Accordingly, the Secretary-General, as depositary, did not make any differentiation in the above-mentioned publication between treaty actions that were performed by the former Yugoslavia and those that were performed by Yugoslavia, both categories of treaty actions being listed against the name “Yugoslavia”. The General Assembly admitted Yugoslavia to membership by its resolution 55/12 on 1 November 2000. At the same time, Yugoslavia renounced its claim to have continued the international legal personality of the former Yugoslavia.

The issue of the participation of Yugoslavia in a treaty containing the “Vienna formula” arose in the case of the *United Nations Framework Convention on Climate Change, 1992*. The Federal Republic of Yugoslavia signed this Convention on 8 June 1992, before the adoption of General Assembly resolution 47/1. Since the Secretary-General, as depositary, is guided in matters of representation and status of States and other entities by the decisions of competent United Nations organs, in view of the absence of such a decision until the adoption of resolution 47/1, he maintained the status quo with respect to Yugoslavia in the United Nations and its participation in United Nations activities. On this basis, during the Rio Conference on Environment and Development, the signature of Yugoslavia was accepted, consistent with article 20 of the Convention.²² The acceptance on 3 September 1997 of the deposit by Yugoslavia of an instrument of ratification of the *United Nations Framework Convention on Climate Change, 1992*, was based on the interpretation of General Assembly resolution 47/1. Accordingly, in light of the Legal Counsel’s view that

²¹ ST/LEG/SER.E/21, status as at 31 December 2002.

²² Several participants in the Conference reserved their positions as to the status of Yugoslavia and its participation in the Conference.

General Assembly resolution 47/1 had not terminated or suspended Yugoslavia's membership in the United Nations, the Secretary-General, as depositary, accepted in deposit this instrument of ratification pursuant to article 22 of the *United Nations Framework Convention on Climate Change, 1992*.

Following the admission of Yugoslavia to the United Nations on 1 November 2000 and the renunciation by Yugoslavia of its claim to continue the international legal personality of the former Yugoslavia, a review was undertaken of the multilateral treaties deposited with the Secretary-General, in relation to many of which the former Yugoslavia and Yugoslavia had undertaken a range of treaty actions. Four categories of treaty actions were identified:

- a. Treaty actions undertaken by the former Yugoslavia prior to 27 April 1992;²³
- b. Treaty actions undertaken by Yugoslavia between 27 April 1992 and 1 November 2000, pursuant to its previous claim to continue the legal personality of the former Yugoslavia;
- c. Treaty actions undertaken by Yugoslavia in its own right, and not dependent on prior treaty actions by the former Yugoslavia; and
- d. Treaty actions undertaken by Yugoslavia which require membership in the United Nations or a specialized agency as an essential precondition.

The Legal Counsel advised Yugoslavia, following its admission to the United Nations, to undertake specific measures with regard to its status relating to treaties deposited with the Secretary-General. Accordingly:

1. Yugoslavia could succeed to treaty actions undertaken by the former Yugoslavia prior to 27 April 1992;
2. It could also succeed to those treaties to which the former Yugoslavia was a party, and in relation to which Yugoslavia had undertaken subsequent treaty actions. In such cases, Yugoslavia undertook the relevant actions between 27 April 1992 and 1 November 2000. In the process of indicating its succession to a particular treaty, Yugoslavia would also have to confirm the subsequent related actions undertaken during the period of 27 April 1992 to 1 November 2000;

3. Treaty actions undertaken by Yugoslavia in its own right, and not dependent on prior treaty actions by the former Yugoslavia between 27 April 1992 and 1 November 2000 did not need further action; and

4. Treaty actions undertaken by Yugoslavia requiring membership in the United Nations or a specialized agency as an essential precondition needed to be confirmed on a case-by-case basis.

In the case of the *United Nations Framework Convention on Climate Change, 1992*, the issue arose as to whether the signature on 8 June 1992 and ratification on 3 September 1997 by Yugoslavia could be sustained. The Secretary-General took the view that he could not recognize these actions since Yugoslavia was not considered to have been a member of the United Nations or the specialized agencies at the time the actions in question were undertaken. Accordingly, these actions were voided and Yugoslavia deposited an instrument of accession to the *United Nations Framework Convention on Climate Change, 1992*, on 12 March 2001.²⁴

4. International organizations

The *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986* (hereinafter the "Vienna Convention, 1986") in essence codified the practice of international organizations participation in treaties. Such participation primarily depends, as for States, upon the relevant provisions of the treaty.

a. Certain treaties cannot be implemented by international organizations by reason of their nature and the absence of competence in respect of the subject matter of those treaties. Accordingly, negotiating parties have taken the view that such treaties would not be open to international organizations. See the human rights conventions. The *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984*, provides in article 25:

1. This Convention is open for signature by all States.
2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

²³ Yugoslavia assumed responsibilities for its international relations on 27 April 1992.

²⁴ Similarly, the signature and ratification by Yugoslavia of the *Protocol extending the 1986 International Agreement on Olive Oil and Table Olives, 1993*, on 23 December 1993 was rendered null.

This formulation would prevent an international organization from becoming a party to this Convention.

- b. In contrast, a treaty may contain provisions on participation of international organizations. In such a case, the treaty may identify the organizations that participation is open to or specify the characteristics and competencies that the organizations must possess.

The *Agreement on the Establishment of the International Vaccine Institute, 1996*, states:

Article IV

This Agreement shall be open for signature by all states and intergovernmental organizations at Headquarters of the United Nations, New York. It shall remain open for signature for a period of two years from 28 October 1996 unless such a period is extended prior to its expiry by the Depository at the request of the Board of Trustees of the Institute.

Article V

This Agreement shall be subject to ratification, acceptance or approval by the signatory states and intergovernmental organizations referred to in article IV.

The *International Coffee Agreement, 2000*, states in article 4 (3) and (4):

3. Any reference in this Agreement to a Government shall be construed as including a reference to the European Community, or any intergovernmental organization having comparable responsibilities in respect of the negotiation, conclusion and application of international agreements, in particular commodity agreements.

4. Such intergovernmental organizations shall not itself have any votes but in the case of a vote on matters within its competence it shall be entitled to cast collectively the votes of its member States. In such cases, the Member States of such intergovernmental organizations shall not be entitled to exercise their individual voting rights.²⁵

²⁵ See also the *United Nations Convention on the Law of the Sea, 1982* (article 305).

5. Regional economic integration organizations

Certain treaties, in particular those covering trade, commodities, the seas and the environment are increasingly open to participation by international organizations. Negotiating parties have specifically identified regional economic integration organizations with full or shared competencies in the subject matter covered by those treaties as capable of participation.

The definition of a regional economic integration organization encompasses two key elements: the grouping of States in a certain region for the realization of common purposes and the transfer of competencies relating to those common purposes from the members of the regional economic integration organization to the organization. The term regional economic integration organization mainly refers to the European Communities.²⁶

The European Community, as a regional economic integration organization, has the capacity to bind its members at the level of international law and to ensure that the provisions of treaties are implemented at the domestic level in those areas that its member States have transferred competence. It also has the power to enact legislation to ensure that its obligations under a treaty are implemented without additional approvals by the legislatures of its member States. Articles III (e) and XXII (a) and (b) of the *Food Aid Convention, 1999*, provide:

Article III

(e) Subject to the provisions of Article VI, the commitment of each member shall be:

Member	Tonnage ⁽¹⁾ (wheat equivalent)	Value ⁽¹⁾ (millions)	Total indicative value (millions)
Argentina	35,000	-	-
Australia	250,000	-	A\$ 90 ⁽²⁾
Canada	420,000	-	C\$ 150 ⁽²⁾
European Community and its member States	1,320,000	€ 130 ⁽²⁾	€ 422 ⁽²⁾
Japan	300,000	-	-
Norway	30,000	-	NOK 59 ⁽²⁾
Switzerland	40,000	-	-
United States of America	2,500,000	-	US\$ 900-1,000 ⁽²⁾

⁽¹⁾ Members shall report their food aid operations in line with the relevant Rules of Procedure.

⁽²⁾ Includes transport and other operational costs.

²⁶ There are three European Communities, the European Coal and Steel Community (ECSC); the European Community (EC), which was originally called the European Economic Community (EEC); and the European Atomic Energy Community (Euratom).

Article XXII

Signature and Ratification

(a) This Convention shall be open for signature from 1 May 1999 until and including 30 June 1999 by the Governments referred to in paragraph (e) of Article III.

(b) This Convention shall be subject to ratification, acceptance or approval by each signatory Government in accordance with its constitutional procedures. Instruments of ratification, acceptance or approval shall be deposited with the depositary not later than 30 June 1999, except that the Committee may grant one or more extensions of time to any signatory Government that has not deposited its instrument of ratification, acceptance or approval by that date.

Exceptionally, other international organizations may be recognized for this purpose. It is noted that the Organization of African Unity is a party to the *Agreement establishing the Common Fund for Commodities, 1980*, which is open to “any intergovernmental organization of regional economic integration which exercises competence in the fields of activity of the Fund.” Articles 4 (b) and 54 of the Fund provide:

Article 4

Eligibility

Membership in the Fund shall be open to:

- (a) All States Members of the United Nations or any of its specialized agencies or of the International Atomic Energy Agency; and
- (b) Any intergovernmental organization of regional economic integration which exercises competence in fields of activity of the Fund. Such intergovernmental organizations shall not be required to undertake any financial obligations to the Fund; nor shall they hold any votes.

Article 54

Signature and Ratification, Acceptance or Approval

1. This Agreement shall be open for signature by all States listed in schedule A, and by intergovernmental organizations specified in article 4(b), at United Nations Headquarters in New York from 1 October 1980 until one year after the date of its entry into force.

2. Any signature State or signatory intergovernmental organization may become a party to this Agreement by depositing an instrument of ratification, acceptance or approval until 18 months after the date of its entry into force.

Accordingly, the Secretary-General, as depositary, decided that the Gulf Cooperation Council could not participate in the *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994* (which is open to participation by regional economic integration organizations), because it did not possess the characteristics and competences that a regional economic integration organization must possess.

6. Limitations on the ability of international organizations to participate in treaties

a. Some treaties provide that an organization may become party to a treaty only if its constituent member States are already parties to the treaty. A key concern is to avoid the parties to a regional economic integration organization being given additional votes in an international organization through the participation of the regional economic integration organizations. Article VIII (a) of the *Protocol to the 1950 Agreement on the Importation of Educational, Scientific and Cultural Materials of 22 November, 1976*, states:

This Protocol, of which the English and French texts are equally authentic, shall bear today's date and shall be open to signature by all States Parties to the Agreement, as well as by customs or economic unions, provided that all the member States constituting them are also Parties to the Protocol.

Furthermore, ratification by a regional economic integration organization will not be counted as an additional party for the purpose of determining the entry into force of the treaty. See the *Stockholm Convention on Persistent Organic Pollutants, 2001* (article 26(3)):

For the purpose of paragraphs 1 and 2, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of that organization.²⁷

b. Unless the treaty itself otherwise provides, under international law, an international organization participating in a treaty does so in its own

²⁷ See also the *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998* (article 26(3)).

capacity and on behalf of the organization as a whole, rather than on behalf of each and all of its member States. When the treaty provides for participation by States and international organizations, particularly regional integration organizations with shared competence in the implementation of that treaty, the treaty often specifies the responsibilities of the organization and its member States in the performance of their obligations and the exercise of their rights under that treaty to avoid concurrence. This practice is followed notably in the environmental field. This practice has also prevailed in the field of commodity agreements, in respect of the European Community and its member States, despite the exclusive competence of the European Community for trade in goods, including commodity agreements.

The *Convention on Biological Diversity, 1992*, illustrates these principles:

Article 33

Signature

This Convention shall be open for signature at Rio de Janeiro by all States and any regional economic integration organization from 5 June 1992 to 14 June 1992, and at United Nations Headquarters in New York from 15 June 1992 to 4 June 1993.

Article 34

Ratification, Acceptance or Approval

1. This Convention and any protocol shall be subject to ratification, acceptance or approval by States and by regional economic integration organizations. Instruments of ratification, acceptance or approval shall be deposited with the Depositary.
2. Any organization referred to in paragraph 1 above which becomes a Contracting Party to this Convention or any protocol without any of its member States being a Contracting Party shall be bound by all the obligations under the Convention or the protocol, as the case may be. In the case of such organizations, one or more of whose member States is a Contracting Party to this Convention or relevant protocol, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under the Convention or protocol, as the case may be. In such cases, the organization and the member States shall not be entitled to exercise rights under the Convention or relevant protocol concurrently.²⁸

7. Exclusive competence of international organizations

Certain treaties prohibit member States of international organizations from becoming parties to the treaty in their own right, in cases where that international organization has competence over all the matters governed by the treaty. The *Agreement for the Implementation of the Provisions of the 1982 United Nations Convention on the Law of the Sea, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995*, provides in article 47(2):

2. In cases where an international organization referred to in Annex IX, article 1, of the Convention has competence over all the matters governed by this Agreement, the following provisions shall apply to participation by such international organization in this Agreement:

- (a) at the time of signature or accession, such international organization shall make a declaration stating:
 - (i) that it has competence over all the matters governed by this Agreement;
 - (ii) that, for this reason, its member States shall not become States Parties, except in respect of their territories for which the international organization has no responsibility; and
 - (iii) that it accepts the rights and obligations of States under this Agreement;
- (b) participation of such an international organization shall in no case confer any rights under this Agreement on member States of the international organization;
- (c) In the event of a conflict between the obligations of an international organization under this Agreement and its obligations under the agreement establishing the international organization or any acts relating to it, the obligations under this Agreement shall prevail.

²⁸ See also the *Vienna Convention for the Protection of the Ozone Layer, 1985* (articles 12 and 13), and the *United Nations Framework Convention on Climate Change, 1992* (articles 20 and 22).

8. Participation by entities other than States or international organizations

In principle, non-metropolitan and other non-independent territories do not have the power to conclude treaties. However, the parent State may authorize such a territory to enter into treaty relations either *ad hoc* or in certain fields. On the basis of such delegated authority, some treaties authorize participation by entities other than independent States or international organizations. However, this is exceptional.

For example, Hong Kong is a party to the World Meteorological Organization, the World Tourist Organization and the World Trade Organization.²⁹ Articles XI and XII of the *Marrakesh Agreement establishing the World Trade Organization, 1994* provide:

Article XI

Original Membership

1. The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original members of WTO.
2. The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

Article XII

Accession

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the

²⁹ Hong Kong, because of its economic significance has been allowed to become party to treaties on its own behalf while it was a United Kingdom overseas territory and, more recently, as the Hong Kong Special Administrative Region of China. The United Kingdom gave Hong Kong instruments of "Entrustment" to conclude certain treaties for which the United Kingdom would remain ultimately responsible. The *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 1984*, allows the Hong Kong Special Administrative Region to be a separate customs territory that may participate in international trade agreements and organizations.

WTO. Such accession shall apply to this Agreement and the Multilateral Agreements annexed thereto.

2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of WTO.

3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article 305 (1) (c), (d) and (e) of the *United Nations Convention on the Law of the Sea, 1982*, permits certain self-governing associated States and internal self-governing territories to become parties, provided that they have competence on matters governed by the Convention, including the competence to enter into treaties in respect of those matters. Article 305(1) reads:

1. This Convention shall be open for signature by:

- (a) all States;
- (b) Namibia, represented by the United Nations Council for Namibia;
- (c) all self-governing associated States which have chosen that status in an act of self-determination supervised and approved by the United Nations in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters;
- (d) all self-governing associated States which, in accordance with their respective instruments of association, have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters;
- (e) all territories which enjoy full internal self-government, recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters;
- (f) international organizations, in accordance with Annex IX.

9. Regional agreements

Certain regional treaties adopted within the framework of the United Nations regional commissions provide that they are open, not only to the States members of the Commission and to regional economic integration organizations but also to States having consultative status with the Commission and other entities specified.

See the *Agreement on International Railways in the Arab Mashreq, 2003*, a treaty concerning the provision of railway links between countries of the region. Article 4 states:

Signature, ratification, acceptance, approval and accession

1. This Agreement shall be open for signature to members of the Economic and Social Commission for Western Asia (ESCWA) at United Nations House in Beirut from 14 to 17 April 2003, and thereafter at United Nations Headquarters in New York until 31 December 2004.

2. The members referred to in paragraph 1 of this article may become Parties to this Agreement by:

- (a) Signature not subject to ratification, acceptance or approval (definitive signature);
- (b) Signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or
- (c) Accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of the requisite instrument with the depositary.

4. States other than ESCWA members may accede to the Agreement upon approval by all ESCWA members Parties thereto, by depositing an instrument of accession with the depositary. The Secretariat of the ESCWA Committee on Transport (the "Secretariat") shall distribute the applications for accession of non-ESCWA member States to the ESCWA members Parties to the Agreement for their approval. Once notifications approving the said application are received from all ESCWA members Parties to the Agreement, the application for accession shall be deemed approved.

D. OPENING FOR SIGNATURE

Time

a. When a multilateral treaty provides for its signature, it usually specifies the period of time when signatures could be affixed to the treaty. Some treaties are open for signature indefinitely. This is the case with most multilateral treaties on human rights for which universal participation is an overriding concern. The *Convention on the Elimination of All Forms of Discrimination against Women, 1979*, and the *Convention on the Rights of the Child, 1989*, provide in articles 25 (1) and 46:

The present Convention shall be open for signature by all States.³⁰

b. The most common approach in treaties is to indicate that they are open for signature until a specified event or a time period. The *Comprehensive Nuclear-Test-Ban Treaty, 1996*, in article XI provides:

This treaty shall be open to all States for signature before its entry into force.

The *United Nations Convention on the Assignment of Receivables in International Trade, 2001*, in article 34 (1) specifies the following:

This Convention is open for signature by all States at the Headquarters of the United Nations in New York until 31 December 2003.

Venue

a. Treaties are most frequently open for signature at the United Nations Headquarters in New York unless specific arrangements are made with the Treaty Section consistent with ST/SGB/2001/7 to open a treaty for signature elsewhere. For example, the *Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997*, provides in article 34:

The present Convention shall be open for signature by all States and by regional economic integration organizations from 21 May

³⁰ See also the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990* (article 86).

1997 until 21 May 2000 at United Nations Headquarters in New York.³¹

Treaties may be opened for signature in two different locations, at different times. Since there is only one original copy of each treaty deposited with the Secretary-General, it would not be physically possible to have the original text of a treaty in two simultaneous signature ceremonies. Treaties open for signature at two locations are very often open for signature at the place where the treaty was adopted and, subsequently, at United Nations Headquarters in New York. To facilitate treaty-signing events this was the case for most of the environmental conventions. This is done to facilitate high profile treaty signature ceremonies, which usually last for a short duration, arranged by the treaty secretariats or the States hosting the plenipotentiary conferences for the adoption of these treaties.³² The arrangements are made in consultation with the Treaty Section. A representative of the Treaty Section customarily travels to the signing location and maintains custody of the original text.

b. The *Stockholm Convention on Persistent Organic Pollutants, 2001*, article 24, reads as follows:

This Convention shall be open for signature at Stockholm by all States and regional economic integration organizations on 23 May 2001, and at the United Nations Headquarters in New York from 24 May 2001 to 22 May 2002.³³

A unique situation occurred in relation to the *Convention on the Law of the Sea, 1982*. Exceptionally, it was open for signature at two locations simultaneously. Given the effect of ST/SGB/2001/7, this situation is unlikely to recur. Article 305 (2) stipulates that:

2. This Convention shall remain open for signature until 9 December 1984 at the Ministry of Foreign Affairs of Jamaica and also, from 1 July 1983 until 9 December 1984, at United Nations Headquarters in New York.

³¹ See also the *Agreement on the establishment of the International Vaccine Institute, 1996* (article IV); the *International Convention on the Suppression of Financing of Terrorism, 1999* (article 25); and the *United Nations Convention on the Assignment of Receivables in International Trade, 2001* (article 34).

³² In rare cases a treaty may be open for signature for a long period of time away from United Nations Headquarters. However, consistent with ST/SGB/2001/7, this is no longer the practice of the Secretary-General.

³³ See also the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997* (article 15); the *Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, 1998* (article 12); and the *United Nations Convention against Transnational Organized Crime, 2000* (article 36).

Practice of the Secretary-General

In accordance with the Secretary-General's bulletin ST/SGB/2001/7, section 6.3, "[a]ll treaties and international agreements deposited with the Secretary-General and open for signature shall remain in the custody of the Treaty Section. Any exceptions to this rule shall be arranged in advance with the Treaty Section."³⁴ In the event that the negotiating parties are committed to a signature ceremony away from the United Nations Headquarters, it has been the practice of the Secretary-General as depositary of multilateral treaties to advise that the ceremonial signature period in locations away from New York Headquarters be limited to a few days. The costs involved in moving the treaty, the necessary staff away from Headquarters, and the security of the treaty itself are major considerations for the Secretary-General.

(See also paragraphs 116 to 119 of the *Summary of Practice* for depositary practice regarding the opening for signature of multilateral treaties and section 3.1.2 of the *Treaty Handbook*.)

E. SIMPLE SIGNATURE

Apart from authentication,³⁵ signature has other legal effects. Signature is usually the first step in the process of becoming party to a treaty. Multilateral treaties generally provide for signature subject to ratification, acceptance or approval also called simple signature. Simple signature indicates the State's intention to undertake positive action to express its consent to be bound by the treaty at a later date.

Signature creates an obligation for a signatory State to refrain from acts that would defeat the object and purpose of the treaty, until such State makes its intention clear not to become a party to the treaty. This fundamental principle of treaty law is enshrined in article 18 of the *Vienna Convention, 1969*, article 18:

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

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

³⁴ ST/SGB/2001/7.

³⁵ See chapter I, section A, above.

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;³⁶ or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

A signatory State also has certain rights. It is entitled to become a party to the treaty that it has signed and it is a recipient of depositary notifications and communications relating to such treaty (see article 77 of the *Vienna Convention, 1969*).³⁷

Signature provision

It is usual for multilateral treaties to contain signature provisions indicating the place of signature, date of opening for signature, period of signature, etc., as further discussed below. Article 34 of the *Agreement on the Privileges and Immunities of the International Criminal Court, 2002*, states:

Signature, ratification, acceptance, approval or accession

1. The present Agreement shall be open for signature by all States from 10 September 2002 until 30 June 2004 at United Nations Headquarters in New York.
 2. The present Agreement is subject to ratification, acceptance or approval by Signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General.
 3. The present Agreement shall remain open for accession by all States. The instruments of accession shall be deposited with the Secretary-General.
- (For multilateral treaties deposited with the Secretary-General, practical information regarding arrangements with the Treaty Section to sign a treaty, see section 6.2 of the *Treaty Handbook*.)
- (For full powers to sign a treaty, when required, see the *Summary of Practice*, paragraphs 101 to 115, and the *Treaty Handbook*, section 3.2 and annexes 1 and 3.)

³⁶ See notifications of the United States of America and Israel in relation to the International Criminal Court in the *Status of Multilateral Treaties Deposited with the Secretary-General* (ST/LEG/SER/E/21) or the electronic version available on the Internet, chapter XVIII.10.

³⁷ For practical reasons, it is the current practice of the Secretary-General as depositary that all States, even non-participant States, receive depositary notifications in hard copy and electronic format.

Although it is now an outdated practice, some multilateral treaties do not provide for their signature. Treaties adopted within the Food and Agriculture Organization normally provide for acceptance without prior signature as the way to express consent to be bound.³⁸ The *Protocol relating to the Status of Refugees, 1967*, the *Convention on the Privileges and Immunities of the Specialized Agencies, 1947*, and the *Convention on the Privileges and Immunities of the United Nations, 1946*, each provides that consent to be bound must be expressed by accession.

F. CONSENT TO BE BOUND BY A TREATY EXPRESSED BY SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL OR ACCESSION

In order to become a party to a multilateral treaty, a State must demonstrate its willingness to undertake the legal rights and obligations contained in the treaty. It must express, through a concrete act, its consent to be bound by the treaty. A State can express its consent to be bound in several ways. The most common ways are definitive signature, ratification, acceptance, approval and accession (see article 11 of the *Vienna Convention, 1969*). These actions refer to acts undertaken at the international level requiring the execution of an instrument and the deposit of such instrument with the depositary.

(See paragraphs 120 to 143 of the *Summary of Practice* and sections 3.3, 6.3 and annexes 4 and 5 of the *Treaty Handbook*.)

1. Definitive signature

Some treaties provide that States can express their consent to be legally bound by signature alone (see article 12 of the *Vienna Convention 1969*). This method is most commonly used in bilateral treaties and is rarely used in modern multilateral treaties. Where it is employed in a multilateral treaty, the entry into force provision will expressly provide that the treaty will enter into force upon the definitive signature and the deposit of instruments of ratification, acceptance, approval or accession by a specific number of States.

Of the treaties deposited with the Secretary-General, this method is most commonly used in certain treaties negotiated under the auspices of the Economic Commission for Europe. The *Agreement concerning the Adoption of Uniform Conditions for Periodical Technical Inspections of Wheeled Vehicles and the Reciprocal Recognition of such Inspections, 1997*, article 4 (3) states:

³⁸ See the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993*.

Countries under paragraphs 1 and 2 of this Article may become Contracting Parties to the Agreement:

- (a) By signing it without reservation to ratification;
- (b) By ratifying it after signing it subject to ratification;
- (c) By acceding to it.

Also article 12 (2) of the *Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations*, 1998, provides:

A State may express its consent to be bound by this Convention:

- (a) by signature (definitive signature);
- (b) by signature subject to ratification, acceptance or approval followed by deposit of an instrument of ratification, acceptance or approval; or
- (c) by deposit of an instrument of accession.

Practice of the Secretary-General

The depositary must ensure that the signatory does not exceed his or her powers. It is therefore necessary for the depositary to verify the nature and scope of the powers issued to the representative before the latter signs the treaty to ascertain, *inter alia*, whether the signature is subject to ratification. In those cases where the full powers are not required and the treaty provides for definitive signature, the depositary will normally request confirmation on this point. Where a signature is affixed without written confirmation of the intent of the signatory, the assumption is that it is a simple signature.

2. Ratification, acceptance and approval

- a.** Modern multilateral treaties explicitly provide for States to express their consent to be bound by signature subject to ratification, acceptance or approval (see article 14 of the *Vienna Convention, 1969*). The *United Nations Convention against Transnational Organized Crime, 2000*, provides in article 36 (3) that the Convention is subject to ratification, acceptance or approval:

Signature, ratification, acceptance, approval and accession

1. This Convention shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.
2. This Convention shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Convention in accordance with paragraph 1 of this article.
3. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence. [...]

Providing for signature subject to ratification allows States time to seek approval for the treaty at the domestic level and to enact any legislation necessary to implement the treaty domestically, prior to undertaking the legal obligations under the treaty at the international level. Upon ratification, the treaty legally binds the State.

The *International Covenant on Civil and Political Rights, 1966*, and the *International Covenant on Economic, Social and Cultural Rights, 1966*, provide in paragraphs 1 and 2 of articles 48 and 26, respectively, that the Covenants are subject to ratification:

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

- b.** Acceptance or approval of a treaty following signature has the same legal effect as ratification, and the same rules apply, unless the treaty provides otherwise. The *Convention on Prohibitions or Restrictions on the Use of*

Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 1980, permits acceptance or approval with prior signature. Article 4 stipulates:

1. This Convention is subject to ratification, acceptance or approval by the Signatories. Any State which has not signed this Convention may accede to it.
2. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.
3. Expressions of consent to be bound by any of the Protocols annexed to this Convention shall be optional for each State, provided that at the time of deposit of its instrument of ratification, acceptance or approval of this Convention or accession thereto, that State shall notify the Depositary of its consent to be bound by any two or more of these Protocols.
4. At any time after the deposit of its instrument of ratification, acceptance or approval of this Convention or accession thereto, a State may notify the Depositary of its consent to be bound by any annexed Protocol by which it is not already bound.
5. Any Protocol by which a High Contracting Party is bound shall for that Party form an integral part of this Convention.

The Agreement on the Importation of Educational, Scientific and Cultural Materials, 1950, allows for acceptance of the treaty as follows:

Article X

The States referred to in paragraph 1 of article IX may accept this Agreement from 22 November 1950. Acceptance shall become effective on the deposit of a formal instrument with the Secretary-General of the United Nations.

The European Community uses the mechanism of acceptance or approval frequently.

(Model instruments of ratification, acceptance or approval are available in the *Treaty Handbook*.)

3. Accession

A State may express its consent to be bound by a treaty by accession (see article 15 of the *Vienna Convention, 1969*). Accession has the same legal effect as ratification, acceptance or approval. However, unlike ratification, acceptance and

approval, which must be preceded by signature, accession requires only the deposit of an instrument of accession. Accession, as a means of becoming party to a treaty, is generally used by States wishing to express their consent to be bound by a treaty if, for whatever reason, they are unable to sign it. This may occur if the deadline for signature has passed or if domestic circumstances prevent a State from signing a treaty.

Accession is also an action that a new State may take when it does not wish to be bound immediately by virtue of succession, which is generally considered to be effective on the date the new State becomes responsible for its international affairs, unless it is not possible to determine such a date. For example, Serbia and Montenegro acceded to the *Convention on the Prevention and Punishment of the Crime of Genocide, 1948*, on 12 March 2001.

a. The common approach is for multilateral treaties to provide for accession. article 16 of the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997*, states:

1. This Convention is subject to ratification, acceptance or approval of the Signatories.
2. It shall be open for accession by any State which has not signed the Convention.
3. The instruments of ratifications, acceptance, approval or accession shall be deposited with the Depositary.³⁹

b. Many treaties in the human rights field provide for accession at any time; they do not specify the deadline for signature. Article 18 of the *International Convention on the Elimination of All Forms of Racial Discrimination, 1966*, states:

1. This Convention shall be open to accession by any State referred to in article 17, paragraph 1, of the Convention.
2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Likewise, articles 48 (3) and 26 (3) of the *International Covenant on Civil and Political Rights, 1966*, and the *International Covenant on Economic,*

³⁹ See also the *Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992* (article 25).

Social and Cultural Rights, 1966, state:

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.⁴⁰

c. Normally treaties permit accession from the day after they close for signature. This is consistent with the traditional approach. See article 25 (1) of the *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998*, which permits accession from the day after it closes for signature:

1. This Convention shall be subject to ratification, acceptance or approval by States and by regional economic integration organizations. It shall be open for accession by States and by regional economic integration organizations from the day after the date on which the Convention is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

Similarly, article 24 (1) of the *Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change, 1997*, provides that:

1. This Protocol shall be open for signature and subject to ratification, acceptance or approval by States and regional economic integration organizations which are Parties to the Convention. It shall be open for signature at United Nations Headquarters in New York from 16 March 1998 to 15 March 1999. This Protocol shall be open for accession from the day after the date on which it is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.⁴¹

Other treaties provide for States to accede after the treaty enters into force. Disarmament treaties make provision of this nature. Article XIII of the *Comprehensive Nuclear-Test-Ban Treaty, 1996*, provides:

Any State which does not sign this treaty before its entry into force may accede to it at any time thereafter.⁴²

⁴⁰ See also the *Convention on the Elimination of All Forms of Discrimination against Women, 1979* (article 25); the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984* (article 26); the *Convention on the Rights of the Child, 1989* (article 48); and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990* (article 86).

⁴¹ See also the *Vienna Convention for the Protection of the Ozone Layer, 1985* (article 14); and the *Convention on Biological Diversity, 1992* (article 35).

⁴² See also the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1992* (article XX); and the *International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973* (article XIV).

d. Some treaties may also permit accession without explicitly specifying when the action may be undertaken. This is a technique adopted in recent times to accommodate States that for various reasons are unable to sign a treaty but would nevertheless wish to become parties to it. See the *Rome Statute of the International Criminal Court, 1998*, article 125:

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.⁴³

The *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997*, states:

Article 15

This Convention, done at Oslo, Norway, on 18 September 1997, shall be open for signature at Ottawa, Canada, by all States from 3 December 1997 to 4 December 1997, and at the United Nations Headquarters in New York from 5 December 1997 until its entry into force.

Article 16

1. This Convention is subject to ratification, acceptance or approval of the Signatories.

2. It shall be open for accession by any State which has not signed the Convention.

[...]

⁴³ See also the *International Convention for the Suppression of the Financing of Terrorism, 1999* (article 25); the *United Nations Convention against Transnational Organized Crime, 2000* (article 36); and the *Agreement on the Privileges and Immunities of the International Criminal Court, 2002* (article 34).

In such cases, some States have deposited instruments of accession while the treaty was still open for signature. The Former Yugoslav Republic of Macedonia and Equatorial Guinea deposited their instruments of accession during the period when the Convention was still open for signature, i.e., before the entry into force of the Convention on 1 March 1999.

(A model instrument of accession is available at page 49 of the *Treaty Handbook*.)

Practice of the Secretary-General

Where a treaty provides for conditions of accession (after a date or an event) but an instrument of accession is received before such conditions are fulfilled, the Secretary-General, as depositary, will inform the State that its instrument will be held until the conditions for accession are fulfilled; once fulfilled it will be accepted in deposit. Until then, the instrument will not count for the purposes of calculating the date of entry into force.

4. Ratification, acceptance, approval or accession with conditions

Some multilateral treaties impose specific limitations or conditions on ratification, acceptance, approval or accession. These conditions, being mandatory in most cases and specifically incorporated to achieve a particular objective, should be satisfied. When a State deposits with the Secretary-General an instrument of ratification, acceptance or approval, or accession to the *Optional Protocol to the 1989 Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000*, article 3 (2) provides:

2. Each State Party shall deposit a binding declaration upon ratification of or accession to this Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards that it has adopted to ensure that such recruitment is not forced or coerced.

A State depositing an instrument of ratification, acceptance or approval, or accession to the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 1980*, must, at the same time, notify the Secretary-General of its consent to be bound by any two or more of the protocols related to

the Convention.⁴⁴

The conditions under the *International Sugar Agreement, 1992*, article 41 are explicitly incorporated:

This Agreement shall be open to accession by the Governments of all states upon conditions established by the council. Upon accession, the State concerned shall be deemed to be listed in the annex to this Agreement, together with its votes as laid down in the conditions of accession.

Accession shall be effected by the deposit of an instrument of accession with the depositary. Instruments of accession shall state that the Government accepts all the conditions established by the Council.

When the consent of a State to be bound by a treaty is expressed in any of the forms discussed above, an instrument of ratification, acceptance, approval or accession establishes such consent upon deposit with the depositary. In the practice of the Secretary-General, it is the date of deposit of the communication with the depositary that is relevant. Accordingly, the depositary performs functions of considerable significance, including determining the date when the treaty enters into force.

G. PROVISIONAL APPLICATION OF A TREATY

1. Provisional application of a treaty before its entry into force

Provisional application of a treaty may occur when a State unilaterally decides to give legal effect to the obligations under a treaty on a provisional and voluntary basis. This provisional application may end at any time.

A treaty or part of it is applied provisionally pending its entry into force if either the treaty itself so provides or the negotiating States, in some other manner, have so agreed. Article 25 (1) of the *Vienna Convention, 1969*, states:

Provisional application

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

⁴⁴ The relevant protocols are Protocols I, II and III of 10 October 1980; Protocol IV of 13 October 1995; and Protocol II, as amended, of 3 May 1996. Any State that expresses its consent to be bound by Protocol II after the amended Protocol II entered into force on 3 December 1998 is considered to have consented to be bound by Protocol II, as amended, unless it expresses a contrary intention. Such a State is also considered to have consented to be bound by the unamended Protocol II in relation to any State that is not bound by Protocol II, as amended, pursuant to article 40 of the *Vienna Convention, 1969*.

- (a) the treaty itself so provides; or
- (b) the negotiating States have in some other manner so agreed.

The *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997*, article 18 states:

Provisional application

Any State may at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally paragraph 1 of Article 1 of this Convention pending its entry into force.

Also, article 7 of the *Agreement relating to the implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea, 1994*, provides:

Provisional application

1. If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force by:

- (a) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which before 16 November 1994 notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing;
- (b) States and entities which sign this Agreement, except any such State or entity which notifies the depositary in writing at the time of signature that it will not so apply this Agreement;
- (c) States and entities which consent to its provisional application by so notifying the depositary in writing;
- (d) States which accede to this Agreement.

2. All such States and entities shall apply this Agreement provisionally in accordance with their national or internal laws and regulations, with effect from 16 November 1994 or the date of signature, notification of consent or accession, if later.⁴⁵

Article 308 (4) of the *United Nations Convention on the Law of the Sea, 1982*, stipulates:

⁴⁵ The *Agreement relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea, 1994*, applied provisionally with effect from 16 November 1994, the date on which the *United Nations Convention on the Law of the Sea, 1982*, entered into force.

4. The rules, regulations and procedures drafted by the Preparatory Commission shall apply provisionally pending their formal adoption by the Authority in accordance with Part XI.

Unless the treaty provides otherwise a State may unilaterally terminate such provisional application at any time upon notification to the depositary.⁴⁶

2. Provisional application of a treaty after its entry into force

Provisional application is possible even after the entry into force of a treaty. This option is open to a State that may wish to give effect to the treaty without incurring the legal commitments under it. It may also wish to cease applying the treaty without complying with the termination provisions. The *International Cocoa Agreement, 1993*, article 55 (1) provides:

Notification of Provisional Application

1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government for which the Council has established conditions for accession, but which has not yet been able to deposit its instrument, may at any time notify the depositary that, in accordance with its constitutional procedures and/or its domestic laws and regulations, it will apply this Agreement provisionally either when it enters into force in accordance with article 56 or, if it is already in force, at a specified date. Each Government giving such notification shall at that time state whether it will be an exporting Member or an importing Member.⁴⁷

H. RESERVATIONS

The *Vienna Convention, 1969*, defines a reservation as a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State (see article 2(1)(d)). The *Vienna Convention, 1986*, uses a similar definition (see article 2(1)(d)).

⁴⁶ See paragraph 2 of article 25 of the *Vienna Convention, 1969*. Article 25 (2) of the *Vienna Convention, 1969*, deals with the difference between termination of the provisional application and termination of or withdrawal from a treaty by consent of the parties as provided in article 54 of the *Vienna Convention, 1969*. Pursuant to article 54, a State may terminate the provisional application at any time but a State that has expressed its consent to be bound by a treaty through definitive signature, ratification, acceptance, approval or accession, generally can only withdraw or terminate it in accordance with the treaty provisions or in accordance with general rules of treaty law.

⁴⁷ See also the *International Agreement on Olive Oil and Table Olives, 1986* (article 54), and the *International Sugar Agreement, 1992* (article 39).

Reservations restrict or modify the effects of treaties but they may help to promote international relations by enabling States to participate in treaties that they would not participate in without reservations. Reservations to multilateral treaties raise the immediate question of their admissibility and validity.

The Secretary-General's practice has seen the law on reservations develop. In some areas, such developments were not envisaged in the *Vienna Convention, 1969*.

(See the *Summary of Practice*, paragraphs 161 to 216. For current practice see *Treaty Handbook*, sections 3.5 and 6.4. See also the Reports of Alain Pellet, Special Rapporteur for the topic "law and practice relating to reservations to treaties" as appointed by the International Law Commission at the forty-sixth session in 1994.⁴⁸)

1. Formulation of reservations

Article 19 of the *Vienna Convention, 1969*, on the formulation of reservations provides that:

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

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

In accordance with article 20 (1) of the *Vienna Convention, 1969*, a reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States, unless the treaty so provides.

Where reservations are permitted

- a. Some treaties expressly permit reservations. The *Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, 1998*, in its article 14 (1) sets forth the following:

⁴⁸ A/CN.4/470 and Corr.1 (first report); A/CN.4/477 and Add.1 (second report); A/CN.4/491 and Corr.1 (English only); A/CN.4/491/Add.1, Add.2 and Corr.1, Add.3 and Corr.1 (Chinese, French and Russian only); Add.4 and Corr.1, Add.5 and Add.6 and Corr.1 (third report); A/CN.4/499 (fourth report); A/CN.4/508/Add.1 to 4 (fifth report); A/CN.4/518 and Add.1 to 3 (sixth report); and A/CN.4/526 and Add.1 to 3 (seventh report).

When definitively signing, ratifying or acceding to this Convention or any amendment hereto, a State Party may make reservations.

- b. Treaties providing for reservations may also contain clauses stipulating the legal consequences deriving from a reservation or an objection. This is not common in recent practice. The *Convention on the Nationality of Married Women, 1957*, article 8 (2) provides that:

If any State makes a reservation in accordance with paragraph 1 of the present article, the Convention, with the exception of those provisions to which the reservation relates, shall have effect as between the reserving State and the other Parties. The Secretary-General of the United Nations shall communicate the text of the reservation to all States which are or may become Parties to the Convention. Any State Party to the Convention or which thereafter becomes a Party may notify the Secretary-General that it does not agree to consider itself bound by the Convention with respect to the State making the reservation. This notification must be made, in the case of a State already a Party, within ninety days from the date of the communication by the Secretary-General; and, in the case of a State subsequently becoming a Party, within ninety days from the date when the instrument of ratification or accession is deposited. In the event that such a notification is made, the Convention shall not be deemed to be in effect as between the State making the notification and the State making the reservation.

- c. Reservations may be withdrawn at any time by the reserving State. Such withdrawals do not require the consent of other parties (see article 22 (1) of the *Vienna Convention, 1969*). Although not a common practice in contemporary multilateral treaties, it is possible to provide for the withdrawal of reservations. Article 20 (3) of the *International Convention on the Elimination of All Forms of Racial Discrimination, 1966*, that provides:

Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received.⁴⁹

When permitted by the treaty, reservations are to be made at the time of signing or of depositing an instrument expressing the consent to be bound by the treaty. If a reservation is formulated upon simple signature, it must be confirmed when the State expresses its consent to be bound. If the reservation made at the time of

⁴⁹ Examples of similar wording are found in the *Convention on the Rights of the Child, 1989* (article 5); the *International Convention Against Recruitment, Use, Financing and Training of Mercenaries, 1989* (article 17); the *International Convention for the Suppression of Terrorist Bombings, 1997* (article 20); and the *International Convention for the Suppression of the Financing of Terrorism, 1999* (article 24).

simple signature were not confirmed upon ratification, acceptance or approval, it would have no legal validity.

In some instances, States parties formulate reservations after having expressed their consent to be bound (late reservations).

(For the time for formulating reservations, see also section 3.5.3 of the *Treaty Handbook*.)

Practice of the Secretary-General

Where a State formulates a reservation expressly authorized by the treaty, the Secretary-General, as depositary, informs the States concerned by depositary notification.

Where reservations are prohibited

a. It is not unusual for some treaties to expressly prohibit reservations. All reservations are prohibited under article 120 of the *Rome Statute of the International Criminal Court, 1998*:

No reservations may be made to this Statute.⁵⁰

Treaties in the environmental field often prohibit reservations. The *Stockholm Convention on Persistent Organic Pollutants, 2001*, article 27 provides that:

No reservations may be made to this Convention.

The *Montreal Protocol on Substances that Deplete the Ozone Layer, 1987*, article 18 provides:

No reservations may be made to this Protocol.

The *Vienna Convention for the Protection of the Ozone Layer, 1985*, states in article 18:

No reservations may be made to this Convention.⁵¹

b. Other treaties implicitly prohibit the formulation of reservations. For example, it is generally acknowledged that international labour

conventions implicitly prohibit reservations due to the objective of the International Labour Organization (ILO) to make uniform the labour conditions worldwide.

Practice of the Secretary-General

Where a treaty prohibits reservations, the Secretary-General, as depositary, makes a preliminary legal assessment as to whether a given statement constitutes a reservation.

If the statement has no bearing on the State's legal obligations, the Secretary-General circulates the statement. If the statement *prima facie* unambiguously excludes or modifies the legal effects of the provisions of the treaty, the Secretary-General will draw the attention of the State concerned to the issue. The Secretary-General may also request clarification from the declarant on the real nature of the statement. If it is formally clarified that the statement is not a reservation, the Secretary-General will formally receive the instrument in deposit and notify all States concerned. Such clarification will estop the State concerned from relying on its "reservation" later.

States may also revise the statements that they submitted.

Where only certain reservations are permitted

a. A treaty may permit certain reservations only. The *International Convention on Arrest of Ships, 1999*, in its article 10 states:

Reservations

1. Any State may, at the time of signature, ratification, acceptance, approval, or accession, or at any time thereafter, reserve the right to exclude the application of this Convention to any of the following:

- (a) ships which are not seagoing;
- (b) ships not flying the flag of a State Party;
- (c) claims under article 1, paragraph 1(s).

2. A State may, when it is also a State Party to a specified treaty on navigation on inland waterways, declare when signing, ratifying, accepting, approving or acceding to this Convention, the rules on jurisdiction, recognition and execution of court decisions provided for in such treaties shall prevail over the rules contained in article 7 of this Convention.

b. Other treaties prohibit reservations with exceptions. See article 309 of the *United Nations Convention on the Law of the Sea, 1982*, to which no

⁵⁰ See also provisions with similar but not identical wording: the *International Natural Rubber Agreement, 1987* (article 67); and the *International Coffee Agreement, 2000* (article 47).

⁵¹ Provisions with identical wording include the *United Nations Framework Convention on Climate Change, 1992* (article 24); the *Convention on Biological Diversity, 1992* (article 37); the *United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994* (article 37); and the *Stockholm Convention on Persistent Organic Pollutants, 2001* (article 27).

entity may make a reservation or exception, unless expressly permitted elsewhere in the Convention:

Reservations and exceptions

No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.⁵²

Article 2 of the *Agreement relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea, 1994*, provides that article 309 of the Convention also applies to the Agreement.

Article XV of the *Comprehensive Nuclear-Test-Ban Treaty, 1996*, in respect to its Protocol and the annexes to the Protocol provides:

The Articles of and the Annexes to this Treaty shall not be subject to reservations. The provisions of the Protocol to this Treaty and the Annexes to the Protocol shall not be subject to reservations incompatible with the object and purpose of this Treaty.⁵³

2. Formulation of reservations: where the treaty is silent on reservations

Many treaties do not make provision for reservations. Human rights treaties often fall into this category.⁵⁴ That is the case of the *Convention on the Prevention and Punishment of the Crime of Genocide, 1948*, which, following the formulation of reservations made by the former Soviet Union and other Eastern European countries to some of its provisions,⁵⁵ marked an important step in the development of the doctrine relating to the admissibility of reservations.

The basic rules relating to reservations are embodied in article 19 of the *Vienna Convention, 1969*, which states:

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

⁵² Similar wording is found in the *United Nations Convention on the Assignment of Receivables in International Trade, 2001* (article 44).

⁵³ See the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1992* (article XXII).

⁵⁴ See the *International Covenant on Economic, Social and Cultural Rights, 1966*; the *International Covenant on Civil and Political Rights, 1966*; the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968*; the *International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973*; the *International Convention against Apartheid in Sports, 1985*; and the *Agreement establishing the Fund for the Indigenous Peoples of Latin America and the Caribbean, 1992*.

⁵⁵ For the text of reservations concerning articles IX and XII of the *Convention on the Prevention and Punishment of the Crime of Genocide, 1948*, see *Status of Multilateral Treaties Deposited with the Secretary-General* (ST/LEG/SER/E/21) or its electronic version available on the Internet, chapter IV.1.

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Articles 20 and 21 of the *Vienna Convention, 1969*, deals with objections to reservations and the legal effects of reservations and objections to reservations. Withdrawal of reservations is dealt with under article 22 of the *Vienna Convention, 1969*. Reservations and objections to reservations, as well as withdrawal of reservations or objections must be formulated in writing (see article 23 of the *Vienna Convention, 1969*).

Practice of the Secretary-General

Where a treaty is silent on reservations and a State formulates a reservation consistent with article 19 of the *Vienna Convention, 1969*, the Secretary-General, as depositary, informs the States concerned of the reservation by depositary notification.

(See also the *Summary of Practice*, paragraphs 168 to 181.)

I. DECLARATIONS

The contemporary practice shows a proliferation of declarations in relation to treaties. Articles on declarations and notifications included in the text of the treaty are not always found in the sections addressing the final clauses or final provisions. Instead, they may appear in other sections of the treaty text.

(See the *Summary of Practice*, paragraphs 217 through 220, and the *Treaty Handbook*, section 3.6.)

1. Interpretative declarations

Unlike reservations, interpretative declarations do not purport to exclude or limit the legal effect of certain provisions of a treaty in their application to a particular State but only to clarify their meaning or interpretation. However, in practice, the determination of whether a statement is a declaration or an unauthorized reservation may become complex. See paragraphs 217 to 220 of the *Summary of Practice*.

Declarations are usually made at the time of signature or at the time of the deposit of the relevant instrument.⁵⁶

A treaty may expressly provide for the formulation of declarations. Article 310 of the *United Nations Convention on the Law of the Sea, 1982*, stipulates the following:

Declarations and statements

Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.

2. Mandatory declarations

Some treaties provide that certain declarations must be made by contracting States at the time of expressing their consent to be bound by the treaty or within a certain time period from the moment such consent has been expressed. The *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1992*, provides in its article III:

1. Each State Party shall submit to the Organization, not later than 30 days after this Convention enters into force for it, the following declarations, in which it shall:

- (a) With respect to chemical weapons:
 - (i) Declare whether it owns or possesses any chemical weapons, or whether there are any chemical weapons located in any place under its jurisdiction or control;
 - (ii) Specify the precise location, aggregate quantity and detailed inventory of chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with Part IV (A), paragraphs 1 to 3, of the (iii)

⁵⁶ In the past, declarations were sometimes made in contemplation of the impending signature of the treaty, after its adoption. In such cases, the Secretary-General has considered such declarations to be made at the time of signature and has circulated their text accordingly. See those declarations that related directly to the implementation of the treaty included in the Final Act of the Conference that adopted the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989*. Such declarations were considered to be made upon signature and were circulated accordingly.

Verification Annex, except for those chemical weapons referred to in sub-paragraph (iii);

- (iii) Report any chemical weapons on its territory that are owned and possessed by another State and located in anyplace under the jurisdiction or control of another State, in accordance with Part IV (A), paragraph 4, of the Verification Annex;
- (iv) Declare whether it has transferred or received, directly or indirectly, any chemical weapons since January 1946 and specify the transfer or receipt of such weapons, in accordance with Part IV (A), paragraph 5, of the Verification Annex;
- (v) Provide its general plan for destruction of chemical weapons that it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with Part IV (A), paragraph 6, of the Verification Annex;
- (b) With respect to old chemical weapons and abandoned chemical weapons: [...]
- (c) With respect to chemical weapons production facilities: [...]
- (d) With respect to other facilities: [...]
- (e) With respect to riot control agents: [...].⁵⁷

Also the *Optional Protocol to the 1989 Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000*, article 3 (2) stipulates:

Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.

3. Optional declarations

A treaty may provide for optional declarations. Many human rights treaties provide for States to make legally binding optional declarations. These declarations mostly relate to the competence of the human rights committees as independent treaty monitoring bodies responsible for overseeing the implementation of the treaty provisions. The Head of State, the Head of Government or the Minister for Foreign Affairs must sign such declarations.

⁵⁷ An additional example of a mandatory declaration is seen in the *Convention relating to the Status of Refugees, 1951* (article I B.1).

The *Convention against Torture and Other Cruel, Inhuman or Degrading, Treatment or Punishment, 1984*, provides for optional declarations recognizing the competence of the Committee against Torture to receive and consider communications from States claiming the non-observance of the Convention by another State party (article 21) or from or on behalf of individuals claiming to be victims of a violation by a State party of the provisions of the Convention. Articles 21 and 22 read:

Article 21

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. [...]

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 22

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

[...]

8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties

with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

Similarly, the *International Covenant on Civil and Political Rights, 1966*, provides for an optional declaration under article 41 recognizing the competence of the Human Rights Committee:

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

[...]

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Likewise, the *International Convention on the Elimination of All Forms of Racial Discrimination, 1966*, article 14 (1), (2) and (3) provides for declarations relating to the competence of the Committee on the Elimination of Racial Discrimination:

1. A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the

Committee if it concerns a State Party which has not made such a declaration.

2. Any State Party which makes a declaration as provided for in paragraph 1 of this article may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this Convention and who have exhausted other available local remedies.

3. A declaration made in accordance with paragraph 1 of this article and the name of any body established or indicated in accordance with paragraph 2 of this article shall be deposited by the State Party concerned with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General, but such a withdrawal shall not affect communications pending before the Committee.

[...]⁵⁸

Practice of the Secretary-General

Since interpretative declarations do not have the legal effect similar to that of a reservation, they need not be signed by a formal authority as long as they clearly emanate from the State concerned. However, it is highly desirable that the Head of State, Head of Government or the Minister for Foreign Affairs signs such a declaration in the event that the declaration turns out to be a reservation. In accordance with the practice of the Secretary-General, optional and mandatory declarations imposing legal obligations on the declarant must be signed by the Head of State, the Head of Government or the Minister for Foreign Affairs or a person having full powers for that purpose issued by one of the above authorities.

J. NOTIFICATIONS

Notifications should be distinguished from interpretative declarations. Interpretative declarations are normally statements that make more explicit the

⁵⁸ The *Convention on the Elimination of All Forms of Discrimination against Women, 1979*, and the *Convention on the Rights of the Child, 1989*, also establish independent bodies (the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child, respectively) that monitor how well States meet their obligations under those conventions. However, these two conventions do not provide for the optional acceptance of the competence of their respective committees. Furthermore, the Committee on Economic, Social and Cultural Rights, unlike the five other human rights treaty bodies, was not established by its corresponding Covenant, the *International Covenant on Economic, Social and Cultural Rights, 1966*, but created in 1985 by the Economic and Social Council of the United Nations.

meaning of a provision. Notifications are statements simply providing information required under a treaty. The *International Convention for the Suppression of the Financing of Terrorism, 1999*, article 7 (3) states:

3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established in accordance with paragraph 2. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.

Likewise, article 45 (4) of the *Convention on Road Traffic, 1968*, stipulates:

4. On signing this Convention or on depositing its instrument of ratification or accession, each State shall notify the Secretary-General of the distinguishing sign it has selected for display in international traffic on vehicles registered by it, in accordance with Annex 3 to this Convention. By a further notification addressed to the Secretary-General, any State may change a distinguishing sign it has previously selected.

However, some notifications made under a treaty may create binding new or additional obligations. See the *International Covenant on Civil and Political Rights, 1966*. Pursuant to article 4, States may, in case of public emergency, suspend the application of certain provisions of the Covenant. In addition, the State using the right of derogation must notify the Secretary-General of such derogation. This is usually done by note verbale from the Permanent Mission of the notifying State to the United Nations to which the relevant domestic Decree is attached. Article 4 reads:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Also, article I B.(2) of the *Convention Relating to the Status of Refugees, 1951*, requires contracting States to notify the Secretary-General when extending their obligations under the Convention. Article I B. states:

I B. (1) For the purposes of this Convention, the words “events occurring before 1 January 1951” in article 1, section A, shall be understood to mean either

(a) “events occurring in Europe before 1 January 1951”; or

(b) “events occurring in Europe or elsewhere before 1 January 1951”;

and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

K. ENTRY INTO FORCE

125 For a multilateral treaty to become binding under international law, it is necessary that the conditions for its entry into force be fulfilled.

The provisions of the treaty normally determine the manner in which and the date on which the treaty enters into force. If the treaty does not provide for a date or the method of entry into force, there is a presumption that the treaty enters into force as soon as the negotiating States have expressed their consent to be bound by the treaty (see article 24 (1) and (2) of the *Vienna Convention, 1969*). However, this method of entry into force is not generally used in modern multilateral treaties.

When a State expresses its consent to be bound by a treaty after the treaty has come into force, the treaty enters into force for such State on that date, unless the treaty provides otherwise (see article 24 (3) of the *Vienna Convention, 1969*). Accordingly, a treaty may be binding for certain States, following the entry into force provisions established therein but not for all participants. It will not be applicable to States, which, although entitled to become parties, have not yet expressed their consent to be bound.

The rule embodied in article 24 (2) of the *Vienna Convention, 1969* requiring the unanimous consent of the negotiating States, has never been applied for treaties

deposited with the Secretary-General, as it is very difficult to achieve universal participation.⁵⁹

The depositary has functions of considerable importance relating to the provision of information as to the time at which the treaty enters into force.

(See paragraphs 221 to 247 of the *Summary of Practice* and section 4.2 of the *Treaty Handbook*.)

1. Definitive entry into force of a treaty

A treaty may provide that it shall enter into force on the date when certain conditions are met, or that it shall enter into force on a specific date.

Upon a specified number, percentage or category of States depositing instruments expressing consent to be bound

a. To enter into force, most treaties require that a minimum number of States express their consent to be bound by a particular treaty. See article 36(1) of the *Framework Convention on Tobacco Control, 2003*:

Entry into force

1. This Convention shall enter into force on the ninetieth day following the date of the deposit of the fortieth instrument of ratification, acceptance, approval, formal confirmation or accession with the Depositary.

The required number can be very small (see the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956*, which needed two States for its entry into force). Generally, the number of instruments of consent to be bound for the entry into force of a treaty is much larger. The *Rome Statute of the International Criminal Court, 1998*, required sixty. A significant number of instruments of consent to be bound are specified to ensure broad acceptance of the treaty before its entry into force.

b. Treaties could provide that entry into force shall take place when a specified number of States have deposited their instruments expressing consent to be bound. Although this is a straightforward and uncomplicated formulation, it is not usual to find modern treaties that enter into force immediately upon deposit. See the *Agreement on the Establishment of the International Vaccine Institute, 1996*, article VIII (1):

⁵⁹ See the *Treaty establishing the European Economic Community, 1957* (article 247).

This Agreement and the Constitution appended thereto shall come into force immediately after three instruments of ratification, acceptance, approval or accession have been deposited with the Secretary-General.⁶⁰

c. Treaties normally stipulate that a certain period of time must elapse between the date on which the required number of instruments is deposited and the date of entry into force. A time period is often required to ensure that pre-conditions are met. This period may vary from thirty days to twelve months. The time so provided may give contracting States time to enact domestic legislation or to bring into effect implementing legislation previously enacted. It also gives the depositary time to notify contracting States of the forthcoming entry into force. The *Agreement on the Privileges and Immunities of the International Criminal Court, 2002*, article 35 states:

1. The present Agreement shall enter into force thirty days after the date of deposit with the Secretary-General of the tenth instrument of ratification, acceptance, approval or accession.

Likewise, the *United Nations Convention Against Transnational Organized Crime, 2000*, article 38 (1) states:

Entry into force

1. This Convention shall enter into force on the ninetieth day after the date of the deposit of the fortieth instrument of ratification, acceptance, approval or accession. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.⁶¹

d. Where the negotiating States considered that it is necessary to ensure that a range of pre-conditions are met prior to the entry into force of a treaty, treaties may provide for additional conditions to be satisfied in addition to the deposit of a specified number of instruments. Certain environmental and disarmament treaties require that specific categories of States be

⁶⁰ See also the *Agreement on the Importation of Educational, Scientific and Cultural Matters, 1950* (article 11); the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956* (article 13); the *Protocol relating to the Status of Refugees, 1967* (article VIII); the *Agreement establishing the International Pepper Community, 1971* (article 12); the *Convention on the Registration of Objects Launched into Outer Space, 1974* (article 8); and the *Agreement Establishing the Asia-Pacific Institute for Broadcasting Development, 1977* (article 16).

⁶¹ See also article 126 of the *Rome Statute for the International Criminal Court, 1998* (sixty days); article 87 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990* (three months); article 45 of the *United Nations Convention on the Assignment of Receivables in International Trade, 2001* (six months); and article 308 of the *United Nations Convention on the Law of the Sea, 1982* (twelve months).

included among the number of parties needed for the entry into force. This ensures that States with significant interests in the subject matter, major financial contributors or those that are crucial for the implementation of the treaty become parties from the outset. This is also a factor that normally delays the entry into force of a treaty. Article 25 of the *Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change, 1997*, provides:

1. This Protocol shall enter into force on the ninetieth day after the date on which not less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession.

2. For the purposes of this Article, "the total carbon dioxide emissions for 1990 of the Parties included in Annex I" means the amount communicated on or before the date of adoption of this Protocol by the Parties included in Annex I in their first national communications submitted in accordance with Article 12 of the Convention.

3. For each State or regional economic integration organization that ratifies, accepts or approves this Protocol or accedes thereto after the conditions set out in paragraph 1 above for entry into force have been fulfilled, this Protocol shall enter into force on the ninetieth day following the date of deposit of its instrument of ratification, acceptance, approval or accession.

4. For the purposes of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States members of the organization.⁶²

The *Comprehensive Nuclear-Test-Ban Treaty, 1996*, cannot enter into force until the forty-four States named in annex 2 to the treaty have ratified the treaty. Annex 2 comprises States that formally participated in the 1996 session of the Conference on Disarmament, and that possess nuclear research and nuclear power reactors according to data compiled by the International Atomic Energy Agency. Article XIV provides:

Entry into force

1. This Treaty shall enter into force 180 days after the date of deposit of the instruments of ratification by all States listed in

⁶² The *Montreal Protocol on Substances that Deplete the Ozone Layer, 1987* (article 16), requires that the minimum ratifications, accessions etc. for entry into force represent at least two thirds of the States responsible for the 1986 estimated global consumption of the controlled substances (CFCs).

Annex 2 to this Treaty, but in no case earlier than two years after its opening for signature.

2. If this Treaty has not entered into force three years after the date of the anniversary of its opening for signature, the Depositary shall convene a Conference of the States that have already deposited their instruments of ratification upon the request of a majority of those States. That Conference shall examine the extent to which the requirement set out in paragraph 1 has been met and shall consider and decide by consensus what measures consistent with international law may be undertaken to accelerate the ratification process in order to facilitate the early entry into force of this Treaty.

3. Unless otherwise decided by the Conference referred to in paragraph 2 or other such conferences, this process shall be repeated at subsequent anniversaries of the opening for signature of this Treaty, until its entry into force.

4. All States Signatories shall be invited to attend the Conference referred to in paragraph 2 and any subsequent conferences as referred to in paragraph 3, as observers.

5. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Treaty, it shall enter into force on the 30th day following the date of deposit of their instruments of ratification or accession.

The European Agreement on Important International Combined Transport Lines and Related Installations (AGTC), 1991, in its article 10 (1) states:

1. This Agreement shall enter into force 90 days after the date on which the Governments of eight States have deposited an instrument of ratification, acceptance, approval or accession, provided that one or more lines of international combines network link, in a continuous manner, the territories of at least four of the States which have deposited such an instrument.

e. Some treaties exceptionally provide, as an additional condition, that those States that have expressed their consent to be bound also specifically agree on the entry into force. Thus, article 21 of the *Statutes of the International Centre for Genetic Engineering and Biotechnology, 1983*, states:

1. These Statutes shall enter into force when at least 24 States, including the Host State of the Centre, have deposited instruments of ratification or acceptance and, after having ascertained among themselves that sufficient financial resources are ensured, notify the Depositary that these Statutes shall enter into force.

Similarly, article 25 of the *Constitution of the United Nations Industrial Development Organization, 1979*, provides:

1. This Constitution shall enter into force when at least eight States that had deposited instruments of ratification, acceptance or approval notify the Depositary that they have agreed, after consultations among themselves, that this Constitution shall enter into force.

f. Where specific geographical representation is considered important by the negotiating States, it is possible to stipulate this element. This approach ensures a deliberately wide geographical participation in the treaty. The *Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution, 1984*, requires ratification by nineteen States and organizations within the geographical scope of the Protocol (Europe).⁶³ Article 10 of the Protocol states:

Entry into Force

1. The present Protocol shall enter into force on the ninetieth day following the date on which:

(a) instruments of ratification, acceptance, approval or accession have been deposited by at least nineteen States and Organizations referred to in article 8 paragraph 1 which are within the geographical scope of EMEP; and

(b) the aggregate of the UN assessment rates for such States and Organizations exceeds forty per cent.

2. For each State and Organization referred to in article 8, paragraph 1, which ratifies, accepts or approves the present protocol or accedes thereto after the requirements for entry into force laid down in paragraph 1 above have been met, the Protocol shall enter into force on the ninetieth day after the date of deposit by such State or Organization of its instrument of ratification, acceptance, approval or accession.

The *International Agreement for the Establishment of the University for Peace and Charter of the University for Peace, 1982*, provides that the minimum of ten States required for the entry into force must represent at least two continents. Article 7 states:

The present Agreement shall enter into force on the date on which it shall have been signed or acceded to by ten States from more than one continent. For States signing or acceding after the

⁶³ Accordingly, instruments deposited by Canada and the United States before the entry into force of the Protocol did not count for the purpose of the entry into force of the Protocol.

entry into force, the Agreement shall enter into force upon the date of signature or accession.

On a specific date

a. Some treaties exceptionally provide for a set date of entry into force. This type of provision is quite unusual as securing the necessary instruments of consent to be bound by a given date may prove to be difficult. The *Agreement providing for the Provisional Application of the Draft International Customs Conventions on Touring, on Commercial Road Vehicles and on the International Transport of Goods by Road, 1949*, stipulates in its article III (1):

The present Agreement shall enter into force on 1 January 1950.

b. Usually, where a treaty specifies a date for its entry into force, it also provides for certain other conditions to be fulfilled. For example, the *Montreal Protocol on Substances that Deplete the Ozone Layer, 1987*, article 16 states:

Entry into force

1. This Protocol shall enter into force on 1 January 1989, provided that at least eleven instruments of ratification, acceptance, approval of the Protocol or accession thereto have been deposited by States or regional economic integration organizations representing at least two thirds of 1986 estimated global consumption of the controlled substances, and the provisions of paragraph 1 of Article 17 of the Convention have been fulfilled. In the event that these conditions have not been fulfilled by this date, the Protocol shall enter into force on the ninetieth day following the date on which the conditions have been fulfilled.

2. For the purposes of paragraph 1, any such instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

3. After the entry into force of this Protocol, any State or regional economic integration organization shall become a party to it on the ninetieth day following the date of deposit of its instrument of ratification, acceptance, approval or accession.

The required number of instruments for the entry into force of the Montreal Protocol was received prior to 1 January 1989. However, since the Protocol did not define "estimated global consumption of the controlled substances", the Secretary-General, as depositary, only notified

the entry into force of the Protocol after having obtained confirmation that, in the light of information provided by the parties, the number of instruments deposited exceeded the required figure. The information was confirmed prior to 1 January 1989 and the Protocol entered into force on that date, as provided for in article 16 (1).

In the case of the *Food Aid Convention, 1999*, entry into force would occur once a specified threshold of aid commitments was reached. Article XXIV (a) reads:

This Convention shall enter into force on 1 July 1999 if by 30 June 1999 the Governments, whose combined commitments, as listed in paragraph (e) of Article III, equal at least 75% of the total commitments of all governments listed in that paragraph, have deposited instruments of ratification, acceptance, approval or accession, or declarations of provisional application, and provided that the Grains Trade Convention, 1995 is in force.⁶⁴

The conditions for the entry into force may be even more complex. Thus, article 58 (1) and (3) of the *International Cocoa Agreement, 2001*, provides:

Entry into force

1. This Agreement shall enter into force definitely on 1 October 2003, or any time thereafter, if by such date Governments representing at least five exporting countries accounting for at least 80 per cent of the total exports of countries listed in annex A and Governments representing importing countries having at least 60 per cent of total imports as set out in annex B have deposited their instruments of ratification, acceptance, approval or accession with the depositary. It shall also enter into force definitively once it has entered into force provisionally and these percentage requirements are satisfied by the deposit of instruments of ratification, acceptance, approval or accession.

[...]

3. If the requirements for entry into force under paragraph 1 or paragraph 2 of this article have not been met by 1 September 2002, the Secretary-General of the United Nations shall, at the earliest time practicable, convene a meeting of those governments which have deposited instruments of ratification, acceptance, approval or accession, or have notified the depositary that they will apply this Agreement provisionally. These governments may decide whether to put this Agreement

⁶⁴ See also the *Montreal Protocol on Substances that Deplete the Ozone Layer, 1987* (article 16), which specifies a date for entry into force provided that certain conditions are fulfilled.

into force definitively or provisionally among themselves, in whole or in part, on such date as they may determine or to adopt any other arrangement as they may deem necessary.⁶⁵

Commodity agreements have traditionally employed complex entry into force provisions, which reflect the need for a balance between exporter and importer (or producer and consumer) interests. This ensures that both are represented in adequate numbers, in particular the major ones, but makes commodity agreements difficult to bring into force definitively (see “Provisional entry into force of a treaty” below).

(See the *Summary of Practice*, paragraph 236, for calculation by the depositary of date of initial entry into force of a treaty.)

Entry into force for a State after the treaty has entered into force

When a State gives its consent to be bound after the treaty has entered into force, it will enter into force for that State on the date of deposit of the instrument expressing consent, unless the treaty provides otherwise (see article 24(3) of the *Vienna Convention, 1969*).

Treaties normally include provisions for entry into force for a State when the treaty has already entered into force. Generally, they provide that the treaty will enter into force after a specified period has elapsed following deposit. This is often the same period as for the original entry into force of the treaty after receipt of the required number of instruments of ratification, acceptance, approval or accession. For example:

The International Convention for the Suppression of the Financing of Terrorism, 1999, article 26(2) reads:

2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.

Similarly, the *Rome Statute of the International Criminal Court, 1998*, article 126 (2):

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

⁶⁵ See also the *International Coffee Agreement, 2000* (article 45).

Likewise, the *United Nations Convention on the Law of the Sea, 1982*, stipulates in article 308 (2):

2. For each State ratifying or acceding to this Convention after the deposit of the sixtieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day following the deposit of its instrument of ratification or accession, subject to paragraph 1.

(See the *Summary of Practice*, paragraphs 244 through 247, for calculation of the date of entry into force for a State after the treaty has entered into force.)

2. Provisional entry into force of a treaty

Some treaties provide for provisional entry into force. In such cases, States that are ready to implement the obligations under a treaty may do so among themselves, without waiting for the completion of the requirements for its formal entry into force. Once a treaty has entered into force provisionally, it creates obligations for the parties that agreed to bring it into force in such a manner.

Provisional entry into force is a mechanism usually employed in commodity agreements. Entry into force requirements of commodity agreements are so stringent that initially they are often brought into force provisionally followed by subsequent definitive entry into force.⁶⁶ This practical approach allows a greater opportunity for the treaty to enter into force earlier since the time period stipulated for the definitive entry into force is generally too short. It also allows those parties that provisionally apply the treaty to take part in the decision with regard to the definitive or provisional coming into force of the treaty. See for example article 58 the *International Cocoa Agreement, 2001*:

Entry into force

[...]

2. This Agreement shall enter into force provisionally on 1 January 2002, if by such date Governments representing at least five exporting countries accounting for at least 80 per cent of the total exports of countries listed in annex A and Governments representing importing countries having at least 60 per cent of total imports as set out in annex B have deposited their instruments of ratification, acceptance, approval or accession, or have notified the depositary that they will apply this

⁶⁶ See the entry into force process of the *International Natural Rubber Agreements, 1979, 1987 and 1994*, and the *International Coffee Agreements, 1962, 1968, 1976, 1983 and 1994*. Also note that from 1972 there have been six consecutive *International Cocoa Agreements*, five of which have not definitively entered into force.

Agreement when it enters into force. Such Governments shall be provisional Members.

3. If the requirements for entry into force under paragraph 1 or paragraph 2 of this article have not been met by 1 September 2002, the Secretary-General of the United Nations shall, at the earliest time practicable, convene a meeting of those governments which have deposited instruments of ratification, acceptance, approval or accession, or have notified the depositary that they will apply this Agreement provisionally. These governments may decide whether to put this Agreement into force definitively or provisionally among themselves, in whole or in part, on such date as they may determine or to adopt any other arrangement as they may deem necessary.

4. For a Government on whose behalf an instrument of ratification, acceptance, approval or accession or a notification of provisional application is deposited after the entry into force of this Agreement in accordance with paragraph 1, paragraph 2 or paragraph 3 of this article, the instrument or notification shall take effect on the date of such deposit and, with regard to notification of provisional application, in accordance with the provisions of paragraph 1 of article 57.⁶⁷

In accordance with this provision, a meeting of Governments and an international organization held in London on 4 June 2003 decided to bring the Agreement into force as of 1 October 2003 among the Governments and the international organization that had deposited instruments of ratification, acceptance, approval or accession, or notifications of provisional application of the Agreement.

3. Entry into force of annexes, amendments, and regulations

Many multilateral treaties, particularly those concluded in recent years, have built-in amendment procedures for annexes, amendments,⁶⁸ and regulations that include entry into force provisions. Commonly, such provisions also specify that the annexes, amendments, and regulations only enter into force for those parties that have accepted them or enter into force for all parties that have not objected to them.

a. Where parties require clear checks and balances on the entry into force of annexes and amendments of annexes, detailed procedures are incorporated

⁶⁷ Other examples of treaties with provisional entry into force clauses include the *International Sugar Agreement, 1992* (article 40); the *International Tropical Timber Agreement, 1994* (article 41); the *Grains Trade Convention, 1995, 1994* (article 28); the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997* (article 18); the *International Coffee Agreement, 2000* (article 45); and the *Agreement Establishing the Terms of Reference of the International Juice Study Group, 2001* (article 23).

⁶⁸ For a detailed discussion of amendment provisions see section III, "Amendment, Revision and Modification", below.

in treaties for this purpose. The *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998*, article 22 reads:

Adoption and amendment of annexes

1. Annexes to this Convention shall form an integral part thereof and, unless expressly provided otherwise, a reference to this Convention constitutes at the same time a reference to any annexes thereto.

2. Annexes shall be restricted to procedural, scientific, technical or administrative matters.

3. The following procedure shall apply to the proposal, adoption and entry into force of additional annexes to this Convention:

(a) Additional annexes shall be proposed and adopted according to the procedure laid down in paragraphs 1, 2 and 3 of Article 21;

(b) Any Party that is unable to accept an additional annex shall so notify the Depositary, in writing, within one year from the date of communication of the adoption of the additional annex by the Depositary. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time withdraw a previous notification of non-acceptance in respect of an additional annex and the annex shall thereupon enter into force for that Party subject to subparagraph (c) below; and

(c) On the expiry of one year from the date of the communication by the Depositary of the adoption of an additional annex, the annex shall enter into force for all Parties that have not submitted a notification in accordance with the provisions of subparagraph (b) above.

4. Except in the case of Annex III, the proposal, adoption and entry into force of amendments to annexes to this Convention shall be subject to the same procedures as for the proposal, adoption and entry into force of additional annexes to the Convention.

5. The following procedure shall apply to the proposal, adoption and entry into force of amendments to Annex III:

(a) Amendments to Annex III shall be proposed and adopted according to the procedure laid down in Articles 5 to 9 and paragraph 2 of Article 21;

(b) The Conference of the Parties shall take its decisions on adoption by consensus;

(c) A decision to amend Annex III shall forthwith be communicated to the Parties by the Depository. The amendment shall enter into force for all Parties on a date to be specified in the decision.

6. If an additional annex or an amendment to an annex is related to an amendment to this Convention, the additional annex or amendment shall not enter into force until such time as the amendment to the Convention enters into force.⁶⁹

Similarly, the *Convention for the Suppression of the Financing of Terrorism, 1999*, includes a provision for the amendment of the annex to the Convention. Article 23 (4) regulates the entry into force of amendments to the annex:

4. The adopted amendment to the annex shall enter into force 30 days after the deposit of the twenty-second instrument of ratification, acceptance or approval of such amendment for all those States Parties having deposited such an instrument. For each State Party ratifying, accepting or approving the amendment after the deposit of the twenty-second instrument, the amendment shall enter into force on the thirtieth day after deposit by such State Party of its instrument of ratification, acceptance or approval.

The *United Nations Convention against Transnational Organized Crime, 2000*, article 39 (4) and (5) provides:

Amendment

[...]

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the

provisions of this Convention and any earlier amendments that they have ratified, accepted or approved.⁷⁰

b. The general tendency is for treaties to provide for entry into force of amendments (or annexes) only for those parties that have accepted them. This reflects the general reluctance of States to be bound by amendments that they have not accepted. This approach, however, often creates significant problems of interpretation and implementation since it could establish situations whereby States can be parties to different regimes under a single treaty.

The *Amendment to Article 43 (2) of the 1989 Convention on the Rights of the Child, 1995*, increasing the membership of the Committee on the Rights of the Child from ten to eighteen experts, entered into force when it was accepted by a two-thirds majority of States parties, on 18 November 2002 in accordance with article 50(2) of the Convention. Pursuant to article 50 (3) the amendments only bind those States parties that have notified their acceptance. This would have created an impossible situation where the Committee would have consisted of ten members for some States parties and eighteen members for others. A practical approach was taken by States parties to the Convention in this case and the amendment was deemed to bind all parties. Where amendment provisions are negotiated, it is important to anticipate this type of problem and draft the provisions accordingly.

Ideally, for the sake of clarity and simplicity, provisions regarding the entry into force of amendments (or annexes) should include either an automatic entry into force for all parties (e.g., the amendment shall bind all the parties after a specific number of parties, as of the date that the amendment was approved, have expressed their consent to be bound by the amendment) or an entry into force for all parties based on non-objection by any party (e.g., the amendment enters into force for all the parties after circulation of the proposed amendment to all parties and within a specified number of months none of the parties have objected to it).

The first type is reflected in the *Comprehensive Nuclear-Test-Ban Treaty, 1996*, article VII (6):

6. Amendments shall enter into force for all States Parties 30 days after the deposit of the instruments of ratification or acceptance by all those States Parties casting a positive vote at the Amendment Conference.

⁷⁰ See also the *Agreement for Establishing the Asia-Pacific Institute for Broadcasting Development, 1977* (article 13), and the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989* (article 17).

⁶⁹ See also the *Stockholm Convention on Persistent Organic Pollutants, 2001* (article 22).

The *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1992*, article XV(3) states:

3. Amendments shall enter into force for all States Parties 30 days after deposit of the instruments of ratification or acceptance by all the States Parties referred to under subparagraph (b) below:

- (a) When adopted by the Amendment Conference by a positive vote of a majority of all States Parties with no State Party casting a negative vote; and
- (b) Ratified or accepted by all those States Parties casting a positive vote at the Amendment Conference.

The second type is reflected in the *Agreement concerning the adoption of uniform conditions of approval and reciprocal recognition of approval for motor vehicle equipment and parts, 1958*. Regarding amendment of regulations, article 12 states:

Article 12

The Regulations to be annexed to this Agreement may be amended in accordance with the following procedure:

1. Any Contracting Party applying a Regulation may propose one or more amendments to it. The text of any proposed amendment to a Regulation shall be transmitted to the Secretary-General of the United Nations, who shall transmit it to the other Contracting Parties. The amendment shall be deemed to have been accepted unless within a period of three months following this notification a Contracting Party applying the Regulation has expressed an objection, in which case the amendment shall be deemed to have been rejected. If the amendment is deemed to have been accepted, it shall enter into force at the end of a further period of two months.

2. Should a country become a Contracting Party between the time of the communication of the proposed amendment by the Secretary-General and its entry into force, the Regulation in question shall not enter into force for that Contracting Party until two months after it has formally accepted the amendment or two months after the lapse of a period of three months since the communication to that Party by the Secretary-General of the proposed amendment.

The *Convention on Psychotropic Substances, 1971*, article 30 (2):

2. If a proposed amendment circulated under paragraph 1(b) has not been rejected by any Party within eighteen months after it has been circulated, it shall thereupon enter into force. If, however a proposed amendment is rejected by any Party, the Council may decide, in the light of comments received from Parties, whether a conference shall be called to consider such amendment.

The *Stockholm Convention on Persistent Organic Pollutants, 2001*, article 22 (3) reads:

Adoption and amendment of annexes

[...]

3. The following procedure shall apply to the proposal, adoption and entry into force of additional annexes to this Convention:

(a) Additional annexes shall be proposed and adopted according to the procedure laid down in paragraphs 1, 2 and 3 of Article 21;

(b) Any Party that is unable to accept an additional annex shall so notify the depositary, in writing, within one year from the date of communication by the depositary of the adoption of the additional annex. The depositary shall without delay notify all Parties of any such notification received. A Party may at any time withdraw a previous notification of non-acceptance in respect of any additional annex, and the annex shall thereupon enter into force for that Party subject to subparagraph (c); and

(c) On the expiry of one year from the date of the communication by the depositary of the adoption of an additional annex, the annex shall enter into force for all Parties that have not submitted a notification in accordance with the provisions of subparagraph (b).

Due to the need for organizational structures to be applicable to all parties, treaties establishing international organizations include amendment procedures automatically binding on all members. Accordingly, once an amendment has been approved by a specific percentage of members the amendment binds all, including those that did not vote for or ratify it. Article 108 of the *Charter of the United Nations* reads:

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional

processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.⁷¹

c. Exceptionally, the amendment itself may contain the entry into force provision, generally to expedite its own entry into force. Article 3 of the *Amendment to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, 1999*:

1. This Amendment shall enter into force on 1 January 2001, provided that at least twenty instruments of ratification, acceptance or approval of the Amendment have been deposited by States or regional economic integration organizations that are Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer. In the event that this condition has not been fulfilled by that date, the Amendment shall enter into force on the ninetieth day following the date on which it has been fulfilled.⁷²

This particular situation is exceptional. Concerned that the ozone hole had reached record proportions the States involved wished to see a less onerous procedure by which control measures could quickly be extended to new ozone-depleting substances. They intended that the amendment would enter into force quickly and drafted the amendment's entry into force provision accordingly.

Determining the date when the amendment or annex enters into force

Determining the date of entry into force of amendments and annexes has caused in the past difficulties for the Secretary-General as depositary.

- a. Some treaties provide for entry into force when a specified proportion (e.g., three-quarters, two-thirds) of all the parties has deposited their instruments expressing their consent to be bound (e.g., acceptance). Often, these treaties do not specify whether the number of acceptances is calculated on the basis of the number of parties at the time of adoption of the amendment or at the time of its acceptance. This type of clause creates confusion for States.

The *Convention against Torture and other Cruel, Inhuman or Degrading, Treatment or Punishment, 1984*, provides in article 29(2):

2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two-thirds of the States Parties

⁷¹ See also the *Constitution of the International Labour Organization, 1946* (article 36); the *Constitution of the World Health Organization, 1946* (article 73); the *Convention establishing the World Intellectual Property Organization, 1967* (article 17); and the *Statute of International Atomic Energy Agency, 1956* (article 18).

⁷² See also the *Amendments to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer of 29 June 1990* (article 2); of 25 November 1992 (article 3); and of 17 September 1997 (article 3).

to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.

Likewise, the *Convention on the Rights of the Child, 1989*, which contains additional complexities whereby the approval of the General Assembly as well as a two-thirds majority of the States parties are required for entry into force of amendments, does not specify when the two-thirds proportion is to be calculated. Specifically, article 50 (2), reads:

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

See also the *Amendments to the Agreement Establishing the Asia-Pacific Institute for Broadcasting Development, 1999*, article 14(1):

1. [...] Amendments shall, subject to paragraph 2 of this article enter into force for all Contracting Parties three months after their acceptance by a two-thirds majority of the Contracting Parties.

Similar wording appears in the *Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992*, article 21 (4):

4. An amendment to the present Convention shall be adopted by consensus of the representatives of the Parties to this Convention present at a meeting of the Parties, and shall enter into force for the Parties to the Convention which have accepted it on the ninetieth day after the date on which two thirds of those Parties have deposited with the Depositary their instruments of acceptance of the amendment. The amendment shall enter into force for any other Party on the ninetieth day after the date on which that Party deposits its instrument of acceptance of the amendment.⁷³

Equally, using a seven-eighths proportion, the *Rome Statute of the International Criminal Court, 1998*, article 121, paragraph 4, provides:

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after the instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

⁷³ Almost identical language is found in the *Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1999* (article 18).

Entry into force provisions should specify the basis on which established percentages are to be calculated in order to avoid confusion relating to the time of entry into force. When a treaty is silent on this matter, the practice of the Secretary-General as depositary is to calculate the number of acceptances on the basis of the number of parties to the treaty at the time of acceptance. This practice is referred to as the “moving target” or the “current time” approach.

(See also the *Treaty Handbook*, section 4.4.3.)

b. A more practical approach is reflected in certain treaties that employ a formula that includes either a consistent number of votes required for all the amendments or a proportion with a clear statement of the date of calculation of the proportion. This is a preferred approach. The *Agreement on the Privileges and Immunities of the International Criminal Court, 2002*, article 36 (5) states:

5. An amendment shall enter into force for States Parties which have ratified or accepted the amendment sixty days after two thirds of the States which were Parties at the date of adoption of the amendment have deposited instruments of ratification or acceptance with the Secretary-General.

The *Amendment to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, 1999*, article 3 (1) provides:

1. This Amendment shall enter into force on 1 January 2001, provided that at least twenty instruments of ratification, acceptance or approval of the Amendment have been deposited by States or regional economic integration organizations that are Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer. In the event that this condition has not been fulfilled by that date, the Amendment shall enter into force on the ninetieth day following the date on which it has been fulfilled.

L. REGISTRATION AND PUBLICATION

Pursuant to Article 102 of the *Charter of the United Nations*, States Members of the United Nations have a legal obligation to register treaties and international agreements entered into after the entry into force of the *Charter* with the

Secretariat, and the Secretariat is mandated to publish registered treaties and international agreements.⁷⁴ Article 102 of the *Charter* provides:

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
2. No party to any such treaty or international agreement, which has not been registered in accordance with the provisions of paragraph 1 of this Article, may invoke that treaty or agreement before any organ of the United Nations.

The objective of Article 102 is to ensure that all treaties and international agreements remain in the public domain and thus contribute to eliminating secret diplomacy. This provision, which could be traced to Article 18 of the Covenant of the League of Nations, was designed to eliminate secret diplomacy, a factor that was considered to be a major cause of international instability. A treaty or an international agreement cannot be invoked before the International Court of Justice (ICJ) or any other organ of the United Nations if it is not registered.⁷⁵

Registration provisions are more often found in older treaties than in treaties drafted more recently. The *Protocol to amend the 1921 Convention for the Suppression of the Traffic in Women and Children and the 1933 Convention for the Suppression of the Traffic in Women of Full-Age, 1947*, provides in article VI:

In accordance with paragraph 1 of Article 102 of the Charter of the United Nations and the regulations pursuant thereto adopted by the General Assembly, the Secretary-General of the United Nations is authorized to effect registration of the present Protocol and the amendments made in the Conventions by this Protocol on the respective dates of their entry into force, and to publish the Protocol and the amended Conventions as soon as possible after registration.⁷⁶

Similarly, article XIX of the *Convention on the Prevention and Punishment of the Crime of Genocide, 1948*, explicitly provides:

⁷⁴ See General Assembly Regulations to give effect to Article 102 (*Treaty Series*, volume 859/860, p. VIII) and General Assembly resolution 97(I) of 14 December 1946, as amended by resolutions 364 B (IV) of 1 December 1949; 482 (V) of 12 December 1950; 33/141 of 19 December 1978; and 52/153 of 15 December 1997.

⁷⁵ It is noted that, the ICJ in the case of *Qatar v. Bahrain* considered the terms of the 1987 double Exchange of Letters between Qatar and Saudi Arabia and between Bahrain and Saudi Arabia, a treaty that was not registered. The ICJ, in the same case, accepted as a treaty Minutes from a meeting held in December 1990 that were registered by one of the parties less than two weeks before application to the ICJ. The ICJ relied on the Exchange of Letters and the Minutes to decide on the question of its own jurisdiction over the dispute (*Qatar v. Bahrain*, 1994 I.C.J. 112).

⁷⁶ See also the *Protocol Amending the 1904 International Agreement for the Suppression of the White Slave Traffic, 1904*, and the *1910 International Convention for the Suppression of the White Slave Traffic, 1909* (article 7); and the *Protocol Amending the 1926 Slavery Convention, 1953* (article 4).

The Present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

Also the *Agreement on the Importation of Educational, Scientific and Cultural Materials, 1950*, article XVIII states:

1. In accordance with Article 102 of the Charter of the United Nations, this Agreement shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

Likewise, article 21 of the *Convention on the Reduction of Statelessness, 1961*, provides:

This Convention shall be registered by the Secretary-General of the United Nations on the date of its entry into force.

Given the existence of Article 102 of the *Charter of the United Nations* and the fact that the United Nations registers *ex officio* multilateral treaties that designate the Secretary-General as depositary, the inclusion of a registration provision in a multilateral treaty to be deposited with the Secretary-General is unnecessary (see the *Vienna Convention, 1969*, articles 77 (1) (g) and 80).

(Extensive substantive and procedural information on registering and filing and recording treaties may be found in the *Treaty Handbook*, sections 5 and 6.)

M. AUTHENTIC TEXTS

Most multilateral treaties are concluded in more than one language. Accordingly, those treaties often specify the languages of the authentic texts.

Treaties concluded under the auspices of the United Nations normally provide in their final clauses that the texts are authentic in all the official languages of the United Nations.⁷⁷ Today, the official languages are Arabic, Chinese, English, French, Russian and Spanish. This is the current practice. See article 38 of the *Framework Convention on Tobacco Control, 2003*, which reads:

Authentic texts

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

⁷⁷ The *Convention on the Privileges and Immunities of the United Nations, 1946*, reflecting the situation of the early years of the United Nations is authentic in English and French only.

In the case of treaties adopted by United Nations regional commissions, the authentic texts are generally in the official languages of the commissions concerned.⁷⁸ Taking into account recent developments in the depositary practice and consistent with ST/SGB/2001/7, the Secretary-General as depositary strongly insists that every effort shall be made to ensure that the texts of treaties to be deposited with the Secretary-General are concluded only in the official languages of the Organization. Any deviation from this practice could set an unmanageable precedent in an Organization with 191 members.

It is rare that treaties do not contain provisions on the authentic texts.⁷⁹ It is a desirable practice that they do contain such provisions.

II. APPLICATION OF TREATIES

A. TERRITORIAL LIMITATIONS ON APPLICATION OF TREATIES

The basic principle is that a treaty will be binding upon a State in respect to its entire territory. This principle is stated in article 29 of the *Vienna Convention, 1969*:

Territorial scope of treaties

Unless a different intention appears from the treaty or it is otherwise established, a treaty is binding upon each party in respect to its entire territory.

This basic principle becomes difficult to apply in certain situations. Parts of the territory of a State may, under its domestic law, be subject to a separate legal regime. This may be the case of a metropolitan territory as compared to its non-metropolitan territories, colonies, overseas territories or dependencies. When such non-metropolitan territories exist, it may be difficult to apply the provisions of a treaty to them in the same manner as to the metropolitan territory. There may be situations where extensive consultations are required with such non-metropolitan territories due to the existence of a quasi-independent legal regime in such territories. The same may apply to non-autonomous or non-independent territories whose foreign relations are under the international responsibility of certain States.

⁷⁸ As an exception to this general rule, the Secretary-General accepted the use of German also as an authentic text language for the *European Agreement concerning the International Carriage of Goods by Inland Waterways, 2000*. However, this was stated by the Secretary-General to be a case that would not set a precedent. The Secretary-General could refuse to accept a treaty in deposit if it were concluded in languages other than the official languages.

⁷⁹ See the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950*.

Many former territories are now independent, rendering the instances of application of treaties to non-metropolitan territories fewer and less complex. However, a number of former colonial powers still maintain distant colonies.

1. Provisions on the optional extension of territorial application

Provisions for the optional extension of territorial application was a common practice in multilateral treaties before the modern period of decolonization. Article XII of the *Convention on the Prevention and Punishment of the Crime of Genocide, 1948*, reads:

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.⁸⁰

Article 40 of the *Convention relating to the Status of Refugees, 1951*, provides:

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.⁸¹

Furthermore, article 48(1) of the *International Coffee Agreement, 2000*, provides:

Any Government may, at the time of signature or deposit of an instrument of ratification, acceptance, approval, provisional application or accession, or at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Agreement shall extend to any of the territories for whose international relations it is responsible; this Agreement shall extend to the territories named therein from the date of such notification.

2. Provisions on the optional exclusion from territorial application

Where it was considered more practical to exclude territories from the application of a treaty, provision was made, especially in treaties pre-dating 1960, for the optional exclusion of all or some territories of a State from the application of the treaty. Article 12 of the *Convention on the Recovery Abroad of Maintenance, 1956*, states:

Territorial application

The provisions of this Convention shall extend or be applicable equally to all non-self-governing, trust or other territories for the international relations of which a Contracting Party is responsible, unless the latter, on ratifying or acceding to this Convention, has given notice that the Convention shall not apply to any one or more of such territories. Any Contracting Party making such a declaration may, at any time thereafter, by notification to the Secretary-General, extend the application of the Convention to any or all of such territories.⁸²

3. Provisions requiring exercise of territorial application to all territories

Consistent with article 29 of the *Vienna Convention, 1969*, a State becomes party to a treaty on behalf of all its territories. Some treaties specifically provide for the application to all territories. See article IX of the *Convention on the International Right of Correction, 1953*:

The provisions of the present Convention shall extend to or be applicable equally to a contracting metropolitan State and to all the territories, be they Non-Self Governing, Trust or Colonial Territories, which are being

⁸⁰ See also the *Convention on the Intergovernmental Maritime Consultative Organization, 1948* (article 58); the *Agreement Providing for the Provisional Application of the Draft International Customs Convention on Touring, on Commercial Road Vehicles and on the International Transport of Goods by Road, 1949* (article II); the *Agreement on the Impoverishment of Educational, Scientific and Cultural Materials, 1950* (article XIII); and the *Protocol to the Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CIVR), 1978* (article 7).

⁸¹ See also the *Convention relating to the Status of Stateless Persons, 1954* (article 36).

⁸² See also the *Havana Charter for an International Trade Organization, 1948* (article 104); the *Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, 1949* (article XIV); and the *Convention on the Declaration of Death of Missing Persons, 1950* (article 13).

administered or governed by such metropolitan State.⁸³

In view of article 29 of the *Vienna Convention, 1969*, which codified customary international law, a provision of this nature would be superfluous.

4. Provisions on territorial application where consent of a non-metropolitan territory may be required by domestic law

Where the previous consent of non-metropolitan territories may be required by the domestic law of a prospective State party, a treaty may be drafted to accommodate this need. Article 27 of the *Convention on Psychotropic Substances, 1971*, provides:

The Convention shall apply to all non-metropolitan territories for the international relations of which any Party is responsible, except where the previous consent of such territory is required by the Constitution of the Party or of the territory concerned or required by custom. In such case the Party shall endeavour to secure the needed consent of the territory within the shortest period possible, and when the consent is obtained the Party shall notify the Secretary-General. The Convention shall apply to the territory or territories named in such notification from the date of its receipt by the Secretary-General. In those cases where the previous consent of the non-metropolitan territory is not required, the Party concerned shall, at the time of signature, ratification or accession, declare the non-metropolitan territory or territories to which this Convention applies.⁸⁴

5. Absence of provisions on territorial application

Most treaties do not contain specific territorial application clauses. In principle, the absence of a territorial clause obliges a State to apply the treaty to its entire territory (see article 29 of the *Vienna Convention, 1969*).

Certain States in some limited circumstances may not wish to apply a treaty to their entire territory. A practice has been developed by which such States specify to which of their overseas territories the treaty will apply. When becoming a party to the treaty, such a State includes in its instrument a statement to the effect

that the treaty (or some of its provisions) either applies only to the metropolitan territory, or that it extends also to certain territories.

Exceptionally, a State exercising the foreign affairs responsibility for one of its territories may declare that a treaty does not apply to that territory.

Practice of the United Kingdom, the Netherlands, New Zealand and Denmark

*United Kingdom.*⁸⁵ When expressing consent to be bound, the United Kingdom may declare in writing to the depositary to which, if any, of its territories the treaty will extend. If the instrument expressing consent to be bound refers only to the United Kingdom of Great Britain and Northern Ireland, it applies only to the metropolitan territory.

The Netherlands. The Netherlands tends to make declarations regarding territorial application rather than territorial exclusion. Specifically, the Netherlands often declares in its instrument expressing consent to be bound that such declaration is “[f]or the Kingdom in Europe, the Netherlands Antilles and Aruba.” See the ratification of the Netherlands dated 22 May 2002 to the *Optional Protocol to the 1979 Convention on the Elimination of all Forms of Discrimination against Women, 1999*, and its acceptance dated 7 February 2002 to the *Convention on the Safety of United Nations Associated Personnel, 1994*. The Netherlands accepted the *Convention on the Rights of the Child, 1989*, for the Kingdom in Europe on 6 February 1995, and subsequently extended territorial application to Netherlands Antilles on 17 December 1997 and to Aruba on 18 December 2000.⁸⁶

New Zealand. New Zealand makes declarations of territorial application and territorial exclusion on a case-by-case basis. For example, New Zealand, by communication to the Secretary-General dated 10 April 2002, declared that “[c]onsistent with international law, New Zealand regards all treaty actions as extending to Tokelau as a non-self-governing territory of New Zealand unless express provision to the contrary is included in the relevant treaty instrument.” When New Zealand ratified on 19 July 2002 the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the 2000 United Nations Convention against Transnational Organized Crime, 2000*, it declared that the ratification would not extend to Tokelau.

⁸³ See also the *Articles of Agreement of the International Monetary Fund, 1945* (article XXXI, section 2, (g)); *Articles of Agreement of the International Bank for Reconstruction and Development, 1945* (article XI, section 2, (g)); and the *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950* (article 23).

⁸⁴ See also the *Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, 1953* (article 20); the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956* (article 12); and of the *Single Convention on Narcotic Drugs, 1961* (article 42).

⁸⁵ See A. Aust, *Modern Treaty Law and Practice* (2000), p. 166.

⁸⁶ The Government of the Netherlands informed the Secretary-General on 30 December 1985 that “the island of Aruba which was part of the Netherlands Antilles would obtain internal autonomy as a separate country within the Kingdom of the Netherlands as of 1 January 1986.” The treaties concluded by the Kingdom, which applied to the Netherlands Antilles, including Aruba, continued to apply to the Netherlands Antilles (of which Aruba is no longer a part) and to Aruba, after 1 January 1986.

Denmark. When expressing its consent to be bound, Denmark tends to include the entire Kingdom of Denmark. In a communication received on 22 July 2003, the Government of Denmark informed the Secretary-General that "... Denmark's ratifications normally include the entire Kingdom of Denmark including the Faroe Islands and Greenland." On occasion the Government of Denmark has made territorial exclusions. For example, when the Government of Denmark ratified the *Rome Statute of the International Criminal Court, 1998*, on 21 June 2001 it declared that "[u]ntil further notice, the Statute shall not apply to the Faroe Islands or Greenland."

A practice has developed in relation to the People's Republic of China whereby it applies to a specific region a treaty that was applicable under a previous controlling power even though the People's Republic of China itself is not party to such a treaty. Such is the case of the People's Republic of China in respect of Hong Kong and Macao. When Hong Kong became a Special Administrative Region under the sovereignty of the People's Republic of China, the Government of the People's Republic of China transmitted to the Secretary-General a communication relating to the status of Hong Kong from 1 July 1997.⁸⁷ Similarly, the Government of the People's Republic of China transmitted to the Secretary-General a communication relating to the status of Macao from 20 December 1999.⁸⁸ Attached to the communications were two annexes: a) Annex I listing the treaties to which China was then a party that would apply with effect from 1 July 1997 to the Hong Kong Special Administrative Region and from 20 December 1999 to the Macao Special Administrative Region, respectively, and b) Annex II listing the treaties to which China was not a party and which applied to Hong Kong before 1 July 1997 that would continue to apply to the Hong Kong Special Administrative Region, and which applied to Macao before 20 December 1999 that would continue to apply to the Macao Special Administrative Region, respectively. For treaties that were not listed on either Annex it is necessary to determine whether China made a declaration specifying that the treaty would apply to the Hong Kong Special Administrative Region or the Macao Special Administrative Region or both.

(For the Secretary-General's practice regarding territorial application clauses, see paragraphs 263 to 285, of the *Summary of Practice*.)

⁸⁷ See the "Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, signed on 19 December 1984" in the historical information, note 2 under "China", in the *Status of Multilateral Treaties Deposited with the Secretary-General* (ST/LEG/SER/E/21), status as at 31 December 2002.

⁸⁸ See the "Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao signed on 13 April 1987" in the historical information, note 3 under "China", in the *Status of Multilateral Treaties Deposited with the Secretary-General* (ST/LEG/SER/E/21), status as at 31 December 2002.

6. Federal clauses

Declarations of territorial application are distinct from declarations made under "federal clauses" in treaties whose subject matter falls within the legislative jurisdiction of constituent States, provinces or other territorial units. Article 35 (1) and (2) of the *United Nations Convention on the Assignment of Receivables in International Trade, 2001*, provide:

Application to territorial units

1. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may at any time declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.
2. Such declarations are to state expressly the territorial units to which this Convention extends.⁸⁹

Federal clauses are mostly used in treaties on commercial law, private law or private international law, such as those elaborated by the United Nations Commission on Trade Law (UNCITRAL) and the Institute for the Unification of Private Law (UNIDROIT).

B. APPLICATION OF SUCCESSIVE TREATIES RELATING TO THE SAME SUBJECT MATTER

Article 30 of the *Vienna Convention, 1969*, provides:

Application of successive treaties relating to the same subject-matter

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.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation

⁸⁹ See also the *International Convention on Arrest of Ships, 1999* (article 13); and the *United Nations Convention on Contracts for the International Sale of Goods, 1980* (article 93).

under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

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

- (a) as between States parties to both treaties the same rule applies as in paragraph 3;
- (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

Article 30 of the *Vienna Convention, 1969*, makes a distinction between successive treaties relating to the same subject matter concluded between the same parties and successive treaties relating to the same subject matter between different parties.

In the case of successive treaties relating to the same subject matter concluded among the same parties, the principle of *lex posterior derogat priori* applies.⁹⁰ Accordingly, when the parties to the earlier treaty are also parties to the later treaty but the earlier treaty is not terminated or suspended under article 59 of the *Vienna Convention, 1969*,⁹¹ the earlier treaty applies to the extent that its provisions are compatible with those of the later treaty. Thus, unless there is evidence of a contrary intention, the parties are presumed to have intended to terminate or modify the earlier treaty when they conclude a subsequent treaty that is incompatible with the earlier one.

In the case of successive treaties relating to the same subject matter between different parties, the same rule applies when the parties to the later treaty do not include all the parties to the earlier one, but only among parties to both treaties.

⁹⁰ Article 30 of the *Vienna Convention, 1969*, refers to successive treaties "relating to the same subject matter", which is interpreted as treaties having the same general character. However, when a treaty shares the special character with respect to another treaty, in the event of conflict, the *lex specialis* prevails, unless that treaty expresses an intention, express or implied, that it should be otherwise.

⁹¹ See article 59 of the *Vienna Convention, 1969*, on termination or suspension of the operation of a treaty implied by conclusion of a later treaty.

As between a party to both treaties and a party to only one of the treaties, the treaty that both are parties to governs their mutual rights and obligations.⁹²

Provisions on the application of successive treaties

Where negotiating States wish to establish the priority in the application of successive treaties on the same subject-matter, final clauses will contain provisions on the relationship of the new treaty and existing or future treaties on the same subject matter.

The issue of the relationship between successive treaties increasingly arises because of the greater number and complexity of treaties entered into by States. The general rules specified in article 30 of the *Vienna Convention, 1969*, may not be sufficient to address all the problems arising with respect to the priority of the application of a particular treaty. Accordingly, parties to a treaty may decide to address the relationship between the provisions of that treaty and those of any other treaty relating to the same subject matter, including in the treaty in question clauses or provisions that determine the priority in the application of successive treaties. One way to accomplish this is to include provisions in the treaty specifying its relationship to a prior treaty, a future treaty or any treaty, past or future.

The *Charter of the United Nations* establishes the priority of the provisions of the Charter over any other international agreement, existing or future, as set forth in Article 103:

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

Also a treaty may specify that all or some of its provisions shall prevail over previously concluded treaties in general or in relation to a specific treaty. The *Food Aid Convention, 1999*, in its article XXVI, provides:

International Grains Agreement

This Convention shall replace the Food Aid Convention, 1995, as extended, and shall be one of the constituent instruments of the International Grains Agreement, 1995.

The *United Nations Convention on the Law of the Sea, 1982*, precisely explains its relationship to other treaties in article 311:

⁹² Without prejudice to article 41 relating to "Agreements to modify multilateral treaties between certain of the parties only" and article 59 on "Termination or suspension of the operation of a treaty implied by conclusion of a later treaty" of the *Vienna Convention, 1969*.

1. This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.

2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

3. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

Where negotiating States do not wish the provisions of the treaty in question to prevail over a previously concluded treaty or even a later treaty, they may specify that some or all of the provisions of the treaty shall not prevail. For example, the *United Nations Convention on the Assignment of Receivables in International Trade, 2001*, article 38 (1) reads as follows:

Conflicts with other international agreements

1. This Convention does not prevail over any international agreement that has already been or may be entered into and that specifically governs a transaction otherwise governed by this Convention.

The *United Nations Convention on Contracts for the International Sale of Goods, 1980*, article 90 provides:

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties, to such agreement.

The *Tampere Convention on the Provision of Telecommunications Resources for Disaster Mitigation and Relief Operations, 1998*, article 10 provides:

Relationship to Other International Agreements

This Convention shall not affect the rights and obligations of States Parties deriving from other international agreements or international law.

Where existing higher standards are to be preserved, a treaty may specify that there should be no conflict with other treaties that provide for such higher standards. These provisions are most often found in human rights and disarmament treaties. The *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1992*, article XIII states:

Relation to other international agreements

Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and under the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, signed at London, Moscow and Washington on 10 April 1972.

The *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 1980*, provides in article 2:

Relationship with other international agreements

Nothing in this Convention or its annexed Protocols shall be interpreted as detracting from other obligations imposed upon the High Contracting Parties by international humanitarian law applicable in armed conflict.

The *Convention on the Elimination of all Forms of Discrimination against Women, 1979*, states in article 23:

Nothing in this Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

- (a) In the legislation of a State Party; or
- (b) In any other international convention, treaty or agreement in force for that State.

C. SETTLEMENT OF DISPUTES

The Manila Declaration on the Peaceful Settlement of Disputes, part I.9, states, *inter alia*, that States should include “in bilateral agreements and multilateral

conventions, as appropriate, effective provisions for the peaceful settlement of disputes arising from the interpretation or application thereof.⁹³

Multilateral treaties normally contain detailed dispute resolution provisions. Some contain only elementary provisions. If a dispute, controversy or claim were to arise out of a treaty (for example, due to breach, error, fraud, performance issues, etc.) these provisions become extremely important. Although not common, dispute resolution provisions have been relied upon to resolve important issues by States parties to treaties.

Treaties may provide for various dispute resolution mechanisms such as negotiation, consultation, conciliation, mediation and good offices, panel procedures, arbitration or judicial settlement, such as recourse to the International Court of Justice.

Usually the first resort is to non-formal means of dispute resolution with judicial settlement being the final resort.

Parties to a treaty may try to resolve a dispute arising under that treaty by direct negotiation or consultation amongst themselves in private, usually through diplomatic channels. This allows great flexibility, with the parties controlling the process. In fact, the vast majority of disputes are resolved in this manner away from the limelight. Mediation and good offices involve a third person who facilitates a compromise or provides impartial advice to help resolve the dispute. Two attributes of arbitration and judicial settlement are (1) a prior agreement to submit disputes to a third party for a decision and (2) a decision by the third party that is legally binding on the parties. In many cases parties favour arbitration rather than judicial settlement because the parties have more control over the process and it is expeditious. The advantages of the judicial settlement mechanism include having the court or tribunal and procedures already established as well as judges available to hear the disputes. Recourse to the International Court of Justice has the added benefit to the parties of being funded by member contributions to the United Nations budget so that parties do not shoulder the full costs of the court (as they would with an arbitration tribunal and with other judicial bodies).

Article 33 of the *Charter of the United Nations* enunciates the basic principle enshrined in Article 2 (3) of the *Charter* that disputes must be resolved through peaceful means and lists the most common dispute settlement methods:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

⁹³ See General Assembly resolution 37/10 of 15 November 1982.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

a. Negotiation followed by arbitration with subsequent recourse to the International Court of Justice is reflected in the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990*. Its article 92 provides:

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration, the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of the present article. The other States Parties shall not be bound by that paragraph with respect to any State Party that has made such a declaration.
3. Any State Party that has made a declaration in accordance with paragraph 2 of the present article may at any time withdraw that declaration by notification to the Secretary-General of the United Nations.⁹⁴

A policy-oriented solution through the intervention of the Assembly of Parties prior to recourse to the formal mechanisms is reflected in the *Rome Statute of the International Criminal Court, 1998*. Here a dispute must be resolved by negotiation during a three-month period followed by referral to the Assembly of States parties with subsequent referral to the International Court of Justice. Article 119 of the Statute provides:

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.
2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of

⁹⁴ See also the *Convention on the Elimination of All Forms of Discrimination against Women, 1979* (article 29); the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984* (article 30); and the *Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2000* (article 20).

the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Some treaties also allow for a wide range of dispute mechanisms. For example, the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988*, provides in article 32:

Settlement of Disputes

1. If there should arise between two or more Parties a dispute relating to the interpretation or application of this Convention, the Parties shall consult together with a view to the settlement of the dispute by negotiation, enquiry, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their own choice.
2. Any such dispute which cannot be settled in the manner prescribed in paragraph 1 of this article shall be referred, at the request of any one of the States Parties to the dispute, to the International Court of Justice for decision.
3. If a regional economic integration organization referred to in article 26, subparagraph (c) is a Party to a dispute which cannot be settled in the manner prescribed in paragraph 1 of this article, it may, through a State Member of the United Nations, request the Council to request an advisory opinion of the International Court of Justice in accordance with Article 65 of the Statute of the Court, which opinion shall be regarded as decisive.
4. Each State, at the time of signature or ratification, acceptance or approval of this Convention or accession thereto, or each regional economic integration organization, at the time of signature or deposit of an act of formal confirmation or accession, may declare that it does not consider itself bound by paragraphs 2 and 3 of this article. The other Parties shall not be bound by paragraphs 2 and 3 with respect to any party having made such a declaration.
5. Any Party having made a declaration in accordance with paragraph 4 of this article may at any time withdraw the declaration by notification to the Secretary-General.

b. While most dispute resolution mechanisms are found in the final clauses of treaties, provisions for settlement of disputes may be found elsewhere in the treaty instead. See the *International Coffee Agreement, 2000*, which regulates the settlement of disputes in its chapter XIII entitled “Consultations, disputes and complaints” and not in its chapter XIV “Final provisions.” Article 42 of this Agreement provides:

Disputes and complaints

- (1) Any dispute concerning the interpretation or application of this Agreement which is not settled by negotiation shall, at the request of any Member party to the dispute, be referred to the Council for decision.
- (2) In any case where a dispute has been referred to the Council under the provisions of paragraph (1) of this Article, a majority of Members, or Members holding not less than one third of the total votes, may require the Council, after discussion, to seek the opinion of the advisory panel referred to in paragraph (3) of this Article on the issues in dispute before giving its decision.
- (3) (a) Unless the Council unanimously agrees otherwise, the advisory panel shall consist of:
 - (i) two persons, one having wide experience in matters of the kind in dispute and the other having legal standing and experience, nominated by the exporting Members;
 - (ii) two such persons nominated by the importing Members; and
 - (iii) a chairman selected unanimously by the four persons nominated under the provisions of subparagraphs (i) and (ii) or, if they fail to agree, by the Chairman of the Council.
- (b) Persons from countries whose Governments are Contracting Parties to this Agreement shall be eligible to serve on the advisory panel.
- (c) Persons appointed to the advisory panel shall act in their personal capacities and without instructions from any Government.
- (d) The expenses of the advisory panel shall be paid by the Organization.
- (4) The opinion of the advisory panel and the reasons therefor shall be submitted to the Council which, after considering all the relevant information, shall decide the dispute.
- (5) The Council shall rule on any dispute brought before it within six months of submission of such dispute for its consideration.
- (6) Any complaint that any Member has failed to fulfil its obligations under this Agreement shall, at the request of the Member making the complaint, be referred to the Council which shall make a decision on the matter.

(7) No Member shall be found to have been in breach of its obligations under this Agreement except by a distributed simple majority vote. Any finding that a Member is in breach of its obligations under this Agreement shall specify the nature of the breach.

(8) If the Council finds that a Member is in breach of its obligations under this Agreement, it may, without prejudice to other enforcement measures provided for in other Articles of this Agreement, by a distributed two-thirds majority vote, suspend such Member's voting rights in the Council and its right to have its votes cast in the Executive Board until it fulfils its obligations, or the Council may decide to exclude such Member from the Organization under the provisions of Article 50.

(9) A Member may seek the prior opinion of the Executive Board in a matter of dispute or complaint before the matter is discussed by the Council.

The *United Nations Convention against Transnational Organized Crime, 2000*, establishes a regime for the settlement of disputes in its article 35:

Settlement of disputes

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Convention through negotiation.
2. Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.
3. Each State Party may, at the time of signature, ratification, acceptance or approval or accession to this Convention, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.
4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Part XV (articles 279 through 299) of the *United Nations Convention on the Law of the Sea, 1982*, contains very detailed voluntary and compulsory methods of settlement of disputes, including the jurisdiction of the International Tribunal for the Law of the Sea established by the Convention. Part XV requires that States parties settle any dispute between them concerning the interpretation or application of the Convention by peaceful means in accordance with article 2 (3) of the *Charter of the United Nations* and by the means indicated in article 33 (1) of the *Charter*. If no settlement is reached, the dispute is submitted at the request of any party to the dispute to a court or tribunal having jurisdiction in this regard in accordance with article 286. Article 287(1) of the Convention defines those courts or tribunals as:

- (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI [of the Convention];
- (b) the International Court of Justice;
- (c) an arbitral tribunal constituted in accordance with Annex VII of the Convention;
- (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

Compliance mechanisms

In certain areas of international law there is a trend toward assisting the parties with implementing treaty obligations rather than just strictly enforcing the treaty provisions and for treaty monitoring compliance rather than dispute resolution. This is evident in the human rights area and in the environmental field.

Some treaties, such as environmental treaties contain complex provisions for monitoring compliance and providing assistance to the parties with a preventative view to avoiding disputes. The following three treaties illustrate this point. The reporting requirements, however, are handled by the treaty secretariats, not the depositary.

The *Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change, 1997*, compliance regime consists of a compliance committee made up of a facilitative branch and an enforcement branch. The facilitative branch provides advice and assistance to parties to promote compliance. This branch also provides "early-warning" of cases where a party is in danger of not meeting its emissions targets. In response to problems, the facilitative branch may make recommendations and also mobilize financial and technical resources to help the parties comply. Each party must submit a national communication to demonstrate its compliance with its commitments under the protocol. Expert

review teams analyse the information and prepare a report to the conference of parties. There is a Subsidiary Body for Scientific and Technological Advice as well as a Subsidiary Body for Implementation. Additionally, a financial mechanism provides financial resources on a grant or concessional basis including for the transfer of technology.

The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989*, contains specific provisions for the monitoring of implementation and compliance. A number of articles in the Convention oblige parties to take appropriate measures to implement and enforce their provisions, including measures to prevent and punish conduct in contravention of the Convention. In order to assist countries to manage or dispose of their wastes in an environmentally sound way, the secretariat cooperates with national authorities in developing national legislation, setting up inventories of hazardous wastes, strengthening national institutions, assessing the hazardous waste management situation, and preparing hazardous waste management plans and policy tools. It also provides legal and technical advice to countries in order to solve specific problems related to the control and management of hazardous wastes. Through training and technology transfer, developing countries and countries with economies in transition gain the skills and tools necessary to properly manage their hazardous wastes.

In the *Montreal Protocol on Substances that Deplete the Ozone Layer, 1987*, emphasis is placed on the sharing of information among the parties, aided by the Ozone Secretariat. Parties cooperate regarding research, development, public awareness and exchange of information. There are requirements to transfer technology and to take into account in particular the needs of developing countries. A financial mechanism provides financial and technical cooperation, including the transfer of technologies.

In the human rights field, committees or “treaty monitoring bodies” often monitor implementation of treaties. These committees are composed of independent experts of recognized competence in the field of human rights who are elected by States parties.

III. AMENDMENT, REVISION AND MODIFICATION

Treaty provisions may be altered by agreement of the parties in accordance with the procedure set out in the treaty itself or pursuant to customary international law, as codified by the *Vienna Convention, 1969*. The *Vienna Convention, 1969*, contains the rules governing amendments in articles 39 to 41.

(See also *Summary of Practice*, paragraphs 248 through 255, and *Treaty Handbook*, section 4.4.)

The provisions of a treaty may be altered/modified following the procedure indicated in the treaty in question. The parties may also negotiate a new treaty. “Amendments” have at times been considered legally distinct from “modifications” or “revisions” although the distinction is frequently blurred.

The *Vienna Convention, 1969*, distinguishes between “amendment of multilateral treaties” and “modification between certain parties only”.

The term “revision” often refers (but not always) to a general alteration affecting the treaty as a whole, as opposed to an amendment that partially alters some of the treaty provisions. However, the practice also suggests that the terms “amendment”, “modification” and “revision” have been often used interchangeably. Article 236 *the European Economic Community Treaty, 1957*, provided:⁹⁵

The Government of any Member State or the Commission may submit to the Council proposals for the revision of this Treaty.

If the Council, after consulting the Assembly and, where appropriate, the Commission, expresses an opinion in favour of the calling of a conference of representatives of the Governments of member States, such conference be convened by the President of the council for the purpose of determining in common agreement the amendments to be made to this Treaty.

Such amendments shall enter into force after being ratified by all Member States in accordance with their respective constitutional rules.

The *Treaty on European Union, 1992*, states:

Article N

1. The government of any Member State or the Commission may submit to the Council proposals for the amendment of the Treaties on which the Union is founded.

If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area.

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

⁹⁵ Article 236 was repealed.

2. A conference of representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of this Treaty for which revision is provided, in accordance with the objectives set out in Articles A and B.⁹⁶

A. AMENDMENT

1. Amendment in accordance with the provisions of the treaty

a. The text of a treaty may be altered in accordance with its own amendment provisions. Most contemporary treaties include mechanisms for their amendment.⁹⁷ The amendment procedure within a treaty usually contains provisions governing the mode of adoption of amendments and its entry into force.⁹⁸ Articles 108 and 109 of the *Charter of the United Nations* provide:

Amendments

Article 108

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

Article 109

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council. Each Member of the United Nations shall have one vote in the conference.

2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in

accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.

3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

b.

The amendment provision of the treaty may be very detailed and specify the procedure for the notification of the proposals for amendments, its circulation, its adoption, the manner of obtaining the consent of the parties to be bound by the amendment and the effect of the amendment. Article 12 of the *Optional Protocol to the 1989 Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000*, provides:

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties that have accepted it, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments that they have accepted.

Normally, the relevant treaty secretariat circulates proposals of amendment.

Effects of amendments

a. Usually an amendment, upon its entry into force, binds only those States that have formally accepted it. This is a principle ordinarily applicable to the entry into force of amendments. However, it has the negative effect of

⁹⁶ The *European Economic Community Treaty, 1957* (as amended), became the *Treaty establishing the European Community* following the amendments to the Community Treaties made by the *Treaty on European Union, 1992* ("Treaty of Maastricht").

⁹⁷ Some treaties do not provide for specific amendment procedures. The *United Nations Convention on the Assignment of Receivables in International Trade, 2001*, in article 47 only provides that, "[a]t the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States to revise or amend it." In such a case, a conference of the Contracting States will have to establish the procedures for amending the Convention, including its entry into force.

⁹⁸ For a detailed discussion of entry into force of amendments, see chapter I, section K.3, above.

creating different regimes under the same treaty. One regime will govern those States that are party to the amendment; another regime will govern those States that are party to the original treaty only. Article 39 (5) of the *United Nations Convention against Transnational Organized Crime, 2000*, reflects this approach:

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Convention and any earlier amendments that they have ratified, accepted or approved.

Similarly, article 13 (5) of the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997*, stipulates that amendments enter into force only for those States that have accepted them. Article 13 (5) also deals with the States that become party after the entry into force of the amendment:

An amendment to this Convention shall enter into force for all States Parties to this Convention, which have accepted it, upon the deposit with the Depository of instruments of acceptance by a majority of States Parties. Thereafter it shall enter into force for any remaining State Party on the date of deposit of its instrument of acceptance.

- b.** A treaty may also provide that all States parties to the treaty may, upon the entry into force of the amendment, be bound by such amendment. Amendments binding upon all parties ensure uniformity of the obligations among all parties. This should be a preferred option for amendments to the constitution of treaty bodies. However, it is necessary to be careful with such a provision as some parties may have difficulties due to domestic legal concerns. See for example Article 108 of the *Charter of the United Nations*; and chapter I, section K.3, above entitled “Entry into force of annexes and amendments”.

It is suggested that amendment procedures should avoid complex or unclear rules that may lead to practical difficulties. Unambiguous formulae for amendments that include clear rules governing the proposal of amendments; submission of the amendment proposal for circulation to all parties; adoption procedures (if including a specific proportion of votes, clearly indicating whether this proportion relates to all the parties or all the parties present at the time the vote is taken); circulation of the adopted amendment by the depositary; and entry into force procedures may avoid infinite problems of interpretation and implementation.

An amendment provision with clear procedures is found in the *Comprehensive Nuclear-Test-Ban Treaty, 1996*, article VII:

Amendments

1. At any time after the entry into force of this Treaty, any State Party may propose amendments to this Treaty, the Protocol, or the Annexes to the Protocol. Any State Party may also propose changes, in accordance with paragraph 7, to the Protocol or the Annexes thereto. Proposals for amendments shall be subject to the procedures in paragraphs 2 to 6. Proposals for changes, in accordance with paragraph 7, shall be subject to the procedures in paragraph 8.
2. The proposed amendment shall be considered and adopted only by an Amendment Conference.
3. Any proposal for an amendment shall be communicated to the Director-General, who shall circulate it to all States Parties and the Depository and seek the views of the States Parties on whether an Amendment Conference should be convened to consider the proposal. If a majority of the States Parties notify the Director-General no later than 30 days after its circulation that they support further consideration of the proposal, the Director-General shall convene an Amendment Conference to which all States Parties shall be invited.
4. The Amendment Conference shall be held immediately following a regular session of the Conference unless all States Parties that support the convening of an Amendment Conference request that it be held earlier. In no case shall an Amendment Conference be held less than 60 days after the circulation of the proposed amendment.
5. Amendments shall be adopted by the Amendment Conference by a positive vote of a majority of the States Parties with no State Party casting a negative vote.
6. Amendments shall enter into force for all States Parties 30 days after deposit of the instruments of ratification or acceptance by all those States Parties casting a positive vote at the Amendment Conference.
7. In order to ensure the viability and effectiveness of this Treaty, Parts I and III of the Protocol and Annexes 1 and 2 to the Protocol shall be subject to changes in accordance with paragraph 8, if the proposed changes are related only to matters of an administrative or technical nature. All other provisions of the Protocol and the Annexes thereto shall not be subject to changes in accordance with paragraph 8.
8. Proposed changes referred to in paragraph 7 shall be made in accordance with the following procedures:
 - (a) The text of the proposed changes shall be transmitted together with the necessary information to the Director-General. Additional information for the evaluation of the proposal may be provided by any State Party and the Director-General. The

Director-General shall promptly communicate any such proposals and information to all States Parties, the Executive Council and the Depositary;

(b) No later than 60 days after its receipt, the Director-General shall evaluate the proposal to determine all its possible consequences for the provisions of this Treaty and its implementation and shall communicate any such information to all States Parties and the Executive Council;

(c) The Executive Council shall examine the proposal in the light of all information available to it, including whether the proposal fulfils the requirements of paragraph 7. No later than 90 days after its receipt, the Executive Council shall notify its recommendation, with appropriate explanations, to all States Parties for consideration. States Parties shall acknowledge receipt within 10 days;

(d) If the Executive Council recommends to all States Parties that the proposal be adopted, it shall be considered approved if no State Party objects to it within 90 days after receipt of the recommendation. If the Executive Council recommends that the proposal be rejected, it shall be considered rejected if no State Party objects to the rejection within 90 days after receipt of the recommendation;

(e) If a recommendation of the Executive Council does not meet with the acceptance required under sub-paragraph (d), a decision on the proposal, including whether it fulfils the requirements of paragraph 7, shall be taken as a matter of substance by the Conference at its next session;

(f) The Director-General shall notify all States Parties and the Depositary of any decision under this paragraph;

(g) Changes approved under this procedure shall enter into force for all States Parties 180 days after the date of notification by the Director-General of their approval unless another time period is recommended by the Executive Council or decided by the Conference.

2. Amendment where the treaty is silent on amendments

If a treaty does not contain provisions on amendment procedures, the treaty may be amended or modified in accordance with part IV of the *Vienna Convention, 1969*, entitled "Amendment and modification of treaties". Article 39 of the *Vienna Convention, 1969*, states that:

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

The *Vienna Convention, 1969*, makes a distinction between amendment and modification among certain parties only.

Article 40 of the *Vienna Convention, 1969*, stipulates that, unless the treaty otherwise provides, any proposal to amend it for all the parties must be notified to all contracting States. Each contracting State has the right to take part in (a) the decision as to the action to be taken in regard to such proposal and (b) the negotiation and conclusion of any agreement for the amendment of the treaty. Additionally, in accordance with article 24 of the *Vienna Convention, 1969*, as referred to in article 39, an amendment enters into force in such manner and upon such date as it may provide or as the negotiating States may agree. Failing such provision or agreement, it enters into force as soon as the consent to be bound has been established for all the negotiating States.

3. Amendment of protocols to a treaty

a. A treaty may contain provisions on amendments to protocols thereto. The *Vienna Convention for the Protection of the Ozone Layer, 1985*, article 9 allows for amendment of the Convention and protocols as follows:

Amendment of the Convention or Protocols

1. Any Party may propose amendments to this Convention or to any protocol. Such amendments shall take due account, inter alia, of relevant scientific and technical considerations.

2. Amendments to this Convention shall be adopted at a meeting of the Conference of the Parties. Amendments to any protocol shall be adopted at a meeting of the Parties to the protocol in question. The text of any proposed amendment to this Convention or to any protocol, except as may otherwise be provided in such protocol, shall be communicated to the Parties by the secretariat at least six months before the meeting at which it is proposed for adoption. The secretariat shall also communicate proposed amendments to the signatories to this Convention for information.

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at

the meeting, and shall be submitted by the Depositary to all Parties for ratification, approval or acceptance.

4. The procedure mentioned in paragraph 3 above shall apply to amendments to any protocol, except that a two-thirds majority of the parties to that protocol present and voting at the meeting shall suffice for their adoption.
5. Ratification, approval or acceptance of amendments shall be notified to the Depositary in writing. Amendments adopted in accordance with paragraphs 3 or 4 above shall enter into force between parties having accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance by at least three-fourths of the parties to this Convention or by at least two-thirds of the parties to the protocol concerned, except as may otherwise be provided in such protocol. Thereafter the amendments shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval or acceptance of the amendments.
6. For the purposes of this article, "Parties present and voting" means Parties present and casting an affirmative or negative vote.⁹⁹

b.

Where parties wish to stipulate a distinct amendment procedure for protocols, protocols may include their own amendment procedures. *The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the 2000 United Nations Convention against Transnational Organized Crime, 2000*, article 18 states:

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

⁹⁹ See also the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989* (article 17).

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

4. Amendment of annexes to a treaty

A treaty may specify the amendment procedure for its annexes. The *Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change, 1997*, describes in detail the rules governing the proposal, adoption, consent to be bound, entry into force and legal effects of the amendment to its annexes. Article 21 reads:

1. Annexes to this Protocol shall form an integral part thereof and, unless otherwise expressly provided, a reference to this Protocol constitutes at the same time a reference to any annexes thereto. Any annexes adopted after the entry into force of this Protocol shall be restricted to lists, forms and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character.

2. Any Party may make proposals for an annex to this Protocol and may propose amendments to annexes to this Protocol.

3. Annexes to this Protocol and amendments to annexes to this Protocol shall be adopted at an ordinary session of the Conference of the Parties serving as the meeting of the Parties to this Protocol. The text of any proposed annex or amendment to an annex shall be communicated to the Parties by the secretariat at least six months before the meeting at which it is proposed for adoption. The secretariat shall also communicate the

text of any proposed annex or amendment to an annex to the Parties and signatories to the Convention and, for information, to the Depositary.

4. The Parties shall make every effort to reach agreement on any proposed annex or amendment to an annex by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the annex or amendment to an annex shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting. The adopted annex or amendment to an annex shall be communicated by the secretariat to the Depositary, who shall circulate it to all Parties for their acceptance.

5. An annex, or amendment to an annex other than Annex A or B, that has been adopted in accordance with paragraphs 3 and 4 above shall enter into force for all Parties to this Protocol six months after the date of the communication by the Depositary to such Parties of the adoption of the annex or adoption of the amendment to the annex, except for those Parties that have notified the Depositary, in writing, within that period of their non-acceptance of the annex or amendment to the annex. The annex or amendment to an annex shall enter into force for Parties which withdraw their notification of non-acceptance on the ninetieth day after the date on which withdrawal of such notification has been received by the Depositary.

6. If the adoption of an annex or an amendment to an annex involves an amendment to this Protocol, that annex or amendment to an annex shall not enter into force until such time as the amendment to this Protocol enters into force.

7. Amendments to Annexes A and B to this Protocol shall be adopted and enter into force in accordance with the procedure set out in Article 20, provided that any amendment to Annex B shall be adopted only with the written consent of the Party concerned.

Similarly, the *International Convention for the Suppression of the Financing of Terrorism, 1999*, states in article 23 that:

1. The annex may be amended by the addition of relevant treaties that:
 - (a) Are open to the participation of all States;
 - (b) Have entered into force;
 - (c) Have been ratified, accepted, approved or acceded to by at least twenty-two States Parties to the present Convention.
2. After the entry into force of this Convention, any State Party may propose such an amendment. Any proposal for an amendment shall be communicated to the depositary in written form. The depositary shall notify proposals that meet the requirements of paragraph 1 to all States

Parties and seek their views on whether the proposed amendment should be adopted.

3. The proposed amendment shall be deemed adopted unless one third of the States Parties object to it by a written notification not later than 180 days after its circulation.

4. The adopted amendment to the annex shall enter into force 30 days after the deposit of the twenty-second instrument of ratification, acceptance or approval of such amendment for all those States Parties having deposited such an instrument. For each State Party ratifying, accepting or approving the amendment after the deposit of the twenty-second instrument, the amendment shall enter into force on the thirtieth day after deposit by such State Party of its instrument of ratification, acceptance or approval.

When the treaty is silent on amendments to annexes, the general rules governing amendment and modification of treaties apply.

B. REVISION

Revision (or review) of a treaty basically means amendment of a comprehensive nature. However, if the treaty has not yet entered into force, it is not possible to amend that treaty pursuant to its own amendment provisions. In such a case, States may agree that the text needs to be "revised" subsequent to the treaty's adoption, but prior to its entry into force. Then, the negotiating parties, including signatories and contracting parties, may meet to adopt additional agreements or protocols to address the problem. Such was the case of the *Agreement relating to the implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea, 1994*. Certain difficulties relating to the seabed mining provisions contained in Part XI of the Convention were raised primarily by industrialized States. To address these concerns, which would have created a situation where most industrialized States would not have become party to the Convention, the Secretary-General convened in 1990 a series of informal consultations, which culminated in the adoption, on 28 July 1994, of the 1994 Agreement relating to the implementation of Part XI. The Agreement entered into force on 28 July 1996. Its article 2 deals with the relationship between the Agreement and Part XI of the Convention and it provides that the two shall be interpreted and applied together as a single instrument.

A revision may also take place after the entry into force of the treaty. Part IV of the *Vienna Convention, 1969*, does not mention the term revision nor does it refer to the revision procedure. However, some treaties provide for revision or review separate from amendment. In such cases, the term revision is often used to mean a general change to adapt the treaty to new changed circumstances, as opposed to

an amendment that constitutes a change to specific provisions of a treaty. The *Charter of the United Nations* refers to the revision process in Article 109 (under the heading “Amendments”). Article 109 provides:

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council. Each Member of the United Nations shall have one vote in the conference.
2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.
3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

C. MODIFICATION AMONG CERTAIN PARTIES ONLY

Under treaty law, the term modification normally refers to alterations of certain provisions of a treaty only among certain parties to that treaty. Among other parties, the original provisions apply. In accordance with article 41 of the *Vienna Convention, 1969*, two or more parties to a treaty may conclude an agreement to modify that treaty only among themselves if such a possibility is contemplated in the treaty or is not prohibited by the treaty and the modification does not affect other parties’ rights and obligations under the treaty and is not against the object and purpose of the treaty.

The *United Nations Convention on the Law of the Sea, 1982*, article 311 (3) reads:

Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

Provisions modifying a treaty between certain parties only are normally found in bilateral treaties supplementing certain provisions of multilateral treaties such as the *Convention between Spain and Romania Supplementary to the 1954 Convention Relating to Civil Procedure, 1999*; and the *Agreement between the Government of the Republic of Hungary and the Government of Canada on Air Transport* that supplemented the provisions of the *1944 Convention on International Civil Aviation, 1998*.

IV. DURATION

Although not universal, some multilateral treaties contain provisions on duration. Where there is no provision, Part V, sections 1 (articles 42 through 45), and 3 (articles 54 through 64), of the *Vienna Convention, 1969*, set out the circumstances in which a treaty may be denounced, terminated or its operation suspended, other than on grounds of invalidity.¹⁰⁰

A. SUSPENSION

The suspension of the operation of a treaty produces the legal effect of the provisional cessation of the application of its provisions. The treaty still subsists but its application is put on hold. General provisions concerning the suspension of a treaty are contained in Part V, section 1 of the *Vienna Convention, 1969*. Suspension is expressly referred to in article 57.

A treaty may specify the conditions of its suspension. Treaties containing clauses on the suspension of the treaty as a whole are not abundant. Some examples are found in treaties providing for the suspension or derogation of some of their provisions, particularly treaties in the economic field such as those concluded within the framework of the European Community or the World Trade Organization. See for example, article 7 (c) of the *Treaty establishing the European Community, 1957*:

When drawing up its proposals with a view to achieving the objectives set out in Article 8a, the Commission shall take into account the extent of the effort that certain economies showing differences in development will have to sustain during the period of establishment of the internal market and it may propose appropriate provisions.

¹⁰⁰ Part V, section 2 of the *Vienna Convention, 1969*, states the rules on invalidity of treaties.

If these provisions take the form of derogations, they must be of a temporary nature and must cause the least possible disturbance to the functioning of the common market.¹⁰¹

In the absence of provisions relating to suspension, under customary international law, the operation of a treaty may be suspended with regard to all the parties or to a particular party at any time by consent of all the parties after consultation with the other contracting States (see article 57 of the *Vienna Convention, 1969*). As a general rule, provided that suspension is not prohibited by the treaty, such a treaty may also be suspended temporarily by agreement between certain parties only, if the suspension does not affect the enjoyment by the other parties of their rights or the performance of their obligations under the treaty and the suspension is not incompatible with the object and purpose of the treaty (see article 58 (1) (b) of the *Vienna Convention, 1969*). A treaty may be implicitly suspended by the conclusion of a later treaty if it appears from the later treaty or is otherwise established that such was the intention of the parties (article 59 (2) of the *Vienna Convention, 1969*).

B. WITHDRAWAL/DENUNCIATION

Generally, a party may withdraw from or denounce a treaty, in conformity with the provisions of the treaty or at any time with the consent of all parties after consultation with all contracting States (see article 54 of the *Vienna Convention, 1969*). The words denunciation and withdrawal express the same legal concept. Denunciation (or withdrawal) is a procedure initiated unilaterally by a State to terminate its legal engagements under a treaty. The treaty in question continues to produce its effects with respect to other parties to the treaty.

General provisions concerning denunciation or withdrawal of a treaty are included in articles 42 through 45 of the *Vienna Convention*. Part V, section 3, of the *Vienna Convention, 1969* contains further provisions relating to the denunciation of or the withdrawal from a treaty.

1. Withdrawal (or denunciation) in accordance with the provisions of the treaty

When a treaty authorizes its denunciation, it often also specifies the conditions under which the denunciation may take place. The *Optional Protocol to the 1989 Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000*, article 15 provides:

¹⁰¹ See also the *General Agreement on Tariffs and Trade, 1947* (article XVIII); and the *Agreement on Technical Barriers to Trade (annexed to the Marrakech Agreement establishing the World Trade Organization, 1994)* (article 12.8).

1. Any State Party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the Convention and all States that have signed the Convention. The denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any offence that occurs prior to the date on which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued consideration of any matter that is already under consideration by the Committee on the Rights of the Child prior to the date on which the denunciation becomes effective.¹⁰²

The *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997*, also authorizes its denunciation and sets out the conditions to be followed to denounce the Convention. Article 20 provides:

1. This Convention shall be of unlimited duration.

2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating this withdrawal.

3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six-month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.

4. The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law.¹⁰³

The *Convention on the Rights of the Child, 1989*, also permits denunciation. Article 52 provides:

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations.

¹⁰² See also the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, 2000* (article 11).

¹⁰³ See also the *United Nations Framework Convention on Climate Change, 1992* (article 25).

Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.¹⁰⁴

Article 28 of the *Stockholm Convention on Persistent Organic Pollutants, 2001*, for example, provides for the withdrawal from the Convention:

Withdrawal

1. At any time after three years from the date on which this Convention has entered into force for a Party, that Party may withdraw from the Convention by giving written notification to the depositary.
2. Any such withdrawal shall take effect upon the expiry of one year from the date of receipt by the depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.

Article 19 of the *Vienna Convention for the Protection of the Ozone Layer, 1985*, provides for the withdrawal from the Convention and any of its Protocols:

At any time after four years from the date on which this Convention has entered into force for a Party, that Party may withdraw from the Convention by giving written notification to the Depositary.

Except as may be provided in any protocol, at any time after four years from the date on which such protocol has entered into force for a party, that party may withdraw from the protocol by giving written notification to the Depositary.

Any such withdrawal shall take effect upon expiry of one year after the date of its receipt by the Depositary, or on such later date as may be specified in the notification of the withdrawal.

Any Party which withdraws from this Convention shall be considered as also having withdrawn from any protocol to which it is party.

2. Withdrawal (or denunciation) where the treaty is silent on withdrawal (or denunciation)

Some treaties do not contain denunciation or withdrawal provisions. For example, some human rights treaties such as the *International Covenant on Civil and Political Rights, 1966*, do not contain denunciation or withdrawal provisions.

The *Vienna Convention, 1969*, upholds the principle that a treaty is subject to denunciation or withdrawal only if the appropriate provisions are incorporated in the treaty. However, the implicit authorization by a treaty constitutes an exception to that principle. Accordingly, in the case of a treaty that is silent on denunciation or withdrawal, a party may withdraw from or denounce a treaty if it is established that the parties intended to admit the possibility of denunciation or withdrawal or if a right of denunciation or withdrawal may be implied by the nature of the treaty. A party must give at least 12 months' notice of its intention to denounce or withdraw from a treaty (see article 56 of the *Vienna Convention, 1969*).¹⁰⁵

C. DENIAL OF RIGHTS/EXCLUSION

Some treaties contain provisions denying particular rights under the treaties to parties in certain circumstances. Article 61 of the *International Cocoa Agreement, 2001*, provides:

If the Council finds, under paragraph 3 of article 51, that any Member is in breach of its obligations under this Agreement and decides further that such breach significantly impairs the operation of this Agreement, it may, by special vote, exclude such Member from the Organization. The Council shall immediately notify the depositary of any such exclusion.

¹⁰⁵ On 25 August 1997, the Secretary-General received from the Government of the Democratic People's Republic of Korea a notification of withdrawal from the *International Covenant on Civil and Political Rights, 1966*, dated 23 August 1997. As the Covenant does not contain a withdrawal provision, the depositary communicated on 23 September 1997 an aide-mémoire to the Government of the Democratic People's Republic of Korea explaining the Secretary-General's position in relation to the above notification. The Secretary-General, as depositary relying on article 56 of the *Vienna Convention, 1969*, concluded that in the case of the Covenant, the negotiating parties did not seem to have overlooked the possibility of explicitly providing for withdrawal or denunciation but rather that it appeared that they had deliberately intended not to provide for it. In relation to the question on whether the nature of the Covenant, as a human rights treaty, implied a right of denunciation or withdrawal, the Secretary-General concluded that, even though some human rights treaties explicitly provide for denunciation, such treaties do not imply an inherent right of denunciation or withdrawal. In particular, since the Covenant was among the relative minority of human rights treaties not explicitly subject to denunciation or withdrawal, it would be incorrect to assume that the Covenant's nature somehow implied the possibility of denunciation or withdrawal. Therefore, consistent with article 54 of the *Vienna Convention, 1969*, a withdrawal from the Covenant would not appear possible unless all States Parties to the Covenant agreed with such a withdrawal. Accordingly, the Secretary-General circulated the notification of withdrawal and the aide-mémoire to all States Parties under cover of C.N.1997.TREATIES-10 of 12 November 1997. Austria, Canada, Denmark, Finland, France, Germany, Kuwait, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom (and the United Kingdom on behalf of the European Union) wrote to the Secretary-General expressing their views on the denunciation by the Democratic People's Republic of Korea. All except Kuwait clearly stated in their letters to the Secretary-General that they considered that denunciation was not permitted under the Covenant and objected to the withdrawal by the Democratic People's Republic of Korea.

¹⁰⁴ See also the *International Convention on the Elimination of All Forms of Racial Discrimination, 1966* (article 21), and the *Protocol relating to the Status of Refugees, 1967* (article 9).

Ninety days after the date of the Council's decision, that Member shall cease to be a member of the Organization.¹⁰⁶

Similarly, the *International Agreement on Olive Oil and Table Olives, 1986*, article 58, states that:

If the Council decides that any Member is in breach of its obligations under this Agreement and decides further that such breach significantly impairs the operation of this Agreement, it may, by unanimous decision of the other Members, exclude that Member from this Agreement. The Council shall immediately notify the depositary of its decision. The Member in question shall cease to be a Party to this Agreement 30 days after the date of that decision.

Exclusion from a treaty could also result from the non-payment of dues.

D. EXTENSION OF THE DURATION

Where a treaty specifies its duration it may also provide for extension of that duration and the conditions for extension. Thus, for example, article 52 (2) of the *International Coffee Agreement, 2000*, provides:

(2) The Council may, by a vote of a majority of the Members having not less than a distributed two-thirds majority of the total votes, decide to extend this Agreement beyond 30 September 2007 for one or more successive periods not to exceed six years in total.

Similarly, the *Food Aid Convention, 1999*, under its article XXV, was to remain in force "until 30 June 2002".¹⁰⁷ Article XXV (b) and (c) of the Convention further provides:

(b) The Committee may extend this Convention beyond 30 June 2002 for successive periods not exceeding two years on each occasion, provided that the Grains Trade Convention, 1995, or a new Grains Trade Convention replacing it, remains in force during the period of the extension.

(c) If this Convention is extended under paragraph (b) of this Article, the commitments of members under paragraph (e) of Article III may be subject to review by members before the entry into force of each

extension. Their respective commitments, as reviewed, shall remain unchanged for the duration of each extension.

Likewise, the *International Natural Rubber Agreement, 1987*, was to remain in force "for a period of five years after its entry into force" unless extended as permitted under article 66:

3. The Council may, by special vote, extend this Agreement by a period or periods not exceeding two years in all, commencing from the date of expiry of the five-year period specified in paragraph 1 of this article.

V. TERMINATION

Based upon the general principle of international law *pacta sunt servanda*, a treaty in force is binding upon the parties and must be performed by them in good faith.¹⁰⁸ However, a treaty may be ended by agreement of the parties in accordance with the procedure sets out in the treaty itself or pursuant to customary international law, as codified by the *Vienna Convention, 1969*. General provisions governing termination are specified in the *Vienna Convention, 1969*, articles 42 to 45. General rules on termination of the operation of treaties are included in section 3 of the *Vienna Convention, 1969*.

Unlike amendments, which have the effect of altering the provisions of the treaty, termination releases the parties from any obligation to comply further with the treaty provisions; the treaty ceases to be in force (unless the provisions concerned are also part of customary international law).

Article 42 (2) of the *Vienna Convention, 1969*, states that a treaty may only be terminated as a result of the application of the provisions of the treaty itself or of the *Vienna Convention, 1969*. A subsequent treaty to which all the parties of the former treaty are also party may also terminate a treaty.

1. Termination in accordance with the provisions of the treaty

a. Although most treaties are concluded for an indefinite period of time, a treaty may specify the rules governing its termination and the administrative consequences and implications of such termination.

A treaty may be terminated upon the decision of an organ established under the treaty. For example, under article 63 (4) and (5) of the *International Cocoa Agreement, 2001*, the treaty may be terminated:

¹⁰⁸ See article 26 of the *Vienna Convention, 1969*.

[...]

4. The Council may at any time, by special vote, decide to terminate this Agreement. Such termination shall take effect on such date as the Council shall decide, provided that the obligations of Members under article 26 shall continue until the financial liabilities relating to the operation of this Agreement have been discharged. The Council shall notify the depositary of any such decision.

5. Notwithstanding the termination of this Agreement by any means whatsoever, the Council shall remain in being for as long as necessary to carry out the liquidation of the Organization, settlement of its accounts and disposal of its assets. The Council shall have during that period the necessary powers for the conclusion of all administrative and financial matters.

[...]

Also the *International Coffee Agreement, 2000*, article 52 (3) and (4):

The Council may at any time, by a vote of a majority of the Members having not less than a distributed two-thirds majority of the total votes, decide to terminate this Agreement. Termination shall take effect on such date as the Council shall decide.

Notwithstanding the termination of this Agreement, the Council shall remain in being for as long as necessary to take such decisions as are needed during the period of time required for the liquidation of the Organization, settlement of its accounts and disposal of its assets.

Moreover, the *International Natural Rubber Agreement, 1979*, in article 67 (6) states:

The Council may at any time, by special vote, decide to terminate this Agreement with effect from such date as it may determine. The Council shall notify the depositary of any such decision.

b. The treaty may also specify a set date for its termination. For example the *International Agreement on Olive Oil and Table Olives, 1986*, article 60 (1) reads as follows:

This Agreement shall remain in force until 31 December 1991 unless the Council decides to prolong it, extend it, renew it or

terminate it in advance in accordance with the provisions of this article.

c. The treaty may indicate as well that the later treaty is terminating an earlier treaty or a number of them. Thus, the *Single Convention on Narcotic Drugs, 1961*, provides for the termination of certain earlier treaties in the narcotics field as between parties to the *Single Convention*. Its article 44 reads as follows:

Termination of Previous International Treaties

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:

- (a) International Opium Convention, signed at The Hague on 23 January 1912;
- (b) Agreement concerning the Manufacture of, Internal Trade in and Use of Prepared Opium, signed at Geneva on 11 February 1925;
- (c) International Opium Convention, signed at Geneva on 19 February 1925;
- (d) Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, signed at Geneva on 13 July 1931;
- (e) Agreement for the Control of Opium Smoking in the Far East, signed at Bangkok on 27 November 1931;
- (f) Protocol signed at Lake Success on 11 December 1946, amending the Agreements, Conventions and Protocols on Narcotic Drugs concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936, except as it affects the last-named Convention;
- (g) The Conventions and the Agreements referred to in subparagraphs (a) to (e) as amended by the Protocol of 1946 referred to in subparagraph (f);
- (h) Protocol signed at Paris on 19 November 1948 Bringing under International Control Drugs outside the Scope of the Convention of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, as Amended by the Protocol signed at Lake Success on 11 December 1946;
- (i) Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and

Wholesale Trade in, and Use of Opium, signed at New York on 23 June 1953, should that Protocol have come into force.

2. Upon the coming into force of this Convention, article 9 of the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, signed at Geneva on 26 June 1936, shall, between the Parties thereto which are also Parties to this Convention, be terminated, and shall be replaced by paragraph 2(b) of article 36 of this Convention; provided that such a Party may by notification to the Secretary-General continue in force the said article 9.

2. Termination where the treaty is silent on termination

The *Vienna Convention, 1969*, sets out general principles regarding termination in case the treaty does not contain any provision on termination. Articles 54 and 55 provide that the termination of a treaty may take place at any time following consultation by consent of all the parties. Unless the treaty otherwise provides, a multilateral treaty does not terminate by the reason only that the number of parties falls below the number necessary for its entry into force. However, exceptionally, a treaty may terminate for this reason. See the *Convention on the Prevention and Punishment of the Crime of Genocide, 1948*. Article XV provides that:

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date in which the last of these denunciations shall become effective.

Many treaties do not include in their final clauses provisions on termination. This is often the case with human rights and environmental treaties.

CONCLUSIONS

Final clauses are often perceived as merely formal provisions. However, they include articles on a vast variety of matters, some of which, such as entry into force, amendment or settlement of disputes are of extreme importance for the operation of a treaty. Final clauses including articles on signature, ratification, acceptance, approval, accession, reservations, entry into force, settlement of disputes, amendment, annexes, withdrawal/denunciation or the designation of the depositary are set forth in most multilateral treaties. Specific provisions on these matters contribute to assisting with the effective implementation of a multilateral treaty. In contrast, final clauses relating to provisional application, territorial application, relationship to other treaties, or duration, are not always needed. Their inclusion in a particular treaty depends on the nature and content of that treaty.

Although final clauses tend to follow existing precedents, drafting should take into consideration the particular needs of a treaty. Given the essential role they play, final clauses should also be drafted to overcome recurring problems, particularly the most troublesome such as participation in treaties or entry into force of amendments. In this context ST/SGB/2002/7 is considered particularly important from the perspective of the Secretary-General.



28 August 2001

Secretary-General's bulletin

Procedures to be followed by the departments, offices and regional commissions of the United Nations with regard to treaties and international agreements

The Secretary-General, for the purpose of establishing procedures to be followed by the departments, offices and regional commissions of the United Nations with regard to treaties and international agreements, promulgates the following:

Part I Treaties and international agreements concluded by the United Nations

Section 1 Drafts of treaties and international agreements

Drafts of treaties and international agreements to be concluded by the United Nations shall be submitted by the relevant department, office or regional commission to the Office of Legal Affairs for review and comment prior to finalization.

Section 2 Registration or filing and recording

All treaties and international agreements concluded by the United Nations shall be forwarded by the relevant department, office or regional commission to the Treaty Section of the Office of Legal Affairs (Treaty Section), upon their entry into force, for registration pursuant to Article 102 of the Charter of the United Nations, or filing and recording. Such instruments shall remain in the custody of the Treaty Section unless special arrangements have been approved in advance by the Treaty Section.

Part II Instruments relating to treaty actions by the United Nations

Section 3 Instruments requiring consultations

Where the United Nations intends to undertake a treaty action for which purpose full powers, an act of formal confirmation or an instrument of acceptance, approval or accession are required, the relevant department, office or regional commission shall consult with the Office of Legal Affairs in advance of such action.

Part III Treaties and international agreements to be deposited with the Secretary-General

Section 4 Drafts of treaties and international agreements

4.1 All draft treaties and international agreements intended to be deposited with the Secretary-General of the United Nations shall be submitted by the relevant department, office or regional commission to the Office of Legal Affairs for review and comment prior to finalization.

4.2 Draft final clauses of such treaties and international agreements shall be submitted by the relevant department, office or regional commission to the Treaty Section for review and comment prior to finalization.

4.3 Every endeavour shall be made to ensure that the texts of treaties and international agreements to be deposited with the Secretary-General of the United Nations are concluded only in the official languages of the United Nations.

Section 5 Adopted texts of treaties and international agreements

5.1 Following the formal adoption of the texts of treaties and international agreements to be deposited with the Secretary-General of the United Nations, the adopted texts shall be submitted by the relevant department, office or regional commission, in both paper and electronic formats, to the Treaty Section, in all the authentic languages, for purposes of preparing the originals of such agreements, and for performing the requisite depositary functions. In general, a period of four weeks should be allowed between the dates of adoption and the dates on which the treaties or international agreements are opened for signature to enable the preparation of the originals of the treaties or international agreements and the distribution of the certified true copies.

5.2 Following the formal adoption of such texts, no further changes shall be made to the texts by any department, office or regional commission, except in consultation with the Treaty Section.

Section 6 Designation of the Secretary-General as depositary of treaties and international agreements

6.1 When it is intended that the Secretary-General discharge the depositary functions relating to treaties and international agreements, such treaties or international agreements shall confer the depositary functions on the Secretary-General only and not on any other official of the United Nations. The Secretary-General shall not be designated as a co-depositary.

6.2 When it is intended that the Secretary-General be designated the depositary, the relevant department, office or regional commission shall consult the Treaty Section in advance.

6.3 All treaties and international agreements deposited with the Secretary-General and open for signature shall remain in the custody of the Treaty Section. Any exceptions to this rule shall be arranged in advance with the Treaty Section.

Section 7 Full powers

All instruments of full powers received by any department, office or regional commission authorizing representatives to sign treaties and international agreements deposited with the Secretary-General shall be forwarded to the Treaty Section for verification prior to signature of such treaties and international agreements. Any exceptions to this rule shall be arranged in advance with the Treaty Section.

Section 8 Ceremony of signature

When it is arranged for States to sign a treaty or international agreement deposited with the Secretary-General on the same occasion, the Office of Legal Affairs shall be informed in advance by the relevant department, office or regional commission. Arrangements for the ceremony at which the signatures are to be affixed, including provision for the discharge of the depositary functions, shall be made in consultation with the Treaty Section.

Section 9 Instruments and notifications to be deposited with the Secretary-General

Instruments of ratification, acceptance, approval, accession, succession or any similar instruments and notifications relating to treaties and international agreements deposited with the Secretary-General which are received by any department, office or regional commission shall be forwarded to the Treaty Section.

Part IV Final provisions

Section 10 Final provisions

10.1 The present bulletin shall enter into force on 1 October 2001.

10.2 Administrative instruction AI/52 of 25 June 1948 is hereby abolished.

(Signed) Kofi A. Annan
Secretary-General



GLOSSARY

Acceptance

See ratification.

Accession

Accession is the act whereby a State that has not signed a treaty expresses its consent to become a party to that treaty by depositing an "instrument of accession". Accession has the same legal effect as ratification, acceptance or approval.

Adoption

Adoption is the formal act by which negotiating parties establish the form and content of a treaty. Adoption may also be the mechanism used to establish the form and content of amendments to a treaty, or regulations under a treaty.

Amendment

Amendment, in the context of treaty law, means the formal alteration of the provisions of a treaty by its parties.

Approval

See ratification.

Authentication

Authentication is the procedure whereby the text of a treaty is established as authentic and definitive. Once a treaty has been authenticated, its provisions cannot be modified except by formal amendment.

Authentic language

A treaty typically specifies its authentic languages - the languages in which the meaning of its provisions is to be determined.

Authentic text

The authentic text of a treaty is the version of the treaty that has been authenticated by the parties.

Bilateral treaty

See treaty.

Consent to be bound

A State expresses its consent to be bound by a treaty under international law by some formal act, i.e., definitive signature, ratification, acceptance, approval or accession.

Contracting State

A contracting State is a State that has expressed its consent to be bound by a treaty where the treaty has not yet entered into force or where it has not entered into force for that State.

Convention

The term "convention" is now generally used for formal multilateral treaties with a broad number of parties. Conventions are normally open for participation by the international community as a whole, or by a large number of States. Usually instruments negotiated under the auspices of an international organization are referred to as conventions. The same holds true for instruments adopted by an organ of an international organization.

Declaration

interpretative declaration

An interpretative declaration is a declaration by a State as to its understanding of some matter covered by a treaty or its interpretation of a particular provision. Unlike reservations, declarations merely clarify a State's position and do not purport to exclude or modify the legal effect of a treaty.

mandatory declaration

A mandatory declaration is a declaration specifically required by the treaty itself. Unlike an interpretative declaration, a mandatory declaration is binding on the State making it.

optional declaration

An optional declaration is a declaration that a treaty specifically provides for, but does not require. Unlike an interpretative declaration, an optional declaration is binding on the State making it.

Depositary

The depositary of a treaty is the custodian of the treaty and is entrusted with the functions specified in article 77 of the Vienna Convention 1969. A depositary can be one or more States, an international organization, or the chief administrative officer of the organization, such as the Secretary-General of the United Nations.

Depositary notification

A depositary notification (sometimes referred to as a C.N. - an abbreviation for circular notification) is a formal notice that the Secretary-General sends to all Member States, non-member States, the specialized agencies of the United Nations, and the relevant secretariats, organizations and United Nations offices, as depositary of a particular treaty. The notification provides information on that treaty, including actions undertaken.

Entry into force

Entry into force of a treaty is the moment in time when a treaty becomes legally binding on the parties to the treaty. The provisions of the treaty determine the moment of its entry into force. A treaty that has already entered into force may enter into force in a manner specified in it for a State or international organization that expresses its consent to be bound by it after its entry into force.

Final Act

A Final Act is a document summarising the proceedings of a diplomatic conference. It is normally the formal act by which the negotiating parties bring the conference to a conclusion. It is usually part of the documentation arising from the conference, including the treaty, the resolutions and

interpretative declarations made by participating States. There is no obligation to sign the Final Act, but signature may permit participation in subsequent mechanisms arising from the conference, such as preparatory committees. Signing the Final Act does not normally create legal obligations or bind the signatory State to sign or ratify the treaty attached to it.

Final clauses

Final clauses are provisions typically found at the end of a treaty, dealing with such topics as signature, ratification, acceptance, approval, accession, denunciation, amendment, reservation, entry into force, settlement of disputes, depositary matters and authentic texts.

Full powers

Full powers take the form of a solemn instrument issued by the Head of State, Head of Government or Minister for Foreign Affairs, empowering a named representative to undertake given treaty actions.

Interpretative declaration

See declaration.

Mandatory declaration

See declaration.

Modification

Modification, in the context of treaty law, refers to the variation of certain provisions of a treaty only as between particular parties to that treaty. As between other parties, the original provisions apply.

Multilateral treaty

See treaty.

Optional declaration

See declaration.

Party

A party to a treaty is a State or other entity with treaty-making capacity that has expressed its consent to be bound by that treaty by an act of ratification, acceptance, approval or accession, etc., where that treaty has entered into force for that particular State. This means that the State is bound by the treaty under international law.

Protocol

A protocol, in the context of treaty law and practice, has the same legal characteristics as a treaty. The term protocol is often used to describe agreements of a less formal nature than those entitled treaty or convention. Generally, a protocol amends, supplements or clarifies a multilateral treaty. A protocol is normally open to participation by the parties to the parent agreement. However, in recent times States have

negotiated a number of protocols that do not follow this principle. The advantage of a protocol is that, while it is linked to the parent agreement, it can focus on a specific aspect of that agreement in greater detail.

Ratification, acceptance, approval

Ratification, acceptance and approval all refer to the act undertaken on the international plane, whereby a State establishes its consent to be bound by a treaty.

Registration

Registration, in the context of treaty law and practice, refers to the function of the Secretariat of the United Nations in effecting the registration of treaties and international agreements under Article 102 of the *Charter of the United Nations*.

Reservation

A reservation is a statement made by a State by which it purports to exclude or alter the legal effect of certain provisions of a treaty in their application to that State. Reservations cannot be contrary to the object and purpose of the treaty. Some treaties prohibit reservations or only permit specified reservations.

Revision

Revision basically means amendment. However, some treaties provide for revisions separately from amendments. In that case, revision typically refers to an overriding adaptation of a treaty to changed circumstances, whereas the term amendment refers to changes to specific provisions.

Signature

definitive signature (signature not subject to ratification)

Definitive signature occurs where a State expresses its consent to be bound by a treaty by signing the treaty without the need for ratification, acceptance or approval.

simple signature (signature subject to ratification)

Simple signature applies to most multilateral treaties. This means that when a State signs the treaty, the signature is subject to ratification, acceptance or approval. The State has not expressed its consent to be bound by the treaty until it ratifies, accepts or approves the treaty.

Treaty

Treaty is a generic term embracing all instruments binding under international law, regardless of their formal designation, concluded between two or more international juridical persons. Thus, treaties may be concluded between:

- a. States;
- b. International organizations with treaty-making capacity and States; or

c. International organizations with treaty-making capacity.

The application of the term treaty, in the generic sense, signifies that the parties intend to create rights and obligations enforceable under international law.

The Vienna Convention 1969 defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" (article 2(1)(a)). Accordingly, conventions, agreements, protocols, and exchange of letters or notes may all constitute treaties. A treaty must be governed by international law and is normally in written form. Although the Vienna Convention 1969 does not apply to non-written agreements, its definition of a treaty states that the absence of writing does not affect the legal force of international agreements.

No international rules exist as to when an international instrument should be entitled a treaty. However, usually the term treaty is employed for instruments of some gravity and solemnity.

See article 2(1)(a) of the Vienna Convention 1969. See generally Vienna Convention 1969 and Vienna Convention 1986.



REGIONAL COURSES IN INTERNATIONAL LAW

Addis Ababa, Ethiopia
7 April - 2 May 2014

STATE RESPONSIBILITY

Codification Division of the United Nations Office of Legal Affairs

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STATE RESPONSIBILITY
MR. SANTIAGO VILLALPANDO

Legal Instruments and Documents

1. Articles on Responsibility of States for Internationally Wrongful Acts, 2001
For text, see *The Work of the International Law Commission*, 8th ed., vol. II
2. Draft articles on diplomatic protection, with commentaries (Report of the International Law Commission, Fifty-eighth session (1 May-9 June and 3 July-11 August 2006), A/61/10, p. 22) 166
3. *Materials on the Responsibility of States for Internationally Wrongful Acts*, United Nations Legislative Series, 2012 (ST/LEG/SER.B/25) (publication distributed)
4. United Nations General Assembly resolutions 56/83 of 12 December 2001, 59/35 of 2 December 2004, 62/61 and 62/67 of 6 December 2007, 65/19 and 65/27 of 6 December 2010, and 68/104 and 68/113 of 16 December 2013 208

Case Law

5. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment, *I.C.J. Reports 1970*, p. 3
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
6. *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, *I.C.J. Reports 1980*, p. 3
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
7. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports 1986*, p. 14
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
For full text, see *Study Materials, Peaceful Settlement of International Disputes*
8. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p. 7
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
9. *Prosecutor v. Duško Tadić*, ICTY Appeals Chamber, 15 July 1999 (Judgment)
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
For full text, see *Study Materials, International Humanitarian Law*
10. *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004*, p. 136
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
For full text, see *Study Materials, Self-Determination in International Law*

11. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, Judgment, I.C.J. Report 2007*, p. 43
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
12. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), 232 Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582

**Draft articles on diplomatic protection (with commentaries),
Report of the International Law Commission, Fifty-eighth
session (1 May-9 June and 3 July-11 August 2006), A/61/10**



United Nations

Report of the International Law Commission

**Fifty-eighth session
(1 May-9 June and 3 July-11 August 2006)**

**General Assembly
Official Records
Sixty-first session
Supplement No. 10 (A/61/10)**

Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook ... 1971*) indicates a reference to the *Yearbook of the International Law Commission*.

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 2006*.

2. Text of the draft articles with commentaries thereto

50. The text of the draft articles with commentaries thereto adopted by the Commission at its fifty-eighth session are reproduced below.

DIPLOMATIC PROTECTION

(1) The drafting of articles on diplomatic protection was originally seen as belonging to the study on State Responsibility. Indeed the first Rapporteur on State Responsibility, Mr. F.V. García Amador, included a number of draft articles on this subject in his reports presented from 1956 to 1961.¹⁶ The subsequent codification of State Responsibility paid little attention to diplomatic protection and the final draft articles on this subject expressly state that the two topics central to diplomatic protection - nationality of claims and the exhaustion of local remedies - would be dealt with more extensively by the Commission in a separate undertaking.¹⁷ Nevertheless, there is a close connection between the articles on Responsibility of States for internationally wrongful acts and the present draft articles. Many of the principles contained in the articles on Responsibility of States for internationally wrongful acts are relevant to diplomatic protection and are therefore not repeated in the present draft articles. This applies in particular to the provisions dealing with the legal consequences of an internationally wrongful act. A State responsible for injuring a foreign national is obliged to cease the wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act. This reparation may take the form of restitution, compensation or satisfaction, either singly or in combination. All these matters are dealt with in the articles on Responsibility of States for internationally wrongful acts.¹⁸

(2) Diplomatic protection belongs to the subject of "Treatment of Aliens". No attempt is made, however, to deal with the primary rules on this subject - that is, the rules governing the

¹⁶ *Yearbook ... 1956*, vol. II, pp. 173-231, *Yearbook ... 1957*, vol. II, pp. 104-30, *Yearbook ... 1958*, vol. II, pp. 47-73, *Yearbook ... 1959*, vol. II, pp. 1-36, *Yearbook ... 1960*, vol. II, pp. 41-68, and *Yearbook ... 1961*, vol. II, pp. 1-54.

¹⁷ *Ibid.*, *Official Records of the General Assembly Fifty-sixth Session, Supplement No. 10 (A/56/10)*, para. 77, commentary on article 44, footnotes 722 and 726.

¹⁸ Articles 28, 30, 31, 34-37. Much of the commentary on compensation (art. 36) is devoted to a consideration of the principles applicable to claims concerning diplomatic protection.

treatment of the person and property of aliens, breach of which gives rise to responsibility to the State of nationality of the injured person. Instead the present draft articles are confined to secondary rules only - that is, the rules that relate to the conditions that must be met for the bringing of a claim for diplomatic protection. By and large this means rules governing the admissibility of claims. Article 44 of the articles on Responsibility of States for internationally wrongful acts provides:

"The responsibility of a State may not be invoked if:

- "(a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
- "(b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted."

The present draft articles give content to this provision by elaborating on the rules relating to the nationality of claims and the exhaustion of local remedies.

(3) The present draft articles do not deal with the protection of an agent by an international organization, generally described as "functional protection". Although there are similarities between functional protection and diplomatic protection, there are also important differences. Diplomatic protection is traditionally a mechanism designed to secure reparation for injury to the national of a State premised largely on the principle that an injury to a national is an injury to the State itself. Functional protection, on the other hand, is an institution for promoting the efficient functioning of an international organization by ensuring respect for its agents and their independence. Differences of this kind have led the Commission to conclude that protection of an agent by an international organization does not belong in a set of draft articles on diplomatic protection. The question whether a State may exercise diplomatic protection in respect of a national who is an agent of an international organization was answered by the International Court of Justice in the *Reparation for Injuries* case: "In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the

Organization to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense. ...¹⁹

PART ONE

GENERAL PROVISIONS

Article 1

Definition and scope

For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

Commentary

(1) Draft article 1 makes no attempt to provide a complete and comprehensive definition of diplomatic protection. Instead it describes the salient features of diplomatic protection in the sense in which the term is used in the present draft articles.

(2) Under international law, a State is responsible for injury to an alien caused by its wrongful act or omission. Diplomatic protection is the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted. The present draft articles are concerned only with the rules governing the circumstances in which diplomatic protection may be exercised and the conditions that must be met before it may be exercised. They do not seek to define or describe the internationally wrongful acts that give rise to the responsibility of the State for injury to an alien. The draft articles, like those on the Responsibility of States for internationally wrongful acts,²⁰ maintain the distinction between primary and secondary rules and deal only with the latter.

¹⁹ Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion, *I.C.J. Reports 1949*, p. 174 at pp. 185-186.

²⁰ See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, para. 77, general commentary, paras. (1) to (3).

(3) Diplomatic protection has traditionally been seen as an exclusive State right in the sense that a State exercises diplomatic protection in its own right because an injury to a national is deemed to be an injury to the State itself. This approach has its roots, first in a statement by the Swiss jurist Emmerich de Vattel in 1758 that “whoever ill-treats a citizen indirectly injures the State, which must protect that citizen,”²¹ and, secondly in a dictum of the Permanent Court of International Justice in 1924 in the *Mavrommatis Palestine Concessions* case that “by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law.”²² Obviously it is a fiction - and an exaggeration²³ - to say that an injury to a national is an injury to the State itself. Many of the rules of diplomatic protection contradict the correctness of this fiction, notably the rule of continuous nationality which requires a State to prove that the injured national remained its national after the injury itself and up to the date of the presentation of the claim. A State does not “in reality” - to quote *Mavrommatis* - assert its own right only. “In reality” it also asserts the right of its injured national.

(4) In the early years of international law the individual had no place, no rights in the international legal order. Consequently if a national injured abroad was to be protected this could be done only by means of a fiction - that an injury to the national was an injury to the State itself. This fiction was, however, no more than a means to an end, the end being the protection of the rights of an injured national. Today the situation has changed dramatically. The individual is the subject of many primary rules of international law, both under custom and treaty, which protect him at home, against his own Government, and abroad, against foreign

²¹ E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns*, vol. III (1758, English translation by C.G. Fenwick, Carnegie Institution, Washington 1916), chap. VI, p. 136.

²² *Mavrommatis Palestine Concessions (Greece v. U.K.) P.C.I.J. Reports*, 1924, Series A, No. 2, p. 12. This dictum was repeated by the Permanent Court of International Justice in the *Panevezys Saldutiskis Railway case (Estonia v. Lithuania) P.C.I.J. Reports*, 1939, Series A/B, No. 76, p. 16.

²³ J.L. Briery, *The Law of Nations: An Introduction to the International Law of Peace*, 6th edition (Oxford: Clarendon Press, 1963), Sir H. Waldock (ed), pp. 276-7.

Governments. This has been recognized by the International Court of Justice in the *La Grand*²⁴ and *Avena* cases.²⁵ This protection is not limited to personal rights. Bilateral investment treaties confer rights and protection on both legal and natural persons in respect of their property rights. The individual has rights under international law but remedies are few. Diplomatic protection conducted by a State at inter-State level remains an important remedy for the protection of persons whose human rights have been violated abroad.

(5) Draft article 1 is formulated in such a way as to leave open the question whether the State exercising diplomatic protection does so in its own right or that of its national - or both. It views diplomatic protection through the prism of State responsibility and emphasizes that it is a procedure for securing the responsibility of the State for injury to the national flowing from an internationally wrongful act.

(6) Draft article 1 deliberately follows the language of the articles on Responsibility of States for internationally wrongful acts.²⁶ It describes diplomatic protection as the invocation of the responsibility of a State that has committed an internationally wrongful act in respect of a national of another State, by the State of which that person is a national, with a view to implementing responsibility. As a claim brought within the context of State responsibility it is an inter-State claim, although it may result in the assertion of rights enjoyed by the injured national under international law.

(7) As draft article 1 is definitional by nature it does not cover exceptions. Thus no mention is made of stateless persons and refugees referred to in draft article 8 in this provision. Draft article 3 does, however, make it clear that diplomatic protection may be exercised in respect of such persons.

(8) Diplomatic protection must be exercised by lawful and peaceful means. Several judicial decisions draw a distinction between “diplomatic action” and “judicial proceedings” when

describing the action that may be taken by a State when it resorts to diplomatic protection.²⁷ Draft article 1 retains this distinction but goes further by subsuming judicial proceedings under “other means of peaceful settlement”. “Diplomatic action” covers all the lawful procedures employed by a State to inform another State of its views and concerns, including protest, request for an inquiry or for negotiations aimed at the settlement of disputes. “Other means of peaceful settlement” embraces all forms of lawful dispute settlement, from negotiation, mediation and conciliation to arbitral and judicial dispute settlement. The use of force, prohibited by Article 2, paragraph 4, of the Charter of the United Nations, is not a permissible method for the enforcement of the right of diplomatic protection. Diplomatic protection does not include demarches or other diplomatic action that do not involve the invocation of the legal responsibility of another State, such as informal requests for corrective action.

(9) Diplomatic protection may be exercised through diplomatic action or other means of peaceful settlement. It differs from consular assistance in that it is conducted by the representatives of the State acting in the interest of the State in terms of a rule of general international law, whereas consular assistance is, in most instances, carried out by consular officers, who represent the interests of the individual, acting in terms of the Vienna Convention on Consular Relations. Diplomatic protection is essentially remedial and is designed to remedy an internationally wrongful act that has been committed; while consular assistance is largely preventive and mainly aims at preventing the national from being subjected to an internationally wrongful act.

(10) Although it is in theory possible to distinguish between diplomatic protection and consular assistance, in practice this task is difficult. This is illustrated by the requirement of the exhaustion of local remedies. Clearly there is no need to exhaust local remedies in the case of consular assistance as this assistance takes place before the commission of an internationally wrongful act. Logically, as diplomatic protection arises only after the commission of an internationally wrongful act, it would seem that local remedies must always be exhausted, subject to the exceptions described in draft article 15.

²⁴ *La Grand* case (*Germany v. United States of America*) *I.C.J. Reports 2001*, p. 466 at paras. 76-77.

²⁵ *Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* *I.C.J. Reports, 2004*, p. 12 at para. 40.

²⁶ See Chapter 1 of Part Three titled “Invocation of the Responsibility of a State” (articles. 42-48). Part Three itself is titled “The implementation of the International Responsibility of a State”.

²⁷ *Mavrommatis Palestine Concessions, op. cit.*, *Panevyzis-Saldatis Railways case, op. cit.*, p. 4 at p. 16; *Nottebohm case (Liechtenstein v. Guatemala)*, Second Phase Judgment, *I.C.J. Reports 1955*, p. 4 at p. 24.

(11) In these circumstances draft article 1 makes no attempt to distinguish between diplomatic protection and consular assistance. The draft articles prescribe conditions for the exercise of diplomatic protection which are not applicable to consular assistance. This means that the circumstances of each case must be considered in order to decide whether it involves diplomatic protection or consular assistance.

(12) Draft article 1 makes clear the point, already raised in the general commentary,²⁸ that the present draft articles deal only with the exercise of diplomatic protection by a State and not with the protection afforded to its agent by an international organization.²⁹

(13) Diplomatic protection mainly covers the protection of nationals not engaged in official international business on behalf of the State. These officials are protected by other rules of international law and instruments such as the Vienna Convention on Diplomatic Relations of 1961³⁰ and the Vienna Convention on Consular Relations of 1963.³¹ Where, however, diplomats or consuls are injured in respect of activities outside their functions they are covered by the rules relating to diplomatic protection, as, for instance, in the case of the expropriation without compensation of property privately owned by a diplomatic official in the country to which he or she is accredited.

(14) In most circumstances it is the link of nationality between the State and the injured person that gives rise to the exercise of diplomatic protection, a matter that is dealt with in draft articles 4 and 9. The term "national" in this article covers both natural and legal persons. Later in the draft articles a distinction is drawn between the rules governing natural and legal persons, and, where necessary, the two concepts are treated separately.

Article 2

Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with the present draft articles.

²⁸ See general commentary, para. (3).

²⁹ *Reparation for Injuries, I.C.J. Reports 1949*, p. 174.

³⁰ United Nations, *Treaty Series*, vol. 500, p. 95.

³¹ United Nations, *Treaty Series*, vol. 596, p. 261.

Commentary

(1) Draft article 2 is founded on the notion that diplomatic protection involves an invocation - at the State level - by a State of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a national of the former State. It recognizes that it is the State that initiates and exercises diplomatic protection; that it is the entity in which the right to bring a claim vests. It is without prejudice to the question of whose rights the State seeks to assert in the process, that is its own right or the rights of the injured national on whose behalf it acts. Like article 1³² it is neutral on this subject.

(2) A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a State to extend diplomatic protection to a national, but international law imposes no such obligation. The position was clearly stated by the International Court of Justice in the *Barcelona Traction* case:

"... within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress ... The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case".³³

(3) Today there is support in domestic legislation³⁴ and judicial decisions³⁵ for the view that there is some obligation, however limited, either under national law or international law, on the

³² See commentary to article 1, paras. (3) to (5).

³³ *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*, *Second Phase, Judgment, I.C.J. Reports 1970*, p. 4 at p. 44.

³⁴ See the First Report of the Special Rapporteur on Diplomatic Protection, document A/CN.4/506, paras. 80-87.

³⁵ *Rudolf Hess* case, ILR vol. 90, p. 387; *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs* [2003] EWCA Civ. 1598; *Kaunda v. President of the Republic of South Africa* 2005 (4) South African Law Reports 235 (CC), ILM vol. 44 (2005), p. 173.

State to protect its nationals abroad when they have been subjected to serious violation of their human rights. Consequently, draft article 19 declares that a State entitled to exercise diplomatic protection “should ... give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred” (emphasis added). The discretionary right of a State to exercise diplomatic protection should therefore be read with draft article 19 which recommends to States that they should exercise that right in appropriate cases.

(4) Draft article 2 deals with the right of the State to exercise diplomatic protection. It makes no attempt to describe the corresponding obligation on the respondent State to consider the assertion of diplomatic protection by a State in accordance with the present articles. This is, however, to be implied.

PART TWO

NATIONALITY

CHAPTER I

GENERAL PRINCIPLES

Article 3

Protection by the State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.
2. Notwithstanding paragraph 1, diplomatic protection may be exercised by a State in respect of a person that is not its national in accordance with draft article 8.

Commentary

(1) Whereas draft article 2 affirms the discretionary right of the State to exercise diplomatic protection, draft article 3 asserts the principle that it is the State of nationality of the injured person that is entitled, but not obliged, to exercise diplomatic protection on behalf of such a person. The emphasis in this draft article is on the bond of nationality between State and national which entitles the State to exercise diplomatic protection. This bond differs in the cases of natural persons and legal persons. Consequently separate chapters are devoted to these different types of persons.

- (2) Paragraph 2 refers to the exception contained in draft article 8 which provides for diplomatic protection in the case of stateless persons and refugees.

CHAPTER II

NATURAL PERSONS

Article 4

State of nationality of a natural person

For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States, or in any other manner, not inconsistent with international law.

Commentary

(1) Draft article 4 defines the State of nationality for the purposes of diplomatic protection of natural persons. This definition is premised on two principles: first, that it is for the State of nationality to determine, in accordance with its municipal law, who is to qualify for its nationality; secondly, that there are limits imposed by international law on the grant of nationality. Draft article 4 also provides a non-exhaustive list of connecting factors that usually constitute good grounds for the grant of nationality.

(2) The principle that it is for each State to decide in accordance with its law who are its nationals is backed by both judicial decisions and treaties. In 1923, the Permanent Court of International Justice stated in the *Nationality Decrees in Tunis and Morocco* case that:

“in the present state of international law, questions of nationality are ... in principle within the reserved domain”.³⁶

This principle was confirmed by article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws:

³⁶ *Nationality Decrees issued in Tunis and Morocco (French Zone)*, advisory opinion. P.C.I.J. Reports, Series B, No. 4, 1923, at p. 24.

“It is for each State to determine under its own law who are its nationals.”³⁷

More recently it has been endorsed by the 1997 European Convention on Nationality.³⁸

(3) The connecting factors for the conferment of nationality listed in draft article 4 are illustrative and not exhaustive. Nevertheless they include the connecting factors most commonly employed by States for the grant of nationality: birth (*ius soli*), descent (*ius sanguinis*) and naturalization. Marriage to a national is not included in this list as in most circumstances marriage per se is insufficient for the grant of nationality: it requires in addition a period of residence, following which nationality is conferred by naturalization. Where marriage to a national automatically results in the acquisition by a spouse of the nationality of the other spouse problems may arise in respect of the consistency of such an acquisition of nationality with international law.³⁹ Nationality may also be acquired as a result of the succession of States.⁴⁰

(4) The connecting factors listed in draft article 4 are those most frequently used by States to establish nationality. In some countries, where there are no clear birth records, it may be difficult to prove nationality. In such cases residence could provide proof of nationality although it may not constitute a basis for nationality itself. A State may, however, confer nationality on such persons by means of naturalization.

(5) Draft article 4 does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the *Nottebohm* case,⁴¹ as an additional factor for the

exercise of diplomatic protection, even where the national possesses only one nationality. Despite divergent views as to the interpretation of the case, the Commission took the view that there were certain factors that served to limit *Nottebohm* to the facts of the case in question, particularly the fact that the ties between Mr. Nottebohm and Liechtenstein (the Applicant State) were “extremely tenuous”⁴² compared with the close ties between Mr. Nottebohm and Guatemala (the Respondent State) for a period of over 34 years, which led the International Court of Justice to repeatedly assert that Liechtenstein was “not entitled to extend its protection to Nottebohm vis-à-vis Guatemala”.⁴³ This suggests that the Court did not intend to expound a general rule⁴⁴ applicable to all States but only a relative rule according to which a State in Liechtenstein’s position was required to show a genuine link between itself and Mr. Nottebohm in order to permit it to claim on his behalf against Guatemala with whom he had extremely close ties. Moreover, it is necessary to be mindful of the fact that if the genuine link requirement proposed by *Nottebohm* was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today’s world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection.

(6) The final phrase in draft article 4 stresses that the acquisition of nationality must not be inconsistent with international law. Although a State has the right to decide who are its nationals, this right is not absolute. Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws confirmed this by qualifying the provision that “it is for each State to determine under its own law who are its nationals” with the proviso “[t]his law shall be recognized by other States insofar as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality”.⁴⁵ Today, conventions, particularly in the field of human rights,

⁴² *Ibid.*, p. 25.

⁴³ *Ibid.*, p. 26.

⁴⁴ This interpretation was placed on the *Nottebohm* case by the Italian-United States Conciliation Commission in the *Flegenheimer* case, ILR vol. 25 (1958), p. 148.

⁴⁵ See also article 3 (2) of the 1997 European Convention on Nationality.

³⁷ League of Nations, *Treaty Series*, vol. 179, p. 89.

³⁸ United Nations, *Treaty Series*, vol. 2135, p. 213, article 3.

³⁹ See, e.g., article 9 (1) of the Convention on the Elimination of All Forms of Discrimination against Women, United Nations, *Treaty Series*, vol. 1249, p. 13, and article 1 of the Convention on the Nationality of Married Women, *ibid.*, vol. 309, p. 65, which prohibit the acquisition of nationality in such circumstances. See para. (6) below.

⁴⁰ See Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, *Yearbook ... 1999*, vol. II (Part Two), para. 47.

⁴¹ In the *Nottebohm* case the International Court of Justice stated: “According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual’s connection which has made him its national”; *op. cit.* at p. 23.

require States to comply with international standards in the granting of nationality.⁴⁶ For example, article 9, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women provides that:

“States parties shall grant women equal rights to men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.”⁴⁷

(7) Draft article 4 recognizes that a State against which a claim is made on behalf of an injured foreign national may challenge the nationality of such a person where his or her nationality has been acquired contrary to international law. Draft article 4 requires that nationality should be acquired in a manner “not inconsistent with international law”. The double negative emphasizes the fact that the burden of proving that nationality has been acquired in violation of international law is upon the State challenging the nationality of the injured person. That the burden of proof falls upon the State challenging nationality follows from the recognition that the State conferring nationality must be given a “margin of appreciation” in deciding upon the conferment of nationality⁴⁸ and that there is a presumption in favour of the validity of a State’s conferment of nationality.⁴⁹

(8) Where a person acquires nationality involuntarily in a manner inconsistent with international law, as where a woman automatically acquires the nationality of her husband on marriage, that person should in principle be allowed to be protected diplomatically by her or his

⁴⁶ This was stressed by the Inter-American Court of Human Rights in its advisory opinion on *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Advisory Opinion OC-4/84 of 19 January 1984, Series A, No. 4, in which it held that it was necessary to reconcile the principle that the conferment of nationality falls within the domestic jurisdiction of a State “with the further principle that international law imposes certain limits on the State’s power, which limits are linked to the demands imposed by the international system for the protection of human rights”, at para. 35. See also ILR vol. 79, p. 296.

⁴⁷ See also article 20 of the American Convention on Human Rights, United Nations, *Treaty Series*, vol. 1144, p. 123; article 5 (d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, United Nations, *Treaty Series*, vol. 660, p. 195; and article 1 of the Convention on the Nationality of Married Women.

⁴⁸ See the advisory opinion of the Inter-American Court of Human Rights in the *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, paras. 62-63.

⁴⁹ R. Y. Jennings and A. Watts (eds.), *Oppenheim’s International Law*, 9th ed. (London and New York: Longman, 1992), p. 856.

former State of nationality.⁵⁰ If, however, the acquisition of nationality in such circumstances results in the loss of the individual’s former nationality, equitable considerations require that the new State of nationality be entitled to exercise diplomatic protection. This would accord with the ruling of the International Court of Justice in its 1971 Opinion on *Namibia*⁵¹ that individual rights should not be affected by an illegal act on the part of the State with which the individual is associated.

Article 5

Continuous nationality of a natural person

1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.
2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.
3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury caused when that person was a national of the former State of nationality and not of the present State of nationality.
4. A State is no longer entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the date of the official presentation of the claim.

⁵⁰ See article 2 of the Convention on the Nationality of Married Women.

⁵¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 at p. 56, para. 125.

Commentary

(1) Although the continuous nationality rule is well established,⁵² it has been subjected to considerable criticism⁵³ on the ground that it may produce great hardship in cases in which an individual changes his or her nationality for reasons unrelated to the bringing of a diplomatic claim. Suggestions that it be abandoned have been resisted out of fear that this might be abused and lead to “nationality shopping” for the purpose of diplomatic protection.⁵⁴ For this reason draft article 5 retains the continuous nationality rule but allows exceptions to accommodate cases in which unfairness might otherwise result.

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a person who was its national both at the time of the injury and at the date of the official presentation of the claim. State practice and doctrine are unclear on whether the national must retain the nationality of the claimant State between these two dates, largely because in practice this issue seldom arises.⁵⁵ For these reasons the Institute of International Law in 1965 left open the question whether continuity of nationality was required between the two dates.⁵⁶ It is, however, incongruous to require that the same nationality be shown both at the date of injury and at the date of the official presentation of the claim without requiring it to continue between these two dates. Thus, in an exercise in progressive development of the law, the rule has been drafted to require that the injured person be a national continuously from the date of the injury to the date of the official presentation of the claim. Given the difficulty of providing evidence of continuity, it is presumed if the same nationality existed at both these dates. This presumption is of course rebuttable.

⁵² See, for instance, the decision of the United States, International Claims Commission 1951-1954 in the *Kren* claim, ILR vol. 20, p. 233 at p. 234.

⁵³ See the comment of Judge Sir Gerald Fitzmaurice in the *Barcelona Traction* case, at pp. 101-102; see, too, E. Wytler, *La Règle Dite de la Continuité de la Nationalité dans le Contentieux International* (Paris: PUF, 1990).

⁵⁴ See the statement of Umpire Parker in *Administrative Decision No. V (United States v. Germany)*, UNRIAA vol. VII, p. 119 at p. 141 (1925): “Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal for their claims.”

⁵⁵ H. Briggs, “La protection diplomatique des individus en droit international: La nationalité des Réclamations”, *Annuaire de l’Institut de Droit International*, vol. 51 (1965-I), p. 5 at pp. 72-73.

⁵⁶ Warsaw Session, 1965, *Annuaire de l’Institut de Droit International*, vol. 51 (1965-II), pp. 260-262.

(3) The first requirement is that the injured national be a national of the claimant State at the date of the injury. The date of the injury need not be a precise date but could extend over a period of time if the injury consists of several acts or a continuing act committed over a period of time.

(4) The second temporal requirement contained in paragraph 1 is the date of the official presentation of the claim. There is some disagreement in judicial opinion over the date until which the continuous nationality of the claim is required. This uncertainty stems largely from the fact that conventions establishing mixed claims commissions have employed different language to identify the date of the claim.⁵⁷ The phrase “presentation of the claim” is that most frequently used in treaties, judicial decisions and doctrine to indicate the outer date or *dies ad quem* required for the exercise of diplomatic protection. The word “official” has been added to this formulation to indicate that the date of the presentation of the claim is that on which the first official or formal demand is made by the State exercising diplomatic protection in contrast to informal diplomatic contacts and enquiries on this subject.

(5) The *dies ad quem* for the exercise of diplomatic protection is the date of the official presentation of the claim. There is, however, support for the view that if the individual should change his nationality between this date and the making of an award or a judgment he ceases to be a national for the purposes of diplomatic protection.⁵⁸ In 2003 in *Loewen Group Inc. v. USA*⁵⁹ an ICSID arbitral tribunal held that “there must be continuous material identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through to the date of the resolution of the claim, which date is known as the *dies ad quem*”. On the facts, the Loewen case dealt with the situation in which the person sought to be protected changed nationality after the presentation of the claim to that of the respondent State, in which circumstances a claim for diplomatic protection can clearly not be upheld, as is made clear in draft article 5, paragraph (4). However, the Commission was not prepared to follow the Loewen tribunal in adopting a blanket

⁵⁷ See the dictum of Umpire Parker in *Administrative Decisions No. V (United States v. Germany)*, UNRIAA vol. VII, p. 119 at p. 143.

⁵⁸ R. Y. Jennings and A. Watts, *Oppenheim’s International Law, op. cit.* at p. 512. *Eschautzier* claim (*Great Britain v. Mexico*) UNRIAA vol. V, p. 207.

⁵⁹ ICSID Reports, vol. 7 (2005), p. 442 at para. 225.

rule that nationality must be maintained to the date of resolution of the claim.⁶⁰ Such a rule could be contrary to the interests of the individual, as many years may pass between the presentation of the claim and its final resolution and it could be unfair to penalize the individual for changing nationality, through marriage or naturalization, during this period. Instead, preference is given to the date of the official presentation of the claim as the *dies ad quem*. This date is significant as it is the date on which the State of nationality shows its clear intention to exercise diplomatic protection – a fact that was hitherto uncertain. Moreover, it is the date on which the admissibility of the claim must be judged. This determination could not be left to the later date of the resolution of the claim, the making of the award.

(6) The word “claim” in paragraphs 1, 2 and 4 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form of reparation should take. This matter is dealt with more fully in article 43 of the articles on the Responsibility of States for Internationally Wrongful Acts of 2001 and the commentary thereto.

177) While the Commission decided that it was necessary to retain the continuous nationality rule it agreed that there was a need for exceptions to this rule. Paragraph 2 accordingly provides that a State may exercise diplomatic protection in respect of a person who was a national at the date of the official presentation of the claim but not at the time of the injury provided that three conditions are met: first, the person seeking diplomatic protection had the nationality of a predecessor State or has lost his or her previous nationality; secondly, that person has acquired the nationality of another State for a reason unrelated to the bringing of the claim; and thirdly, the acquisition of the new nationality has taken place in a manner not inconsistent with international law.

(8) Paragraph 2 is concerned with cases in which the injured person has lost his or her previous nationality, either voluntarily or involuntarily. In the case of the succession of States, and, possibly, adoption and marriage when a change of nationality is compulsory, nationality

⁶⁰ For criticism of the *Loewen* case, see J. Paulsson, *Denial of Justice in International Law* (New York: Cambridge University Press, 2005), pp. 183-4.

will be lost involuntarily. In the case of other changes of nationality the element of will is not so clear. For reasons of this kind, paragraph 2 does not require the loss of nationality to be involuntary.

(9) In the case of the succession of States this paragraph is limited to the question of the continuity of nationality for purposes of diplomatic protection. It makes no attempt to regulate succession to nationality, a subject that is covered by the Commission's articles on Nationality of Natural Persons in relation to the Succession of States.

(10) As stated above,⁶¹ fear that a person may deliberately change his or her nationality in order to acquire a State of nationality more willing and able to bring a diplomatic claim on his or her behalf is the basis for the rule of continuous nationality. The second condition contained in paragraph 2 addresses this fear by providing that the person in respect of whom diplomatic protection is exercised must have acquired his or her new nationality for a reason unrelated to the bringing of the claim. This condition is designed to limit exceptions to the continuous nationality rule mainly to cases involving compulsory imposition of nationality, such as those in which the person has acquired a new nationality as a necessary consequence of factors such as marriage, adoption or the succession of States. The exception in paragraph 2 will not apply where the person has acquired a new nationality for commercial reasons connected with the bringing of the claim.

(11) The third condition that must be met for the rule of continuous nationality not to apply is that the new nationality has been acquired in a manner not inconsistent with international law. This condition must be read in conjunction with draft article 4.

(12) Paragraph 3 adds another safeguard against abuse of the lifting of the continuous nationality rule. Diplomatic protection may not be exercised by the new State of nationality against a former State of nationality of the injured person in respect of an injury incurred when that person was a national of the former State of nationality and not the present State of nationality.

⁶¹ See para. (1) of commentary to the present draft article.

character.⁶⁶ Although considerations of equity might seem to endorse such a position, it has on occasion been repudiated.⁶⁷ The inconclusiveness of the authorities make it unwise to propose a rule on this subject.

Article 6

Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.
2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Commentary

(1) Dual or multiple nationality is a fact of international life. An individual may acquire more than one nationality as a result of the parallel operation of the principles of *jus soli* and *jus sanguinis* or of the conferment of nationality by naturalization or any other manner as envisaged in draft article 4, which does not result in the renunciation of a prior nationality. Although the laws of some States do not permit their nationals to be nationals of other States, international law does not prohibit dual or multiple nationality: indeed such nationality was given approval by article 3 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, which provides:

“... a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.”

It is therefore necessary to address the question of the exercise of diplomatic protection by a State of nationality in respect of a dual or multiple national. Draft article 6 is limited to the exercise of diplomatic protection by one or all of the States of which the injured person is a

⁶⁶ E.M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (New York: The Banks Law Publishing Co., 1915), p. 628; *Straub claim*.

⁶⁷ *Eschtaizier claim (Great Britain v. Mexico)*, at p. 209.

(13) Paragraph 4 provides that if a person in respect of whom a claim is brought becomes a national of the respondent State after the presentation of the claim, the applicant State loses its right to proceed with the claim as in such a case the respondent State would in effect be required to pay compensation to its own national. This was the situation in *Loewen Group Inc v. USA* and a number of other cases⁶² in which a change in nationality after presentation of the claim was held to preclude its continuation. In practice, in most cases of this kind, the applicant State will withdraw its claim, despite the fact that in terms of the fiction proclaimed in *Mavrommatis* the claim is that of the State and the purpose of the claim is to seek reparation for injury caused to itself through the person of its national.⁶³ The applicant State may likewise decide to withdraw its claim when the injured person becomes a national of a third State after the presentation of the claim. If the injured person has in bad faith retained the nationality of the claimant State until the date of presentation and thereafter acquired the nationality of a third State, equity would require that the claim be terminated, but the burden of proof will be upon the respondent State.

(14) Draft article 5 leaves open the question whether the heirs of an injured national, who dies as a consequence of the injury or thereafter, but before the official presentation of the claim, may be protected by the State of nationality of the injured person if he or she has the nationality of another State. Judicial decisions on this subject, while inconclusive as most deal with the interpretation of particular treaties, tend to support the position that no claim may be brought by the State of nationality of the deceased person if the heir has the nationality of a third State.⁶⁴

Where the heir has the nationality of the respondent State it is clear that no such claim may be brought.⁶⁵ There is some support for the view that where the injured national dies before the official presentation of the claim, the claim may be continued because it has assumed a national

⁶² *Ebenezer Barston* in G.H. Hackworth, *Digest of International Law*, vol. 5 (1943), p. 805; *Executors of F. Lederer* in *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, vol. 3, p. 763; *Hawaiian Claims* in F.K. Nielson, *America and British Claims Arbitration* (1926), p. 30; *Chopin in French and American Claims Commission, 1880-1884*, vol. 60, Records of Claims; *Gribble*, Report of Robert S. Hale Esq. [1873, Part II, vol. III], U.S. Foreign Relations 14 (1874).

⁶³ See commentary to art. 1, para. (3).

⁶⁴ *Eschtaizier claim*, UNRIAA vol. IV, p. 207; *Kren claim*; *Gleadowell claim (Great Britain v. Mexico)* UNRIAA vol. V, p. 44; *Sed contra, Straub claim*, ILR vol. 20, p. 228.

⁶⁵ *Stevenson claim (Great Britain v. Venezuela)*, 9 UNRIAA, p. 494; *Bogovic claim*, ILR vol. 21, p. 156; *Executors of F. Lederer (deceased) v. German Government*.

national against a State of which that person is not a national. The exercise of diplomatic protection by one State of nationality against another State of nationality is covered in draft article 7.

(2) Paragraph 1 allows a State of nationality to exercise diplomatic protection in respect of its national even where that person is a national of one or more other States. Like draft article 4, it does not require a genuine or effective link between the national and the State exercising diplomatic protection.

(3) Although there is support for the requirement of a genuine or effective link between the State of nationality and a dual or multiple national in the case of the exercise of diplomatic protection against a State of which the injured person is not a national, in both arbitral decisions⁶⁸ and codification endeavours,⁶⁹ the weight of authority does not require such a condition. In the *Salem* case an arbitral tribunal held that Egypt could not raise the fact that the injured individual had effective Persian nationality against a claim from the United States, another State of nationality. It stated that:

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“the rule of International Law [is] that in a case of dual nationality a third Power is not entitled to contest the claim of one of the two powers whose national is interested in the case by referring to the nationality of the other power.”⁷⁰

This rule has been followed in other cases⁷¹ and has more recently been upheld by the Iran-United States Claim Tribunal.⁷² The decision not to require a genuine or effective link in

⁶⁸ See the decision of the Yugoslav-Hungarian Mixed Arbitral Tribunal in the *de Born* case, *Annual Digest of Public International Law Cases*, vol. 3, 1925-1926, case No. 205 of 12 July 1926.

⁶⁹ See article 5 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws; resolution on “*Le Caractère national d’une réclamation internationale présentée par un Etat en raison d’un dommage subi par un individu*” adopted by the Institute of International Law at its Warsaw Session in 1965: *Résolutions de l’Institut de Droit International*, 1957-1991 (1992), p. 56 (art. 4 (b)); 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, article 23 (3), in L.B. Sohn and R.R. Baxter, “Responsibility of States for Injuries to the Economic Interests of Aliens”, *AJIL*, vol. 55 (1961), p. 548; Garcia Amador, *Third Report on State Responsibility*, in *Yearbook ... 1958*, vol. II, p. 61, document A/CN.4/111 (art. 21 (3)).

⁷⁰ Award of 8 June 1932, UNRIAA vol. II, p. 1165 at p. 1188.

⁷¹ See the decisions of the Italian-United States Conciliation Commission in the *Mergé* claim of 10 June 1955, *ILR* vol. 22 (1955), p. 443 at p. 456; the *Verzano* claim, decision No. 172 of 17 May 1957, *ILR* vol. 24 (1957), pp. 464-465; and the *Stankovic* claim of 26 July 1963, *ILR* vol. 40 (1963), p. 153 at p. 155.

⁷² See *Dallat v. Iran*, Iran-U.S. C.T.R., vol. 3 (1983), p. 23.

such circumstances accords with reason. Unlike the situation in which one State of nationality claims from another State of nationality in respect of a dual national, there is no conflict over nationality where one State of nationality seeks to protect a dual national against a third State.

(4) In principle, there is no reason why two States of nationality may not jointly exercise a right that attaches to each State of nationality. Paragraph 2 therefore recognizes that two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national against a State of which that person is not a national. While the responsible State cannot object to such a claim made by two or more States acting simultaneously and in concert, it may raise objections where the claimant States bring separate claims either before the same forum or different forums or where one State of nationality brings a claim after another State of nationality has already received satisfaction in respect to that claim. Problems may also arise where one State of nationality waives the right to diplomatic protection while another State of nationality continues with its claim. It is difficult to codify rules governing varied situations of this kind. They should be dealt with in accordance with the general principles of law recognized by international and national tribunals governing the satisfaction of joint claims.

Article 7

Multiple nationality and claim against a State of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.

Commentary

(1) Draft article 7 deals with the exercise of diplomatic protection by one State of nationality against another State of nationality. Whereas draft article 6, dealing with a claim in respect of a dual or multiple national against a State of which the injured person is not a national, does not require an effective link between claimant State and national, draft article 7 requires the claimant State to show that its nationality is predominant, both at the time of the injury and at the date of the official presentation of the claim.

(2) In the past there was strong support for the rule of non-responsibility according to which one State of nationality might not bring a claim in respect of a dual national against another State of nationality. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws declares in article 4 that:

“A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.”⁷³

Later codification proposals adopted a similar approach⁷⁴ and there was also support for this position in arbitral awards.⁷⁵ In 1949 in its advisory opinion in the case concerning *Reparation for Injuries*, the International Court of Justice described the practice of States not to protect their nationals against another State of nationality as “the ordinary practice”.⁷⁶

(3) Even before 1930 there was, however, support in arbitral decisions for another position, namely that the State of dominant or effective nationality might bring proceedings in respect of a national against another State of nationality.⁷⁷ This jurisprudence was relied on by the

International Court of Justice in another context in the *Nottebohm* case⁷⁸ and was given explicit approval by Italian-United States Conciliation Commission in the *Mergé* claim in 1955. Here the Conciliation Commission stated that:

“The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty.”⁷⁹

In its opinion, the Conciliation Commission held that the principle of effective nationality and the concept of dominant nationality were simply two sides of the same coin. The rule thus adopted was applied by the Conciliation Commission in over 50 subsequent cases concerning dual nationals.⁸⁰ Relying on these cases, the Iran-United States Claims Tribunal has applied the principle of dominant and effective nationality in a number of cases.⁸¹ Codification proposals have given approval to this approach. In his Third Report on State Responsibility to the Commission, Garcia Amador proposed that:

⁷³ *I.C.J. Reports* 1955, pp. 22-23. *Nottebohm* was not concerned with dual nationality but the Court found support for its finding that *Nottebohm* had no effective link with Liechtenstein in cases dealing with dual nationality. See also the judicial decisions referred to in footnote 65.

⁷⁴ ILR, vol. 22 (1955), p. 443 at p. 455 (para. V.5). See also *de Leon* case Nos. 218 and 227 of 15 May 1962 and 8 April 1963, UNRIAA, vol. XVI, p. 239 at p. 247.

⁷⁵ See, for example, *Spaulding* claim, decision No. 149, ILR, vol. 24 (1957), p. 452; *Zangrilli* claim of 21 December 1956, ILR, vol. 24 (1957), p. 454; *Cesira* claim, decision No. 165 of 28 February 1957, ILR, vol. 24 (1956), p. 454; *Piccini* claim, decision No. 173 of 17 May 1957, ILR, vol. 24 (1957), p. 454; *Salvani Estate* claim, decision No. 169 of 9 May 1957, ILR, vol. 24 (1957), p. 455; *Ruspoli* claim, decision No. 170 of 15 May 1957, ILR, vol. 24 (1957), p. 457; *Ganapini* claim, decision No. 196 of 30 April 1959, ILR, vol. 30 (1959), p. 366; *Turri* claim, decision No. 209 of 14 June 1960, ILR, vol. 30 (1960), p. 371; *Grantero* claim, decision No. 186 of 20 January 1959, ILR, vol. 30 (1959), p. 451; *Di Ciccio* claim, decision No. 226 of 9 November 1962, ILR, vol. 40 (1962), p. 148.

⁷⁶ See, in particular, *Espahanian v. Bank Tejarat, Iran-U.S.C.T.R.*, vol. 2 (1983), p. 166; case No. A/18, *Iran-U.S.C.T.R.*, vol. 5 (1984), p. 251; *Ataollah Golpira v. Government of the Islamic Republic of Iran, Iran-U.S.C.T.R.*, vol. 2 (1983), p. 174 and ILR, vol. 72, p. 493.

⁷⁷ See, too, art. 16 (a) of the 1929 Harvard Draft Convention of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, AJIL, vol. 23, Special Supplement (1929), pp. 133-139.

⁷⁸ See art. 23 (5) of the 1960 Harvard Draft Convention reproduced in AJIL, vol. 55 on the International Responsibility of States for Injuries to Aliens, reproduced in AJIL, vol. 55 (1961), p. 548; article 4 (a) of the resolution on “*Le Caractère national d'une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu*” adopted by the Institute of International Law at its 1965 Warsaw Session.

⁷⁹ See *Alexander* case (1898) 3 Moore, *International Arbitrations*, p. 2529 (United States-British Claims Commission); *Oldenbourg* case, Decisions and Opinions of Commissioners, 5 October 1929 to 15 February 1930, p. 97. *Honey* case, Further Decisions and Opinions of the Commissioners, subsequent to 15 February 1930, p. 13 (British-Mexican Claims Commission), cited in Z.R. Rodé “Dual Nationals and the Doctrine of Dominant Nationality”, AJIL, vol. 53 (1959), p. 139 at pp. 140-141; *Adams and Blackmore* case, decision No. 64 of 3 July 1931, UNRIAA vol. V, pp. 216-217 (British-Mexican Claims Commission).

⁸⁰ *I.C.J. Reports* 1949, p. 186.

⁸¹ *James Louis Drummond* case 2 Knapp, P.C. Rep., p. 295, 12 Eng. Rep., p. 492; *Brignone, Milani, Stevenson and Mathison* cases (British-Venezuelan Mixed Claim Commission) reported in Ralston, *Venezuelan Arbitrations of 1903*, pp. 710, 754-761, 438-455 and 429-438 respectively; *Carmearo* case (Permanent Court of Arbitration, 1912) reported in Scott, *The Hague Court Reports*, vol. 1, at p. 284; *Hein* case of 26 April and 10 May 1922 (Anglo-German Mixed Arbitral Tribunal). *Annual Digest of Public International Law* cases, vol. 1, 1919-1922, case No. 148, p. 216; *Blumenthal* case (French-German Mixed Tribunal), *Recueil des Décisions des Tribunaux Mixtes*, vol. 3 (1924), p. 616; *de Monfort* case of 10 July 1926 (French-German Mixed Tribunal), *Annual Digest of Public International Law Cases*, vol. 3, 1925-1926, case No. 206, p. 279; *Pinson* case (French-Mexican Mixed Claims Commission), *Annual Digest of Public International Law Cases*, vol. 4, 1927-1928, case Nos. 194 and 195 of 19 October 1928, pp. 297-301; *Tellech* case of 25 May 1928 (United States-Austria and Hungary Tripartite Claim Commission), 6 UNRIAA, vol. VI, p. 248.

“In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal or other ties.”⁸²

A similar view was advanced by Orrego Vicuña in his report to the International Law Association in 2000.⁸³

(4) Even though the two concepts are different the authorities use the term “effective” or “dominant” without distinction to describe the required link between the claimant State and its national in situations in which one State of nationality brings a claim against another State of nationality. Draft article 7 does not use either of these words to describe the required link but instead uses the term “predominant” as it conveys the element of relativity and indicates that the individual has stronger ties with one State rather than another. A tribunal considering this question is required to balance the strengths of competing nationalities and the essence of this exercise is more accurately captured by the term “predominant” when applied to nationality than either “effective” or “dominant”. It is moreover the term used by the Italian-United States Conciliation Commission in the *Mergé* claim which may be seen as the starting point for the development of the present customary rule.⁸⁴

(5) No attempt is made to describe the factors to be taken into account in deciding which nationality is predominant. The authorities indicate that such factors include habitual residence, the amount of time spent in each country of nationality, date of naturalization (i.e., the length of the period spent as a national of the protecting State before the claim arose); place, curricula and language of education; employment and financial interests; place of family life; family ties in each country; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other State of nationality; possession and use of passport of the other State; and military service. None of these factors is decisive and the weight attributed to each factor will vary according to the circumstances of each case.

⁸² Document A/CN.4/111, in *Yearbook ... 1958*, vol. II, p. 61, draft art. 21, para. 4.

⁸³ “Interim Report on the ‘The Changing Law of Nationality of Claims’” in *International Law Association (ILA) Report of the 69th Conference* (2000), pp. 646 (para. 11); confirmed in the final report adopted at the 2006 ILA Conference in Toronto.

⁸⁴ ILR, vol. 22 (1955), p. 455.

(6) Draft article 7 is framed in negative language: “A State of nationality may *not* exercise diplomatic protection ... *unless*” its nationality is predominant. This is intended to show that the circumstances envisaged by draft article 7 are to be regarded as exceptional. This also makes it clear that the burden of proof is on the claimant State to prove that its nationality is predominant.

(7) The main objection to a claim brought by one State of nationality against another State of nationality is that this might permit a State, with which the individual has established a predominant nationality subsequent to an injury inflicted by the other State of nationality, to bring a claim against that State. This objection is overcome by the requirement that the nationality of the claimant State must be predominant both at the date of the injury and at the date of the official presentation of the claim. Although this requirement echoes the principle affirmed in draft article 5, paragraph 1, on the subject of continuous nationality, it is not necessary in this case to prove continuity of predominant nationality between these two dates. The phrases “at the date of injury” and “at the date of the official presentation of the claim” are explained in the commentary on draft article 5. The exception to the continuous nationality rule contained in draft article 5, paragraph 2, is not applicable here as the injured person contemplated in draft article 7 will not have lost his or her other nationality.

Article 8

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

Commentary

(1) The general rule was that a State might exercise diplomatic protection on behalf of its nationals only. In 1931 the United States-Mexican Claims Commission in *Dickson Car Wheel Company v. United Mexican States* held that a stateless person could not be the beneficiary of diplomatic protection when it stated:

“A State ... does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury.”⁸⁵

This dictum no longer reflects the accurate position of international law for both stateless persons and refugees. Contemporary international law reflects a concern for the status of both categories of persons. This is evidenced by such conventions as the Convention on the Reduction of Statelessness of 1961⁸⁶ and the Convention Relating to the Status of Refugees of 1951.⁸⁷

(2) Draft article 8, an exercise in progressive development of the law,⁸⁸ departs from the traditional rule that only nationals may benefit from the exercise of diplomatic protection and allows a State to exercise diplomatic protection in respect of a non-national where that person is either a stateless person or a refugee. Although draft article 8 is to be seen within the framework of the rules governing statelessness and refugees, it has made no attempt to pronounce on the status of such persons. It is concerned only with the issue of the exercise of the diplomatic protection of such persons.

(3) Paragraph 1 deals with the diplomatic protection of stateless persons. It gives no definition of stateless persons. Such a definition is, however, to be found in the Convention Relating to the Status of Stateless Persons of 1954⁸⁹ which defines a stateless person “as a person

⁸⁵ UNRIAA, vol. IV, p. 669 at p. 678.

⁸⁶ United Nations, *Treaty Series*, vol. 989, p. 175.

⁸⁷ *Ibid.*, vol. 189, p. 150.

⁸⁸ In *Al Rawi & Others, R (on the Application of) v. Secretary of State for Foreign Affairs and Another* [2006] EWHC (Admin) an English court held that draft article 8 was to be considered *lex ferenda* and “not yet part of international law” (para. 63).

⁸⁹ United Nations, *Treaty Series*, vol. 360, p. 117.

who is not considered as a national by any State under the operation of its law.”⁹⁰ This definition can no doubt be considered as having acquired a customary nature. A State may exercise diplomatic protection in respect of such a person, regardless of how he or she became stateless, provided that he or she was lawfully and habitually resident in that State both at the time of injury and at the date of the official presentation of the claim. Habitual residence in this context is intended to convey continuous residence.

(4) The requirement of both lawful residence and habitual residence sets a high threshold.⁹¹ Although this threshold is high and leads to a lack of effective protection for some individuals, the combination of lawful residence and habitual residence is justified in the case of an exceptional measure introduced *de lege ferenda*.

(5) The temporal requirements for the bringing of a claim are contained in paragraph 1. The stateless person must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim.

(6) Paragraph 2 deals with the diplomatic protection of refugees by their State of residence. Diplomatic protection by the State of residence is particularly important in the case of refugees as they are “unable or unwilling to avail [themselves] of the protection of [the State of Nationality]”⁹² and, if they do so, run the risk of losing refugee status in the State of residence. Paragraph 2 mirrors the language of paragraph 1. Important differences between stateless persons and refugees, as evidenced by paragraph 3, explain why a separate paragraph has been allocated to each category.

(7) Lawful residence and habitual residence are required as preconditions for the exercise of diplomatic protection of refugees, as with stateless persons,⁹³ despite the fact that article 28 of the Convention Relating to the Status of Refugees sets the lower threshold of “lawfully

⁹⁰ Article 1.

⁹¹ The terms “lawful and habitual” residence are based on the 1997 European Convention on Nationality, article 6 (4) (g), where they are used in connection with the acquisition of nationality. See, too, the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, which includes for the purpose of protection under this Convention a “stateless person having his habitual residence in that State”, article 21 (3) (c).

⁹² Article 1 (A) (2) of the Convention Relating to the Status of Refugees.

⁹³ Habitual residence in this context connotes continuous residence.

staying”⁹⁴ for Contracting States in the issuing of travel documents to refugees. Two factors justify this position. First, the fact that the issue of travel documents, in terms of the Convention, does not in any way entitle the holder to diplomatic protection.⁹⁵ Secondly, the necessity to set a high threshold when introducing an exception to a traditional rule, *de lege ferenda*.⁹⁶

(8) The term “refugee” in paragraph 2 is not limited to refugees as defined in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol but is intended to cover, in addition, persons who do not strictly conform to this definition. The Commission considered using the term “recognized refugees”, which appears in the 1997 European Convention on Nationality,⁹⁷ which would have extended the concept to include refugees recognized by regional instruments, such as the 1969 O.A.U. Convention Governing the Specific Aspects of Refugee Problems in Africa,⁹⁸ widely seen as the model for the international protection of refugees,⁹⁹ and the 1984 Cartagena Declaration on the International Protection of Refugees in Central America, approved by the General Assembly of the O.A.S. in 1985.¹⁰⁰ However, the Commission preferred to set no limit to the term in order to allow a State to extend diplomatic protection to any person that it recognized and treated as a refugee.¹⁰¹ Such recognition must, however, be based on “internationally accepted standards” relating to the recognition of refugees. This term emphasizes that the standards expounded in different conventions and other international instruments are to apply as well as the legal rules contained in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

⁹⁴ The *travaux préparatoires* of the Convention make it clear that “stay” means less than habitual residence.

⁹⁵ See para. 16 of the Schedule to the Convention.

⁹⁶ See para. (4) of the commentary to this draft article.

⁹⁷ Article 6 (4) (g).

⁹⁸ United Nations, *Treaty Series*, vol. 1001, p. 45. This Convention extends the definition of refugee to include “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”.

⁹⁹ Note on International Protection submitted by the United Nations High Commissioner for Refugees, document A/AC.96/830, p. 17, para. 35.

¹⁰⁰ O.A.S. General Assembly, XV Regular Session (1985).

¹⁰¹ For instance, it may be possible for a State to exercise diplomatic protection on behalf of a person granted political asylum in terms of the 1954 Caracas Convention on Territorial Asylum, United Nations, *Treaty Series*, vol. 1438, p. 129.

(9) The temporal requirements for the bringing of a claim are repeated in paragraph 2. The refugee must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim.

(10) Paragraph 3 provides that the State of refuge may not exercise diplomatic protection in respect of a refugee against the State of nationality of the refugee. To have permitted this would have contradicted the basic approach of the present draft articles, according to which nationality is the predominant basis for the exercise of diplomatic protection. The paragraph is also justified on policy grounds. Most refugees have serious complaints about their treatment at the hand of their State of nationality, from which they have fled to avoid persecution. To allow diplomatic protection in such cases would be to open the floodgates for international litigation. Moreover, the fear of demands for such action by refugees might deter States from accepting refugees.

(11) Both paragraphs 1 and 2 provide that a State of refuge “*may* exercise diplomatic protection”. This emphasizes the discretionary nature of the right. A State has a discretion under international law whether to exercise diplomatic protection in respect of a national.¹⁰² *A fortiori* it has a discretion whether to extend such protection to a stateless person or refugee.

(12) Draft article 8 is concerned only with the diplomatic protection of stateless persons and refugees. It is *not* concerned with the conferment of nationality upon such persons. The exercise of diplomatic protection in respect of a stateless person or refugee cannot and should not be seen as giving rise to a legitimate expectation of the conferment of nationality. Draft article 28 of the 1951 Convention Relating to the Status of Refugees, read with paragraph 15 of its Schedule, makes it clear that the issue of a travel document to a refugee does not affect the nationality of the holder. *A fortiori* the exercise of diplomatic protection in respect of a refugee, or a stateless person, should in no way be construed as affecting the nationality of the protected person.

¹⁰² See draft articles 2 and 19 and commentaries thereto.

CHAPTER III

LEGAL PERSONS

Article 9

State of nationality of a corporation

For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

Commentary

(1) Draft article 9 recognizes that diplomatic protection may be extended to corporations. The first part of the article follows the same formula adopted in draft article 4 on the subject of the diplomatic protection of natural persons. The provision makes it clear that in order to qualify as the State of nationality for the purposes of diplomatic protection of a corporation certain conditions must be met, as is the case with the diplomatic protection of natural persons.

(2) State practice is largely concerned with the diplomatic protection of corporations, that is profit-making enterprises with limited liability whose capital is generally represented by shares, and not other legal persons. This explains why the present article, and those that follow, are concerned with the diplomatic protection of corporations and shareholders in corporations. Draft article 13 is devoted to the position of legal persons other than corporations.

(3) As with natural persons, the granting of nationality to a corporation is “within the reserved domain” of a State.¹⁰³ As the International Court of Justice stated in the *Barcelona Tracion* case:

“... international law has to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires

that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.”¹⁰⁴

Although international law has no rules of its own for the creation, management and dissolution of a corporation or for the rights of shareholders and their relationship with the corporation, and must consequently turn to municipal law for guidance on this subject, it is for international law to determine the circumstances in which a State may exercise diplomatic protection on behalf of a corporation or its shareholders. This matter was addressed by the International Court of Justice in *Barcelona Tracion* when it stated that international law “attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office”.¹⁰⁵ Here the Court set two conditions for the acquisition of nationality by a corporation for the purposes of diplomatic protection:

incorporation and the presence of the registered office of the company in the State of incorporation. As the laws of most States require a company incorporated under its laws to maintain a registered office in its territory, even if this is a mere fiction, incorporation is the most important criterion for the purposes of diplomatic protection. The Court in *Barcelona Tracion* was not, however, satisfied with incorporation as the sole criterion for the exercise of diplomatic protection. Although it did not reiterate the requirement of a “genuine connection” as applied in the *Nottebohm* case,¹⁰⁶ and acknowledged that “in the particular field of the diplomatic protection of corporate entities, no absolute test of the ‘genuine connection’ has found general acceptance,”¹⁰⁷ it suggested that in addition to incorporation and a registered office, there was a need for some “permanent and close connection” between the State exercising diplomatic protection and the corporation.¹⁰⁸ On the facts of this case the Court found such a connection in the incorporation of the company in Canada for over 50 years, the maintenance of its registered office, accounts and share register there, the holding of board meetings there for many years, its listing in the records of the Canadian tax authorities and the general recognition by other States

¹⁰⁴ *Barcelona Tracion* case, at pp. 33-34, para. 38.

¹⁰⁵ *Ibid.*, p. 42, para. 70.

¹⁰⁶ *Ibid.*, p. 42, para. 70. *Nottebohm* case.

¹⁰⁷ *I.C.J. Reports 1970*, p. 42, para. 70.

¹⁰⁸ *Ibid.*, p. 42, para. 71.

¹⁰³ *Nationality Decrees issued in Tunis and Morocco* case.

of the Canadian nationality of the company.¹⁰⁹ All of this meant, said the Court, that “Barcelona Traction’s links with Canada are thus manifold”.¹¹⁰ In *Barcelona Traction* the Court was not confronted with a situation in which a company was incorporated in one State but had a “close and permanent connection” with another State. One can only speculate what the Court might have decided in such a situation. Draft article 9 does, however, provide for such cases.

(4) Draft article 9 accepts the basic premise of *Barcelona Traction* that it is incorporation that confers nationality on a corporation for the purposes of diplomatic protection. However, it provides an exception in a particular situation where there is no other significant link or connection between the State of incorporation and the corporation itself, and where certain significant connections exist with another State, in which case that other State is to be regarded as the State of nationality for the purpose of diplomatic protection. Policy and fairness dictate such a solution. It is wrong to place the sole and exclusive right to exercise diplomatic protection in a State with which the corporation has the most tenuous connection as in practice such a State will seldom be prepared to protect such a corporation.

(5) Draft article 9 provides that in the first instance the State in which a corporation is incorporated is the State of nationality entitled to exercise diplomatic protection. When, however, the circumstances indicate that the corporation has a closer connection with another State, a State in which the seat of management and financial control are situated, that State shall be regarded as the State of nationality with the right to exercise diplomatic protection. Certain conditions must, however, be fulfilled before this occurs. First, the corporation must be controlled by nationals of another State. Secondly, it must have no substantial business activities in the State of incorporation. Thirdly, both the seat of management and the financial control of the corporation must be located in another State. Only where these conditions are cumulatively fulfilled does the State in which the corporation has its seat of management and in which it is financially controlled qualify as the State of nationality for the purposes of diplomatic protection.

¹⁰⁹ *Ibid.*, pp. 42-43, paras. 71-76.

¹¹⁰ *Ibid.*, p. 42, para. 71.

(6) In *Barcelona Traction* the International Court of Justice warned that the granting of the right of diplomatic protection to the States of nationality of shareholders might result in a multiplicity of actions which “could create an atmosphere of confusion and insecurity in international economic relations”.¹¹¹ The same confusion might result from the granting of the right to exercise diplomatic protection to several States with which a corporation enjoys a link or connection. Draft article 9 does not allow such multiple actions. The State of nationality with the right to exercise diplomatic protection is either the State of incorporation or, if the required conditions are met, the State of the seat of management and financial control of the corporation. If the seat of management and the place of financial control are located in different States, the State of incorporation remains the State entitled to exercise diplomatic protection.

Article 10

Continuous nationality of a corporation

1. A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.
2. A State is no longer entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim.
3. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the date of injury and which, as the result of the injury, has ceased to exist according to the law of the State of incorporation.

Commentary

- (1) The general principles relating to the requirement of continuous nationality are discussed in the commentary to draft article 5. In practice problems of continuous nationality arise less in the case of corporations than with natural persons. Whereas natural persons change nationality easily as a result of naturalization, marriage or adoption, and State succession, corporations generally change nationality only by being re-formed or reincorporated in another State, in

¹¹¹ *Ibid.*, p. 49, para. 96.

which case the corporation assumes a new personality, thereby breaking the continuity of nationality of the corporation.¹¹² The most frequent instance in which a corporation may change nationality without changing legal personality is in the case of State succession.

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a corporation that was its national both at the time of the injury and at the date of the official presentation of the claim. It also requires continuity of nationality between the date of the injury and the date of the official presentation of the claim. These requirements, which apply to natural persons as well, are examined in the commentary to draft article 5. The date of the official presentation of the claim is preferred to that of the date of the award, for reasons explained in the commentary to draft article 5. An exception is, however, made in paragraph 2 to cover cases in which the Corporation acquires the nationality of the State against which the claim is brought after the presentation of the claim.

(3) The requirement of continuity of nationality is met where a corporation undergoes a change of nationality as a result of the succession of States.¹¹³ In effect, this is an exception to the continuity of nationality rule. This matter is covered by the reference to “predecessor State” in paragraph 1.

(4) The word “claim” in paragraph 1 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form reparation should take.¹¹⁴

¹¹² See Mixed Claims Commission, United States-Venezuela constituted under the Protocol of 17 February 1903, the *Orituco Steamship Company Case*, UNRIAA, vol. IX., p. 180. Here a company incorporated in the United Kingdom transferred its claim against the Venezuelan Government to a successor company incorporated in the United States. As the treaty establishing the Commission permitted the United States to bring a claim on behalf of its national in such circumstances, the claim was allowed. However, *Empire Barge* made it clear that, but for the treaty, the claim would not have been allowed; *ibid.*, at p. 192. See too *Loewen Group Inc. v. U.S.A.*, at paragraph 220.

¹¹³ See further on this subject the *Panewczy-Saldutiskis Railway* case, at p. 18. See also Fourth Report on Nationality in relation to the Succession of States, document A/CN.4/489, which highlights the difficulties surrounding the nationality of legal persons in relation to the succession of States.

¹¹⁴ See, further, article 43 of the draft articles on the Responsibility of States for Internationally Wrongful Acts and the commentary thereto.

(5) In terms of paragraph 2, a State is not entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim. This paragraph is designed to cater for the type of situation that arose in the *Loewen* case¹¹⁵ in which a corporation ceased to exist in the State in which the claim was initiated (Canada) and was reorganized in the respondent State (the United States). This matter is further considered in the commentary to draft article 5.¹¹⁶

(6) Difficulties arise in respect of the exercise of diplomatic protection of a corporation that has ceased to exist according to the law of the State in which it was incorporated and of which it was a national. If one takes the position that the State of nationality of such a corporation may not bring a claim as the corporation no longer exists at the time of presentation of the claim, then no State may exercise diplomatic protection in respect of an injury to the corporation. A State could not avail itself of the nationality of the shareholders in order to bring such a claim as it could not show that it had the necessary interest at the time the injury occurred to the corporation. This matter troubled several judges in the *Barcelona Traction* case¹¹⁷ and it has troubled certain courts and arbitral tribunals,¹¹⁸ and scholars.¹¹⁹ Paragraph 3 adopts a pragmatic approach and allows the State of nationality of a corporation to exercise diplomatic protection in respect of an injury suffered by the corporation when it was its national and has ceased to exist - and therefore ceased to be its national - as a result of the injury. In order to qualify, the claimant State must prove that it was because of the injury in respect of which the claim is brought that the corporation has ceased to exist. Paragraph 3 must be read in conjunction with

¹¹⁵ *Op. cit.* at para. 220.

¹¹⁶ Paragraphs (5) and (13).

¹¹⁷ Judges Jessup, *I.C.J. Reports 1970*, at p. 193, Gros, *ibid.*, at p. 277, and Fitzmaurice, *ibid.*, at pp. 101-102, and Judge *ad hoc* Riphagen, *ibid.*, at p. 345.

¹¹⁸ See the *Kunhardt and co.*, case (Opinions in the American-Venezuelan Commission of 1903), UNRIAA, vol. XII, p. 171, and particularly the dissenting opinion of the Venezuelan Commissioner, Mr. Paál, at p. 180; *F.W. Flück, on behalf of the Estate of the Late D.L. Flück (Great Britain) v. United Mexican States*, decision No. 10 of 6 December 1929, UNRIAA, vol. V, p. 61 at p. 63.

¹¹⁹ L. Caflisch, *La protection des sociétés commerciales et des intérêts indirects en droit international public* (The Hague: Martinus Nijhoff Publishers, 1969), pp. 206-7; W.E. Beckett, “Diplomatic Claims in Respect of Injuries to Companies”, *Transactions of the Grotius Society*, vol. 17 (1932), p. 158 at p. 191; E. Wylser, *La Règle Dite de la Continuité de la Nationalité dans le Contentieux International* (Paris: PUF, 1990), pp. 197-202.

draft article 11, paragraph (a), which makes it clear that the State of nationality of shareholders will not be entitled to exercise diplomatic protection in respect of an injury to a corporation that led to its demise.

Article 11

Protection of shareholders

The State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:

- (a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or
- (b) The corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.

Commentary

(1) The most fundamental principle of the diplomatic protection of corporations is that a corporation is to be protected by the State of nationality of the corporation and not by the State or States of nationality of the shareholders in a corporation. This principle was strongly reaffirmed by the International Court of Justice in the *Barcelona Traction* case. In this case the Court emphasized at the outset that it was concerned only with the question of the diplomatic protection of shareholders in “a limited liability company whose capital is represented by shares”.¹²⁰ Such companies are characterized by a clear distinction between company and shareholders.¹²¹ Whenever a shareholder’s interests are harmed by an injury to the company, it is to the company that the shareholder must look to take action, for “although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed”.¹²² Only where the act complained of is aimed at the direct rights of the shareholders

does a shareholder have an independent right of action.¹²³ Such principles governing the distinction between company and shareholders, said the Court, are derived from municipal law and not international law.¹²⁴

(2) In reaching its decision that the State of incorporation of a company and not the State(s) of nationality of the shareholders in the company is the appropriate State to exercise diplomatic protection in the event of injury to a company, the Court in *Barcelona Traction* was guided by a number of policy considerations. First, when shareholders invest in a corporation doing business abroad they undertake risks, including the risk that the State of nationality of the corporation may in the exercise of its discretion decline to exercise diplomatic protection on their behalf.¹²⁵ Secondly, if the State of nationality of shareholders is permitted to exercise diplomatic protection, this might lead to a multiplicity of claims by different States, as frequently large corporations comprise shareholders of many nationalities.¹²⁶ In this connection the Court indicated that if the shareholder’s State of nationality was empowered to act on his behalf there was no reason why every individual shareholder should not enjoy such a right.¹²⁷ Thirdly, the Court was reluctant to apply by way of analogy rules relating to dual nationality to corporations and shareholders and to allow the States of nationality of both to exercise diplomatic protection.¹²⁸

(3) The Court in *Barcelona Traction* accepted that the State(s) of nationality of shareholders might exercise diplomatic protection on their behalf in two situations: first, where the company had ceased to exist in its place of incorporation¹²⁹ - which was not the case with the *Barcelona Traction*; secondly, where the State of incorporation was itself responsible for inflicting injury on the company and the foreign shareholders’ sole means of protection on the international level was through their State(s) of nationality¹³⁰ - which was not the case with

¹²³ *Ibid.*, p. 36, para. 47.

¹²⁴ *Ibid.*, p. 37, para. 50.

¹²⁵ *Ibid.*, p. 35, para. 43; p. 46, paras. 86-87; p. 50, para. 99.

¹²⁶ *Ibid.*, pp. 48-49, paras. 94-96.

¹²⁷ *Ibid.*, p. 48, paras. 94-95.

¹²⁸ *Ibid.*, p. 38, para. 53; p. 50, para. 98.

¹²⁹ *Ibid.*, pp. 40-41, paras. 65-68.

¹³⁰ *Ibid.*, p. 48, para. 92.

¹²⁰ *I.C.J. Reports 1970*, p. 34, para. 40.

¹²¹ *Ibid.*, p. 34, para. 41.

¹²² *Ibid.*, p. 35, para. 44.

Barcelona Traction. These two exceptions, which were not thoroughly examined by the Court in *Barcelona Traction* because they were not relevant to the case, are recognized in paragraphs (a) and (b) of draft article 11. As the shareholders in a company may be nationals of different States, several States of nationality may be able to exercise diplomatic protection in terms of these exceptions. In practice, however, States will, and should, coordinate their claims and make sure that States whose nationals hold the bulk of the share capital are involved as claimants.

(4) Draft article 11 is restricted to the interests of shareholders in a corporation as judicial decisions on this subject, including *Barcelona Traction*, have mainly addressed the question of shareholders. There is no clear authority on the right of the State of nationality to protect investors other than shareholders, such as debenture holders, nominees and trustees. In principle, however, there would seem to be no good reason why the State of nationality should not protect such persons.¹³¹

(5) Draft article 11, paragraph (a) requires that the corporation shall have “ceased to exist” before the State of nationality of the shareholders shall be entitled to intervene on their behalf. Before the *Barcelona Traction* case the weight of authority favoured a less stringent test, one that permitted intervention on behalf of shareholders when the company was “practically defunct”.¹³² The Court in *Barcelona Traction*, however, set a higher threshold for determining the demise of a company. The “paralysis” or “precarious financial situation” of a company was dismissed as inadequate.¹³³ The test of “practically defunct” was likewise rejected as one “which lacks all legal precision”.¹³⁴ Only the “company’s status in law” was considered relevant. The Court stated: “Only in the event of the legal demise of the company are the shareholders

¹³¹ This is the approach adopted by the United Kingdom. See United Kingdom of Great Britain and Northern Ireland: “Rules Applying to International Claims” reproduced in document A/CN.4/561/Add.1, Annex.

¹³² *Delagoa Bay Railway Co. case*, B.J. Moore, *Digest of International Law*, vol. VI (1906), p. 648; *El Triunfo claim*; B.J. Moore, *Digest of International Law*, vol. VI (1906), p. 649; *Baasch & Romer case*, Netherlands-Venezuelan Mixed Commission, 28 February 1903, UNRIIAA, vol. X, p. 713 at p. 723.

¹³³ *I.C.J. Reports 1970*, pp. 40-41, paras. 65 and 66.

¹³⁴ *Ibid.*, p. 41, para. 66.

deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their Government could arise.”¹³⁵ Subsequent support has been given to this test by the European Court of Human Rights.¹³⁶

(6) The Court in *Barcelona Traction* did not expressly state that the company must have ceased to exist in the *place of incorporation* as a precondition to shareholders’ intervention. Nevertheless it seems clear in the context of the proceedings before it that the Court intended that the company should have ceased to exist in the State of incorporation and not in the State in which the company was injured. The Court was prepared to accept that the company was destroyed in Spain¹³⁷ but emphasized that this did not affect its continued existence in Canada, the State of incorporation: “In the present case, the *Barcelona Traction* is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist.”¹³⁸ A company is “born” in the State of incorporation when it is formed or incorporated there. Conversely, it “dies” when it is wound up in its State of incorporation, the State which gave it its existence. It therefore seems logical that the question whether a company has ceased to exist, and is no longer able to function as a corporate entity, must be determined by the law of the State in which it is incorporated.

(7) The final phrase “for a reason unrelated to the injury” aims to ensure that the State of nationality of the shareholders will not be permitted to bring proceedings in respect of the injury to the corporation that is the cause of the corporation’s demise. This, according to draft article 10, is the continuing right of the State of nationality of the corporation. The State of nationality of the shareholders will therefore only be able to exercise diplomatic protection in respect of shareholders who have suffered as a result of injuries sustained by the corporation

¹³⁵ *Ibid.*, see also, the separate opinions of Judges Nervo, *ibid.*, p. 256 and Ammoun, *ibid.*, pp. 319-320.

¹³⁶ *Agrotexim case*, ECHR., *Series A* (1995), No. 330-A, p. 25, para. 68.

¹³⁷ *I.C.J. Reports 1970*, p. 40, para. 65. See too the separate opinions of Judges Fitzmaurice, *ibid.*, p. 75 and Jessup, *ibid.*, p. 194.

¹³⁸ *Ibid.*, p. 41, para. 67.

unrelated to the injury that might have given rise to the demise of the corporation. The purpose of this qualification is to limit the circumstances in which the State of nationality of the shareholders may intervene on behalf of such shareholders for injury to the corporation.

(8) Draft article 11, paragraph (b), gives effect to the exception allowing the State of nationality of the shareholders in a corporation to exercise diplomatic protection on their behalf where the State of incorporation is itself responsible for inflicting injury on the corporation. The exception is limited to cases where incorporation was required by the State inflicting the injury on the corporation as a precondition for doing business there.

(9) There is support for such an exception in State practice, arbitral awards¹³⁹ and doctrine. Significantly the strongest support for intervention on the part of the State of nationality of the shareholders comes from three claims in which the injured corporation had been *compelled* to incorporate in the wrongdoing State: *Delagoa Bay Railway*,¹⁴⁰ *Mexican Eagle*¹⁴¹ and *El Triunfo*.¹⁴² While there is no suggestion in the language of these claims that intervention is to be limited to such circumstances, there is no doubt that it is in such cases that intervention is most needed. As the Government of the United Kingdom replied to the Mexican argument in *Mexican Eagle* that a State might not intervene on behalf of its shareholders in a Mexican company:

“If the doctrine were admitted that a Government can first make the operation of foreign interests in its territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic

intervention, it is clear that the means would never be wanting whereby foreign Governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad.”¹⁴³

(10) In *Barcelona Traction*, Spain, the respondent State, was not the State of nationality of the injured company. Consequently, the exception under discussion was not before the Court. Nevertheless, the Court did make passing reference to this exception:

“It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction.”¹⁴⁴

Judges Fitzmaurice,¹⁴⁵ Tanaka¹⁴⁶ and Jessup¹⁴⁷ expressed full support in their separate opinions in *Barcelona Traction* for the right of the State of nationality of the shareholders to intervene when the company was injured by the State of incorporation.¹⁴⁸

While both Fitzmaurice¹⁴⁹ and Jessup¹⁵⁰ conceded that the need for such a rule was particularly strong where incorporation was required as a precondition for doing business in the State of

¹⁴³ M. Whiteman, *Digest of International Law*, vol. 8 (Washington D.C.: USA Department of State, 1967), pp. 1273-1274.

¹⁴⁴ *I.C.J. Reports 1970*, p. 48, para. 92.

¹⁴⁵ *Ibid.*, pp. 72-75.

¹⁴⁶ *Ibid.*, p. 134.

¹⁴⁷ *Ibid.*, pp. 191-193.

¹⁴⁸ Judge Wellington Koo likewise supported this position in the *Case concerning the Barcelona Traction, Light and Power Company Limited, Preliminary Objections*, *I.C.J. Reports 1964*, p. 58, para. 20.

¹⁴⁹ *I.C.J. Reports 1970*, p. 73, paras. 15 and 16.

¹⁵⁰ *Ibid.*, pp. 191-192.

¹³⁹ *Delagoa Bay Railway Company; Mexican Eagle (El Aguila)*, M. Whiteman, *Digest of International Law*, vol. VIII, pp. 1272-1274; *Romano-Americano*, Hackworth, *Digest of International Law*, vol. V, p. 841; *El Triunfo* award of 8 May 1902, UNRIIA, vol. XV, p. 467; *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers* award of 5 August 1926, UNRIIA, vol. II, p. 779 at p. 790. For a comprehensive examination of the authorities, see L. Cadfish, *La protection des sociétés commerciales ... op. cit.*; M. Jones, “Claims on Behalf of Nationals who are Shareholders in Foreign Companies”, *BYBIL*, vol. 26 (1949), p. 225. See, too, E. Jiménez de Aréchaga “International Responsibility”, in Max Sørensen (ed.), *Manual of International Law* (New York: St. Martin’s Press, 1968), p. 531 at pp. 580-581.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

incorporation, neither was prepared to limit the rule to such circumstances. Judges Padilla Nervo,¹⁵¹ Morelli¹⁵² and Ammoun,¹⁵³ on the other hand, were vigorously opposed to the exception.

(11) Developments relating to the proposed exception in the post-*Barcelona Traction* period have occurred mainly in the context of treaties. Nevertheless they do indicate support for the notion that the shareholders of a company may intervene against the State of incorporation of the company when it has been responsible for causing injury to the company.¹⁵⁴ In the *Case Concerning Elettronica Sicula S.p.A. (ELSI)*¹⁵⁵ a Chamber of the International Court of Justice allowed the United States to bring a claim against Italy in respect of damages suffered by an Italian company whose shares were wholly owned by two American companies. The Court avoided pronouncing on the compatibility of its finding with that of *Barcelona Traction* or on the proposed exception left open in *Barcelona Traction* despite the fact that Italy objected that the company whose rights were alleged to have been violated was incorporated in Italy and that the United States sought to protect the rights of shareholders in the company.¹⁵⁶ This silence might be explained on the ground that the Chamber was not concerned with the evaluation of customary international law but with the interpretation of a bilateral Treaty of Friendship, Commerce and Navigation which provided for the protection of United States shareholders abroad. On the other hand, the proposed exception was clearly before the Chamber.¹⁵⁷ It is thus possible to infer support for the exception in favour of the right of the State of shareholders in a

corporation to intervene against the State of incorporation when it is responsible for causing injury to the corporation.¹⁵⁸

(12) Before *Barcelona Traction* there was support for the proposed exception, but opinions were divided over whether, or to what extent, State practice and arbitral decisions recognized it. Although arbitral decisions affirmed the principle contained in the exception these decisions were often based on special agreements between States granting a right to shareholders to claim compensation and, as a consequence, were not necessarily indicative of a general rule of customary international law.¹⁵⁹ The *obiter dictum* in *Barcelona Traction* and the separate opinions of Judges Fitzmaurice, Jessup and Tanaka have undoubtedly added to the weight of authority in favour of the exception. Subsequent developments, albeit in the context of treaty interpretation, have confirmed this trend.¹⁶⁰ In these circumstances it would be possible to sustain a general exception on the basis of judicial opinion. However, draft article 11, paragraph (b), does not go this far. Instead it limits the exception to what has been described as a “Calvo corporation”, a corporation whose incorporation, like the Calvo Clause, is designed to protect it from the rules of international law relating to diplomatic protection. It limits the exception to the situation in which the corporation had, at the date of the injury (a further restrictive feature), the nationality of the State alleged to be responsible for causing the injury and incorporation in that State was required by it as a precondition for doing business there. It is not necessary that the law of that State require incorporation. Other forms of compulsion might also result in a corporation being “required” to incorporate in that State.

¹⁵⁸ This view is expressed by Yoram Dinstein in “Diplomatic Protection of Companies under International Law”, in K. Wellens (ed.), *International Law: Theory and Practice, Essays in Honour of Eric Suy* (The Hague: Martinus Nijhoff Publishers, 1998), p. 505 at p. 512.

¹⁵⁹ See the submission to this effect by the United States in A/CN.4/561, pp. 34-35.

¹⁶⁰ According to the United Kingdom’s 1985 Rules Applying to International Claims, “where a United Kingdom national has an interest, as a shareholder or otherwise, in a company incorporated in another State and of which it is therefore a national, and that State injures the company, Her Majesty’s Government may intervene to protect the interests of the United Kingdom national” (Rule VI), reprinted in ICLQ, vol. 37 (1988), p. 1007 and reproduced in document A/CN.4/561/Add.1, Annex.

¹⁵¹ *Ibid.*, pp. 257-259.

¹⁵² *Ibid.*, pp. 240-241.

¹⁵³ *Ibid.*, p. 318.

¹⁵⁴ See *SEDCO Inc. v. National Iranian Oil Company and the Islamic Republic of Iran* case No. 129, of 24 October 1985, ILR, vol. 84, pp. 484, 496 (interpreting article VII (2) of the Algiers Claims Settlement Declaration); *Liberian Eastern Timber Corporation (LETCO) v. The Government of the Republic of Liberia* ICSID Reports, vol. 2 (1994), p. 346 (interpreting art. 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, United Nations, *Treaty Series*, vol. 575, p. 159).

¹⁵⁵ *I.C.J. Reports*, 1989, p. 15.

¹⁵⁶ *Ibid.*, pp. 64 (para. 106), 79 (para. 132).

¹⁵⁷ This is clear from an exchange of opinions between Judges Oda, *ibid.*, pp. 87-88 and Schwabe, *ibid.*, p. 94 on the subject.

Article 12

Direct injury to shareholders

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

Commentary

(1) That shareholders qualify for diplomatic protection when their own rights are affected was recognized by the Court in *Barcelona Traction* when it stated:

“... an act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected. ... The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action.”¹⁶¹

The Court was not, however, called upon to consider this matter any further because Belgium made it clear that it did not base its claim on an infringement of the direct rights of the shareholders.

(2) The issue of the protection of the direct rights of shareholders came before the Chamber of the International Court of Justice in the *ELSI* case.¹⁶² However, in that case, the rights in question, such as the rights of the shareholders to organize, control and manage the company, were to be found in the Treaty of Friendship, Commerce and Navigation that the Chamber was called on to interpret and the Chamber failed to expound on the rules of customary international

law on this subject. In *Agrotexim*,¹⁶³ the European Court of Human Rights, like the Court in *Barcelona Traction*, acknowledged the right of shareholders to protection in respect of the direct violation of their rights, but held that *in casu* no such violation had occurred.¹⁶⁴

(3) Draft article 12 makes no attempt to provide an exhaustive list of the rights of shareholders as distinct from those of the corporation itself. In *Barcelona Traction* the International Court mentioned the most obvious rights of shareholders - the right to a declared dividend, the right to attend and vote at general meetings and the right to share in the residual assets of the company on liquidation - but made it clear that this list is not exhaustive. This means that it is left to courts to determine, on the facts of individual cases, the limits of such rights. Care will, however, have to be taken to draw clear lines between shareholders’ rights and corporate rights, particularly in respect of the right to participate in the management of corporations. That draft article 12 is to be interpreted restrictively is emphasized by the phrases “the rights of the shareholders as such” and rights “as distinct from those of the corporation itself”.

(4) Draft article 12 does not specify the legal order that must determine which rights belong to the shareholder as distinct from the corporation. In most cases this is a matter to be decided by the municipal law of the State of incorporation. Where the company is incorporated in the wrongdoing State, however, there may be a case for the invocation of general principles of company law in order to ensure that the rights of foreign shareholders are not subjected to discriminatory treatment.¹⁶⁵

Article 13

Other legal persons

The principles contained in this chapter shall be applicable, as appropriate, to the diplomatic protection of legal persons other than corporations.

¹⁶³ *Series A*, No. 330-A.

¹⁶⁴ *Ibid.*, p. 23, para. 62.

¹⁶⁵ In his separate opinion in *ELSI*, Judge Oda spoke of “the general principles of law concerning companies” in the context of shareholders’ rights; *I.C.J. Reports 1989*, at pp. 87-88.

¹⁶¹ *I.C.J. Reports 1970*, p. 36, paras. 46-47.

¹⁶² *I.C.J. Reports 1989*, p. 15.

Commentary

(1) The provisions of this Chapter have hitherto focused on a particular species of legal person, the corporation. There are two explanations for this. First, corporations, unlike other legal persons, have certain common, uniform features: they are profit-making enterprises whose capital is generally represented by shares, in which there is a firm distinction between the separate entity of the corporation and the shareholders, with limited liability attaching to the latter. Secondly, it is mainly the corporation, unlike the public enterprise, the university, the municipality, the foundation and other such legal persons, that engages in foreign trade and investment and whose activities fuel not only the engines of international economic life but also the machinery of international dispute settlement. Diplomatic protection in respect of legal persons is mainly about the protection of foreign investment. This is why the corporation is the legal person that occupies centre stage in the field of diplomatic protection and why the present set of draft articles do - and should - concern themselves largely with this entity.

(2) In the ordinary sense of the word, "person" is a human being. In the legal sense, however, a "person" is any being, object, association or institution which the law endows with the capacity of acquiring rights and incurring duties. A legal system may confer legal personality on whatever object or association it pleases. There is no consistency or uniformity among legal systems in the conferment of legal personality.

(3) There is jurisprudential debate about the legal nature of juristic personality and, in particular, about the manner in which a legal person comes into being. The fiction theory maintains that no juristic person can come into being without a formal act of incorporation by the State. This means that a body other than a natural person may obtain the privileges of personality by an act of State, which by a fiction of law equates it to a natural person, subject to such limitations as the law may impose. According to the realist theory, on the other hand, corporate existence is a reality and does not depend on State recognition. If an association or body acts in fact as a separate legal entity, it becomes a juristic person, with all its attributes,

without requiring grant of legal personality by the State. Whatever the merits of the realist theory, it is clear that, to exist, a legal person must have some recognition by law, that is, by some municipal law system. This has been stressed by both the European Court of Justice¹⁶⁶ and the International Court of Justice.¹⁶⁷

(4) Given the fact that legal persons are the creatures of municipal law, it follows that there are today a wide range of legal persons with different characteristics, including corporations, public enterprises, universities, schools, foundations, churches, municipalities, non-profit-making associations, non-governmental organizations and even partnerships (in some countries). The impossibility of finding common, uniform features in all these legal persons provides one explanation for the fact that writers on both public and private international law largely confine their consideration of legal persons in the context of international law to the corporation. Despite this, regard must be had to legal persons other than corporations in the context of diplomatic protection. The case law of the Permanent Court of International Justice shows that a commune¹⁶⁸ (municipality) or university¹⁶⁹ may in certain circumstances qualify as legal persons and as nationals of a State. There is no reason why such legal persons should not qualify for diplomatic protection if injured abroad, provided that they are autonomous entities not forming part of the apparatus of the protecting State.¹⁷⁰ Non-profit-making foundations, comprising assets set aside by a donor or testator for a charitable purpose, constitute legal persons without members. Today many foundations fund projects abroad to promote health, welfare, women's rights, human rights and the environment in developing countries. Should such a legal person be subjected to an internationally wrongful act by the host State, it is

¹⁶⁶ *The Queen v. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust ECJ*, Case 81/87 [1988] ECR 5483, at para. 19.

¹⁶⁷ *Barcelona Traction Case* (Judgment), at pp. 34-35, para. 38.

¹⁶⁸ In *Certain German Interests in Polish Upper Silesia* case (Merits) the Permanent Court held that the commune of Raibor fell within the category of "German national" within the meaning of the German-Polish Convention concerning Upper Silesia of 1922, *P.C.I.J. Reports, Series A*, No. 7, pp. 73-75.

¹⁶⁹ In *Appeal from a Judgment of the Hungarian-Czechoslovak Mixed Arbitral Tribunal (The Peter Pazmány University v. The State of Czechoslovakia Judgment)* the Permanent Court held that the Peter Pazmány University was a Hungarian national in terms of art. 250 of the Treaty of Trianon and therefore entitled to the restitution of property belonging to it, *P.C.I.J. Reports, Series A/B*, No. 61, pp. 208, 227-232.

¹⁷⁰ As diplomatic protection is a process reserved for the protection of natural or legal persons not forming part of the State, it follows that in most instances the municipality, as a local branch of government, and the university, funded and, in the final resort, controlled by the State, will not qualify for diplomatic protection, although it may be protected by other rules dealing with the problem of State organs. Private universities would, however, qualify for diplomatic protection; as would private schools, if they enjoyed legal personality under municipal law.

probable that it would be granted diplomatic protection by the State under whose laws it has been created. Non-governmental organizations engaged in causes abroad would appear to fall into the same category as foundations.¹⁷¹

(5) The diversity of goals and structures in legal persons other than corporations makes it impossible to draft separate and distinct provisions to cover the diplomatic protection of different kinds of legal persons. The wisest, and only realistic, course is to draft a provision that extends the principles of diplomatic protection adopted for corporations to other legal persons - subject to the changes necessary to take account of the different features of each legal person. The proposed provision seeks to achieve this. It provides that the principles governing the State of nationality of corporations and the application of the principle of continuous nationality to corporations, contained in the present Chapter, will apply, "as appropriate", to the diplomatic protection of legal persons other than corporations. This will require the necessary competent authorities or courts to examine the nature and functions of the legal person in question in order to decide whether it would be "appropriate" to apply any of the provisions of the present Chapter to it. Most legal persons other than corporations do not have shareholders so only draft articles 9 and 10 may appropriately be applied to them. If, however, such a legal person does have shareholders draft articles 11 and 12 may also be applied to it.¹⁷²

PART THREE

LOCAL REMEDIES

Article 14

Exhaustion of local remedies

1. A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.
2. "Local remedies" means legal remedies which are open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.

¹⁷¹ See, further, K. Doehring, "Diplomatic Protection of Non-Governmental Organizations", in M. Rama-Montaldo (ed), *El derecho internacional en un mundo en transformación: liber amicorum: en homenaje al profesor Eduardo Jiménez de Aréchaga* (Montevideo: fundacióndecuita universitaria, 1994), pp. 571-580.

¹⁷² This would apply to the limited liability company known in civil law countries which is a hybrid between a corporation and a partnership.

3. Local remedies shall be exhausted where an international claim, or request for a declaratory judgment related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.

Commentary

(1) Draft article 14 seeks to codify the rule of customary international law requiring the exhaustion of local remedies as a prerequisite for the exercise of diplomatic protection. This rule was recognized by the International Court of Justice in the *Interhandel* case as "a well-established rule of customary international law"¹⁷³ and by a Chamber of the International Court in the *Eleftronica Sicula (ELSI)* case as "an important principle of customary international law".¹⁷⁴ The exhaustion of local remedies rule ensures that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system".¹⁷⁵ The International Law Commission has previously considered the exhaustion of local remedies in the context of its work on State responsibility and concluded that it is a "principle of general international law" supported by judicial decisions, State practice, treaties and the writings of jurists.¹⁷⁶

(2) Both natural and legal persons are required to exhaust local remedies. A foreign company financed partly or mainly by public capital is also required to exhaust local remedies. Non-nationals of the State exercising protection, entitled to diplomatic protection in the exceptional circumstances provided for in draft article 8, are also required to exhaust local remedies.

(3) The phrase "all local remedies" must be read subject to draft article 15 which describes the exceptional circumstances in which local remedies need not be exhausted.

¹⁷³ *Interhandel* case (*Switzerland v. United States of America*) Preliminary objections, *I.C.J. Reports 1959*, p. 6 at p. 27.

¹⁷⁴ *I.C.J. Reports 1989*, p. 15 at p. 42, para. 50.

¹⁷⁵ *Interhandel* case, at p. 27.

¹⁷⁶ Article 22 on First Reading, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* and corrigendum (A/51/10 and Corr.1), chap. III D 1; *Yearbook ... 1977*, vol. II (Part Two), pp. 30-50; commentary to art. 44 on Second Reading, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10) pp. 304-307.

(4) The remedies available to an alien that must be exhausted before diplomatic protection can be exercised will, inevitably, vary from State to State. No codification can therefore succeed in providing an absolute rule governing all situations. Paragraph 2 seeks to describe, in broad terms, the main kind of legal remedies that must be exhausted.¹⁷⁷ In the first instance it is clear that the foreign national must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Even if there is no appeal as of right to a higher court, but such a court has a discretion to grant leave to appeal, the foreign national must still apply for leave to appeal to that court.¹⁷⁸ Courts in this connection include both ordinary and special courts since “the crucial question is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress”.¹⁷⁹

(5) Administrative remedies must also be exhausted. The injured alien is, however, only required to exhaust such remedies which may result in a binding decision. He is not required to approach the executive for relief in the exercise of its discretionary powers. Local remedies do not include remedies whose “purpose is to obtain a favour and not to vindicate a right”¹⁸⁰ nor do they include remedies of grace¹⁸¹ unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. Requests for clemency and resort to an ombudsman generally fall into this category.¹⁸²

¹⁷⁷ In the *Ambatielos Claim* of 6 March 1956 the arbitral tribunal declared that “[I]t is the whole system of legal protection, as provided by municipal law, which must have been put to the test”; UNRIAA, vol. XII, p. 83 at p. 120. See further on this subject, C.F. Amerasinghe, *Local Remedies in International Law*, 2nd ed. (Cambridge: Cambridge University Press, 2004), pp. 182-192.

¹⁷⁸ This would include the *certiorari* process before the United States Supreme Court.

¹⁷⁹ *B. Schouw Nielsen v. Denmark*, Application No. 343/57 (European Commission of Human Rights) (1958-1959), *Yearbook of the European Convention on Human Rights*, vol. 2, p. 412 at p. 438 (referring to the views of the Institute of International Law in its resolution of 1954 (*Annuaire*, 1956, vol. 46, p. 364)). See also *Lawless case*, Application No. 332/57 (European Commission of Human Rights) (1958-1959), *Yearbook of the European Convention on Human Rights*, vol. 2, p. 308 at pp. 318-322.

¹⁸⁰ *De Becker v. Belgium*, Application No. 214/56, 1958-1959, *Yearbook of the European Convention on Human Rights*, vol. 2, p. 214 at 238.

¹⁸¹ Claim of Finnish Shipowners against Great Britain in respect of the Use of Certain Finnish Vessels During the War (“*Finnish Ships Arbitration*”) 1934, UNRIAA, vol. III, p. 1479.

¹⁸² See *Avena and Other Mexican Nationals (Mexico v. United States of America)*, at paras. 135-143.

(6) In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise the basic arguments he intends to raise in international proceedings in the municipal proceedings. In the *ELSI* case the Chamber of the International Court of Justice stated that:

“for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success”.¹⁸³

This test is preferable to the stricter test enunciated in the *Finnish Ships Arbitration* that:

“all the contentions of fact and propositions of law which are brought forward by the claimant Government ... must have been investigated and adjudicated upon by the municipal courts”.¹⁸⁴

(7) The claimant State must therefore produce the evidence available to it to support the essence of its claim in the process of exhausting local remedies.¹⁸⁵ The international remedy afforded by diplomatic protection cannot be used to overcome faulty preparation or presentation of the claim at the municipal level.¹⁸⁶

(8) Draft article 14 does not take cognizance of the “Calvo Clause”,¹⁸⁷ a device employed mainly by Latin-American States in the late nineteenth century and early twentieth century, to confine an alien to local remedies by compelling him to waive recourse to international remedies in respect of disputes arising out of a contract entered into with the host State. The validity of such a clause has been vigorously disputed by capital-exporting States¹⁸⁸ on the ground that the alien has no right, in accordance with the rule in *Mavrommatis*, to waive a right that belongs to the State and not its national. Despite this, the “Calvo Clause” was viewed as a regional custom

¹⁸³ *I.C.J. Reports 1989*, p. 15 at para. 59.

¹⁸⁴ UNRIAA, vol. III., at p. 1502.

¹⁸⁵ *Ambatielos Claim*, at p. 120.

¹⁸⁶ D.P. O’Connell, *International Law*, vol. 2 (London: Stevens and Sons, 1970), p. 1059.

¹⁸⁷ Named after a distinguished Argentine jurist, Carlos Calvo (1824-1906).

¹⁸⁸ See, generally, D.R. Shea *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (Minneapolis: University of Minnesota Press, 1955).

in Latin-America and formed part of the national identity of many States. The “Calvo Clause” is difficult to reconcile with international law if it is to be interpreted as a complete waiver of recourse to international protection in respect of an action by the host State constituting an internationally wrongful act (such as denial of justice) or where the injury to the alien was of direct concern to the State of nationality of the alien.¹⁸⁹ The objection to the validity of the “Calvo Clause” in respect of general international law are certainly less convincing if one accepts that the right protected within the framework of diplomatic protection are those of the individual protected and not those of the protecting State.¹⁹⁰

(9) Paragraph 3 provides that the exhaustion of local remedies rule applies only to cases in which the claimant State has been injured “indirectly”, that is, through its national. It does not apply where the claimant State is directly injured by the wrongful act of another State, as here the State has a distinct reason of its own for bringing an international claim.¹⁹¹

(10) In practice it is difficult to decide whether the claim is “direct” or “indirect” where it is “mixed”, in the sense that it contains elements of both injury to the State and injury to the nationals of the State. Many disputes before the International Court of Justice have presented the phenomenon of the mixed claim. In the *Hostages* case,¹⁹² there was a direct violation on the part of the Islamic Republic of Iran of the duty it owed to the United States of America to protect its diplomats and consuls, but at the same time there was injury to the person of the nationals (diplomats and consuls) held hostage; and in the *Interhandel* case, there were claims brought by Switzerland relating to a direct wrong to itself arising out of breach of a treaty and to an indirect wrong resulting from an injury to a national corporation. In the *Hostages* case the Court treated the claim as a direct violation of international law; and in the *Interhandel* case the Court found that the claim was preponderantly indirect and that *Interhandel* had failed to exhaust local remedies. In the *Arrest Warrant of 11 August 2000* case there was a direct injury to the Democratic Republic of the Congo (DRC) and its national (the Foreign Minister) but the Court held that the claim was not brought within the context of the protection of a national so it was

¹⁸⁹ *North American Dredging Company (U.S.A. v. Mexico)*, UNRIIAA, vol. IV, p. 26.

¹⁹⁰ See paragraph (5) of commentary to draft article 1.

¹⁹¹ See generally on this subject, C.F. Amerasinghe, *Local Remedies in International Law*, op. cit., pp. 145-168.

¹⁹² *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, p. 3.

not necessary for the DRC to exhaust local remedies.¹⁹³ In the *Avena* case Mexico sought to protect its nationals on death row in the United States through the medium of the Vienna Convention on Consular Relations, arguing that it had “itself suffered, directly and through its nationals” as a result of the United States’ failure to grant consular access to its nationals under article 36 (1) of the Convention. The Court upheld this argument because of the “interdependence of the rights of the State and individual rights”.¹⁹⁴

(11) In the case of a mixed claim it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant. In the *ELSI* case a Chamber of the International Court of Justice rejected the argument of the United States that part of its claim was premised on the violation of a treaty and that it was therefore unnecessary to exhaust local remedies, holding that:

“the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett [United States corporations]”.¹⁹⁵

Closely related to the preponderance test is the *sine qua non* or “but for” test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered negatively, the claim is an indirect one and local remedies must be exhausted. There is, however, little to distinguish the preponderance test from the “but for” test. If a claim is preponderantly based on injury to a national this is evidence of the fact that the claim would not have been brought but for the injury to the national. In these circumstances one test only is provided for in paragraph 3, that of preponderance.

(12) Other “tests” invoked to establish whether the claim is direct or indirect are not so much tests as factors that must be considered in deciding whether the claim is preponderantly weighted in favour of a direct or an indirect claim or whether the claim would not have been brought but for the injury to the national. The principal factors to be considered in making this assessment

¹⁹³ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3 at p. 18, para. 40.

¹⁹⁴ I.C.J. Reports 2004, p. 12, para. 40.

¹⁹⁵ I.C.J. Reports 1989, p. 15 at p. 43, para. 52. See, also, the *Interhandel* case, I.C.J. Reports 1959, at p. 28.

are the subject of the dispute, the nature of the claim and the remedy claimed. Thus where the subject of the dispute is a Government official,¹⁹⁶ diplomatic official¹⁹⁷ or State property¹⁹⁸ the claim will normally be direct, and where the State seeks monetary relief on behalf of its national as a private individual the claim will be indirect.

(13) Paragraph 3 makes it clear that local remedies are to be exhausted not only in respect of an international claim but also in respect of a request for a declaratory judgment brought preponderantly on the basis of an injury to a national. Although there is support for the view that where a State makes no claim for damages for an injured national, but simply requests a decision on the interpretation and application of a treaty, there is no need for local remedies to be exhausted,¹⁹⁹ there are cases in which States have been required to exhaust local remedies where they have sought a declaratory judgment relating to the interpretation and application of a treaty alleged to have been violated by the respondent State in the course of, or incidental to, its unlawful treatment of a national.²⁰⁰

(14) Draft article 14 requires that the injured person must himself have exhausted all local remedies. This does not preclude the possibility that the exhaustion of local remedies may result from the fact that another person has submitted the substance of the same claim before a court of the respondent State.²⁰¹

Article 15

Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(a) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;

¹⁹⁶ *Arrest Warrant of 11 August 2000*, *I.C.J. Reports 2000*, p. 3, para. 40.

¹⁹⁷ *Hostages case*, *I.C.J. Reports 1980*, p. 3.

¹⁹⁸ *The Corfu Channel case (United Kingdom v. Albania)* Merits, *I.C.J. Reports 1949*, p. 4.

¹⁹⁹ *Case concerning the Air Services Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978, UNRIIAA, vol. XVIII, p. 415; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement*, of 26 June 1947, Advisory Opinion, *I.C.J. Reports 1988*, p. 11 at p. 29, para. 41.

²⁰⁰ See *The Interhandel*, at pp. 28-29; *ELSI* case, at p. 43.

²⁰¹ See *ELSI* case, at 46, para. 59.

(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;

(d) The injured person is manifestly precluded from pursuing local remedies; or

(e) The State alleged to be responsible has waived the requirement that local remedies be exhausted.

Commentary

(1) Draft article 15 deals with the exceptions to the exhaustion of local remedies rule. Paragraphs (a) to (b), which cover circumstances in which local courts offer no prospect of redress, and paragraphs (c) to (d), which deal with circumstances which make it unfair or unreasonable that an injured alien should be required to exhaust local remedies as a precondition for the bringing of a claim, are clear exceptions to the exhaustion of local remedies rule. Paragraph (e) deals with a different situation - that which arises where the respondent State has waived compliance with the local remedies rule.

Paragraph (a)

(2) Paragraph (a) deals with the exception to the exhaustion of local remedies rule sometimes described, in broad terms, as the “futility” or “ineffectiveness” exception. Three options require consideration for the formulation of a rule describing the circumstances in which local remedies need not be exhausted because of failures in the administration of justice:

(i) the local remedies are obviously futile;

(ii) the local remedies offer no reasonable prospect of success;

(iii) the local remedies provide no reasonable possibility of effective redress.

All three of these options enjoy some support among the authorities.

(3) The “obvious futility” test, expounded by Arbitrator Bagge in the *Finnish Ships Arbitration*, sets too high a threshold. On the other hand, the test of “no reasonable prospect of

success”, accepted by the European Commission of Human Rights in several decisions,²⁰² is too generous to the claimant. This leaves the third option which avoids the stringent language of “obvious futility” but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of effective redress offered by the local remedies. This test has its origin in a separate opinion of Sir Hersch Lauterpacht in the *Norwegian Loans* case²⁰³ and is supported by the writings of jurists.²⁰⁴ The test, however, fails to include the element of availability of local remedies which was endorsed by the Commission in its articles on Responsibility of States for Internationally Wrongful Acts²⁰⁵ and is sometimes considered as a component of this rule by courts²⁰⁶ and writers.²⁰⁷ For this reason the test in paragraph (a) is expanded to require that there are no “reasonably available local remedies” to provide effective redress or that the local remedies provide no reasonable possibility of such redress. In this form the test is supported by judicial decisions which have held that local remedies need not be exhausted where the local court has no jurisdiction over the dispute in question,²⁰⁸ the national legislation justifying the acts of which the alien complains will not be

reviewed by local courts,²⁰⁹ the local courts are notoriously lacking in independence;²¹⁰ there is a consistent and well-established line of precedents adverse to the alien;²¹¹ the local courts do not have the competence to grant as appropriate and adequate remedy to the alien;²¹² or the respondent State does not have an adequate system of judicial protection.²¹³

(4) In order to meet the requirements of paragraph (a) it is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. The test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief. This must be determined in the context of the local law and the prevailing circumstances. This is a question to be decided by the competent international tribunal charged with the task of examining the question whether local remedies have been exhausted. The decision on this matter must be made on the assumption that the claim is meritorious.²¹⁴

Paragraph (b)

(5) That the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for an unreasonable delay in allowing a local remedy

²⁰² *Reiting S.A. v. Federal Republic of Germany*, Application No. 712/60, *Yearbook of the European Convention on Human Rights*, vol. 4, p. 385 at p. 400; *X, Y and Z v. UK*, Application Nos. 8022/77, 8027/77, *European Commission of Human Rights, Decisions and Reports*, vol. 18, p. 66 at p. 74. See, too, the commentary to art. 22 of the draft articles on State Responsibility adopted by the Commission on first reading: *Yearbook ... 1977*, vol. II (Part Two), para. 48.

²⁰³ *Case of certain Norwegian Loans (France v. Norway)*, Judgment, *I.C.J. Reports 1957*, at p. 39.

²⁰⁴ G. Fitzmaurice “Hersch Lauterpacht - The Scholar a Judge”, *BYBIL*, vol. 37 (1961), p. 1 at pp. 60-61; M. Herdegen, “Diplomatischer Schutz und die Erschöpfung von Rechtsbehelfen” in G. Ress and T. Stein, *Der diplomatische Schutz im Völker- und Europarecht: Aktuelle Probleme und Entwicklungstendenzen* (1966), p. 63 at p. 70.

²⁰⁵ Article 44 requires local remedies to be “available and effective”.

²⁰⁶ In *Loewen Group Inc v. USA*, the tribunal stated that the exhaustion of local remedies rule obliges the injured person “to exhaust remedies which are effective and adequate and are reasonably available” to him (at para. 168).

²⁰⁷ C.F. Amerasinghe, *Local Remedies in International Law*, *op. cit.*, pp. 181-2, 203-4.

²⁰⁸ *Panevezys-Saldutiskis Railway* case, at p. 18, *Arbitration under Article 181 of the Treaty of Neuilly*, reported in *AJIL*, vol.28, (1934), p. 760 at p. 789; Claims of R. Gelbrunk and “Salvador Commercial Co.” *et al.*, UNRIAA, vol. XV, p. 467 at pp. 476-477; *The Lottie May*, “Incident, Arbitration between Honduras and the United Kingdom, of 18 April 1899, UNRIAA, vol. XV, p. 29 at p. 31; Judge Lauterpacht’s separate opinion in the *Norwegian Loans* case, *I.C.J. Reports 1957*, at pp. 39-40; *Finnish Ships Arbitration*, UNRIAA, vol. III, p. 1535.

²⁰⁹ *Arbitration under Article 181 of the Treaty of Neuilly*, *AJIL*, vol. 28 (1934), p. 789. See also *Affaire des Forêts du Rhodope Central (Fond)* 1933, UNRIAA, vol. III, p. 1405; *Ambatielos* claim, UNRIAA, vol XII, p. 119; *Interhandel* case, *I.C.J. Reports 1959*, at p. 28.

²¹⁰ *Robert E. Brown Claim* of 23 November 1923, UNRIAA, vol. VI, p. 120; *Vélasquez Rodríguez* case, Inter-American Court of Human Rights, Series C, No. 4, paras. 56-78, p. 291 at pp. 304-309.

²¹¹ *Panevezys-Saldutiskis Railway* case, at p. 18; S.S. “Lisman”, UNRIAA, vol. III, p. 1769 at p. 1773; S.S. “*Segurancá*”, UNRIAA, vol. III, p. 1861 at p. 1868; *Finnish Ships Arbitration*, at p. 1495; *X v. Federal Republic of Germany*, 1956, *Yearbook of the European Convention on Human Rights*, vol. I, p. 138; *X v. Federal Republic of Germany*, *Yearbook of the European Convention on Human Rights*, vol. 2, p. 342 at p. 344; *X v. Austria*, *Yearbook of the European Convention on Human Rights*, vol. 3, p. 196 at p. 202.

²¹² *Finnish Ships Arbitration*, at pp. 1496-1497, *Vélasquez Rodríguez* case; *Yağci and Sargin v. Turkey*, Judgment of 8 June 1995, *European Court of Human Rights, Reports and Decisions*, No. 319, p. 3 at p. 17, para. 42; *Hornsbly v. Greece*, Judgment of 19 March 1997, *European Court of Human Rights, Reports and Decisions*, 1997-11, No. 33, p. 495 at p. 509, para. 37.

²¹³ *Mushikwabo and others v. Baragwiza*, 9 April 1996, ILR, vol. 107, p. 457 at 460. During the military dictatorship in Chile the Inter-American Commission on Human Rights resolved that the irregularities inherent in legal proceedings under military justice obviated the need to exhaust local remedies; resolution 14/88, case 9755, *Ann. Rep Int. Am. Com HR* 1987/88.

²¹⁴ *Finnish Ships Arbitration*, at p. 1504; *Ambatielos Claim*, at pp. 119-120.

to be implemented is confirmed by codification attempts,²¹⁵ human rights instruments and practice,²¹⁶ judicial decisions²¹⁷ and scholarly opinion. It is difficult to give an objective content or meaning to “undue delay”, or to attempt to prescribe a fixed time limit within which local remedies are to be implemented. Each case must be judged on its own facts. As the British Mexican Claims Commission stated in the *El Oro Mining* case:

“The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter.”²¹⁸

(6) Paragraph (b) makes it clear that the delay in the remedial process is attributable to the State alleged to be responsible for an injury to an alien. The phrase “remedial process” is preferred to that of “local remedies” as it is meant to cover the entire process by which local remedies are invoked and implemented and through which local remedies are channelled.

Paragraph (c)

196(7) The exception to the exhaustion of local remedies rule contained in draft article 15, paragraph (a), to the effect that local remedies do not need to be exhausted where they are not reasonably available or “provide no reasonable possibility of effective redress”, does not cover situations where local remedies are available and might offer the reasonable possibility of effective redress but it would be unreasonable or cause great hardship to the injured alien to exhaust local remedies. For instance, even where effective local remedies exist, it would be

²¹⁵ See the discussion of early codifications attempts by *F.V. Garcia-Amador* in First Report, *Yearbook ... 1956*, vol. II, p. 173 at 223-226; art. 19 (2) of 1960 Draft Convention on the International Responsibility of States for Injuries to Aliens prepared by the Harvard Research on International Law, reproduced in AJIL, vol. 55 (1961), p. 545 at p. 577.

²¹⁶ International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, p. 171, article 1 (c); American Convention on Human Rights (article 46 (2) (c)); *Weinberger v. Uruguay*, Communication 28/1978, Human Rights Committee, *Selected Decisions*, vol. 1, p. 57 at p. 59; *Las Palmeras*, American Court of Human Rights, Series C, *Decisions and Judgments*, No. 67, para. 38 (4 February 2000); *Erdogan v. Turkey*, Application No. 19807/92, No. 84 A, European Commission of Human Rights (1996), *Decisions and Reports*, p. 5 at p. 15.

²¹⁷ *El Oro Mining and Railway Company (Limited) (Great Britain v. United Mexican States)*, decision No. 55 of 18 June 1931, UNRIAA, vol. V, p. 191 at p. 198. See also *Case concerning the Administration of the Prince von Pless*, Preliminary objections, *P.C.I.J. Series A/B*, 1933, No. 52, p. 4.

²¹⁸ *Ibid.*, at p. 198.

unreasonable and unfair to require an injured person to exhaust local remedies where his property has suffered environmental harm caused by pollution, radioactive fallout or a fallen space object emanating from a State in which his property is not situated; or where he is on board an aircraft that is shot down while in overflight of another State’s territory. In such cases it has been suggested that local remedies need not be exhausted because of the absence of a voluntary link or territorial connection between the injured individual and the respondent State.

(8) There is support in the literature for the proposition that in all cases in which the exhaustion of local remedies has been required there has been some link between the injured individual and the respondent State, such as voluntary physical presence, residence, ownership of property or a contractual relationship with the respondent State.²¹⁹ Proponents of this view maintain that the nature of diplomatic protection and the local remedies rule has undergone major changes in recent times. Whereas the early history of diplomatic protection was characterized by situations in which a foreign national resident and doing business in a foreign State was injured by the action of that State and could therefore be expected to exhaust local remedies in accordance with the philosophy that the national going abroad should normally be obliged to accept the local law as he finds it, including the means afforded for the redress of wrong, an individual may today be injured by the act of a foreign State outside its territory or by some act within its territory in circumstances in which the individual has no connection with the territory. Examples of this are afforded by transboundary environmental harm (for example, the explosion at the Chernobyl nuclear plant near Kiev in the Ukraine in 1986, which caused radioactive fallout as far away as Japan and Scandinavia) and the shooting down of an aircraft that has accidentally strayed into a State’s airspace (as illustrated by the *Aerial Incident* in which Bulgaria shot down an El Al flight that had accidentally entered its airspace). The basis for such a voluntary link or territorial connection rule is the assumption of risk by the alien in a foreign State. It is only where the alien has subjected himself voluntarily to the jurisdiction of the respondent State that he would be expected to exhaust local remedies.

(9) Neither judicial authority nor State practice provide clear guidance on the existence of such an exception to the exhaustion of local remedies rule. While there are tentative dicta in

²¹⁹ See Amerasinghe, *Local Remedies in International Law*, p. 169; T. Meron, “The Incidence of the Rule of Exhaustion of Local Remedies”, *BYBIL*, vol. 35, 1959, p. 83 at p. 94.

support of the existence of such an exception in the *Interhandel*²²⁰ and *Salem*²²¹ cases, in other cases²²² tribunals have upheld the applicability of the local remedies rule despite the absence of a voluntary link between the injured alien and the respondent State. In both the *Norwegian Loans* case²²³ and the *Aerial Incident case (Israel v. Bulgaria)*²²⁴ arguments in favour of the voluntary link requirement were forcefully advanced, but in neither case did the International Court make a decision on this matter. In the *Trail Smelter* case,²²⁵ involving transboundary pollution in which there was no voluntary link or territorial connection, there was no insistence by Canada on the exhaustion of local remedies. This case and others²²⁶ in which local remedies were dispensed with where there was no voluntary link have been interpreted as lending support to the requirements of voluntary submission to jurisdiction as a precondition for the application of the local remedies rule. The failure to insist on the application of the local remedies rule in these cases can, however, be explained on the basis that they provide examples of direct injury, in which local remedies do not need to be exhausted, or on the basis that the arbitration agreement in question did not require local remedies to be exhausted.

(10) Paragraph (c) does not use the term “voluntary link” to describe this exception as this emphasizes the subjective intention of the injured individual rather than the absence of an objectively determinable connection between the individual and the host State. In practice it would be difficult to prove such a subjective criterion. Hence paragraph (c) requires the existence of a “relevant connection” between the injured alien and the host State and not a voluntary link. This connection must be “relevant” in the sense that it must relate in some way to the injury suffered. A tribunal will be required to examine not only the question whether the

²²⁰ Here the International Court stated: “it has been considered necessary that the *State where the violation occurred* should also have an opportunity to redress it by its own means”, *I.C.J. Reports 1959*, at p. 27. Emphasis added.

²²¹ In the *Salem* case an arbitral tribunal declared that “[a]s a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence”, UNRIIAA, vol. II, p. 1165 at p. 1202.

²²² *Finnish Ships Arbitration*, at p. 1504; *Ambatielos Claim*, at p. 99.

²²³ *Case of certain Norwegian Loans (France v. Norway)*, Oral Pleadings of France, *I.C.J. Pleadings 1957*, vol. I, p. 408.

²²⁴ *Case concerning the Aerial Incident of 27 July 1955 (Israel v. Bulgaria)* (Preliminary objections), Oral Pleadings of Israel, *I.C.J. Pleadings 1959*, pp. 531-532.

²²⁵ UNRIIAA, vol. III, p. 1905.

²²⁶ *Virginius* case, reported in J.B. Moore, *A Digest of International Law*, vol. 2 (1906), p. 895 at p. 903; *Jessie* case, reported in AJIL, vol. 16 (1922), pp. 114-116.

injured individual was present, resided or did business in the territory of the host State but whether, in the circumstances, the individual by his conduct, had assumed the risk that if he suffered an injury it would be subject to adjudication in the host State. The word “relevant” best allows a tribunal to consider the essential elements governing the relationship between the injured alien and the host State in the context of the injury in order to determine whether there had been an assumption of risk on the part of the injured alien. There must be no “relevant connection” between the injured individual and the respondent State at the date of the injury.

Paragraph (d)

(11) Paragraph (d) is designed to give a tribunal the power to dispense with the requirement of exhaustion of local remedies where, in all the circumstances of the case, it would be manifestly unreasonable to expect compliance with the rule. This paragraph, which is an exercise in progressive development, must be narrowly construed, with the burden of proof on the injured person to show not merely that there are serious obstacles and difficulties in the way of exhausting local remedies but that he is “manifestly” precluded from pursuing such remedies. No attempt is made to provide a comprehensive list of factors that might qualify for this exception. Circumstances that may manifestly preclude the exhaustion of local remedies possibly include the situation in which the injured person is prevented by the respondent State from entering its territory, either by law or by threats to his or her personal safety, and thereby denying him the opportunity to bring proceedings in local courts. Or where criminal syndicates in the respondent State obstruct him from bringing such proceedings. Although the injured person is expected to bear the costs of legal proceedings before the courts of the respondent State there may be circumstances in which such costs are prohibitively high and “manifestly preclude” compliance with the exhaustion of local remedies rule.²²⁷

Paragraph (e)

(12) A State may be prepared to waive the requirement that local remedies be exhausted. As the purpose of the rule is to protect the interests of the State accused of mistreating an alien, it

²²⁷ On the implications of costs for the exhaustion of local remedies, see *Loewen Group Inc. v. United States of America*, at para. 166.

follows that a State may waive this protection itself. The Inter-American Court of Human Rights has stated:

“In cases of this type, under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts which have been imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defence and, as such, waivable, even tacitly.”²²⁸

(13) Waiver of local remedies may take many different forms. It may appear in a bilateral or multilateral treaty entered into before or after the dispute arises; it may appear in a contract between the alien and the respondent State; it may be express or implied; or it may be inferred from the conduct of the respondent State in circumstances in which it can be described as estoppel or forfeiture.

(14) An express waiver may be included in an *ad hoc* arbitration agreement concluded to resolve an already existing dispute or in a general treaty providing that disputes arising in the future are to be settled by arbitration or some other form of international dispute settlement. It may also be included in a contract between a State and an alien. There is a general agreement that an express waiver of the local remedies is valid. Waivers are a common feature of contemporary State practice and many arbitration agreements contain waiver clauses. Probably the best-known example is to be found in article 26 of the Convention on the Settlement of Investment Disputes, which provides:

“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

²²⁸ *Government of Costa Rica* case (In the matter of Viviana Gallardo *et al.*) of 13 November 1981, Inter-American Court of Human Rights, ILR, vol. 67, p. 578 at p. 587, para. 26. See also ILM, vol. 20 (1981), p. 1057. See also *ELSI* case, ILR, vol. 67, at p. 42, para. 50; *De Witte, Ooms and Versyp* cases (“Belgian Vagrancy Cases”), European Court of Human Rights, 1971, ILR, vol. 56, p. 337 at p. 370, para. 55.

It is generally agreed that express waivers, whether contained in an agreement between States or in a contract between State and alien are irrevocable, even if the contract is governed by the law of the host State.²²⁹

(16) Waiver of local remedies must not be readily implied. In the *ELSI* case a Chamber of the International Court of Justice stated in this connection that it was:

“unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so”.²³⁰

(16) Where, however, the intention of the parties to waive the local remedies is clear, effect must be given to this intention. Both judicial decisions²³¹ and the writings of jurists²³² support such a conclusion. No general rule can be laid down as to when an intention to waive local remedies may be implied. Each case must be determined in the light of the language of the instrument and the circumstances of its adoption. Where the respondent State has agreed to submit disputes to arbitration that may arise in future with the applicant State, there is support for the view that such an agreement “does not involve the abandonment of the claim to exhaust all local remedies in cases in which one of the Contracting Parties espouses the claim of its national”.²³³ That there is a strong presumption against implied or tacit waiver in such a case was confirmed by the Chamber of the International Court of Justice in the *ELSI* case.²³⁴ A waiver of local remedies may be more easily implied from an arbitration agreement entered into after the dispute in question has arisen. In such a case it may be contended that such a waiver may be implied if the respondent State entered into an arbitration agreement with the applicant

²²⁹ *Government of Costa Rica* case, at p. 587, para. 26; “Belgian Vagrancy cases”, at p. 370, para. 55.

²³⁰ *I.C.J. Reports* 1989, at p. 42, para. 50.

²³¹ See, for example, *Steiner and Gross v. Polish State 30 March 1928, 1927-1928, Annual Digest of Public International Law Cases*, vol. 4, p. 472; *American International Group Inc. v. Iran*, Award No. 93-2-3, *Iran-U.S.-C.T.R.*, vol. IV (1983), p. 96.

²³² See, for example, S. Schwebel *International Arbitration: Three Salient Problems* (Cambridge: Grotius Publishers, 1987), pp. 117-121.

²³³ F.A. Mann, “State contracts and international arbitration”, *BYBIL*, vol. 42 (1967), p. 1 at p. 32.

²³⁴ *I.C.J. Reports* 1989, p. 15. In the *Pantevezys-Saldutiskis Railway* case, the Permanent Court of International Justice held that acceptance of the Optional Clause under art. 36, para. 2, of the Statute of the Court did not constitute implied waiver of the local remedies rule, *P.C.I.J. Series A/B*, 1939, No. 76, p. 19 (as had been argued by Judge van Eysinga in a dissenting opinion, *ibid.*, pp. 35-36).

State covering disputes relating to the treatment of nationals after the injury to the national who is the subject of the dispute and the agreement is silent on the retention of the local remedies rule.

(17) Although there is support for the proposition that the conduct of the respondent State during international proceedings may result in that State being estopped from requiring that local remedies be exhausted,²³⁵ paragraph (e) does not refer to estoppel in its formulation of the rule governing waiver on account of the uncertainty surrounding the doctrine of estoppel in international law. It is wiser to allow conduct from which a waiver of local remedies might be inferred to be treated as implied waiver.

PART FOUR

MISCELLANEOUS PROVISIONS

Article 16

Actions or procedures other than diplomatic protection

The rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

Commentary

(1) The customary international law rules on diplomatic protection and the rules governing the protection of human rights are complementary. The present draft articles are therefore not intended to exclude or to trump the rights of States, including both the State of nationality and States other than the State of nationality of an injured individual, to protect the individual under either customary international law or a multilateral or bilateral human rights treaty or other treaty. They are also not intended to interfere with the rights of natural and legal persons or other entities, involved in the protection of human rights, to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.

²³⁵ See *ELSI* case, at p. 44, para. 54; *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges*, award of 30 November 1992 (Arbitration Tribunal), ILR, vol. 102, p. 216 at p. 285, para. 6.33; *Foiti and others*, Judgment of 10 December 1982, Merits, ILR, vol. 71, p. 366 at p. 380, para. 46.

(2) A State may protect a non-national against the State of nationality of an injured individual or a third State in inter-State proceedings under the International Covenant on Civil and Political Rights,²³⁶ the International Convention on the Elimination of All Forms of Racial Discrimination,²³⁷ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,²³⁸ the European Convention on Human Rights,²³⁹ the American Convention on Human Rights,²⁴⁰ and the African Charter on Human and People's Rights.²⁴¹ The same conventions allow a State to protect its own nationals in inter-State proceedings.

Moreover, customary international law allows States to protect the rights of non-nationals by protest, negotiation and, if a jurisdictional instrument so permits, legal proceedings. The view taken by the International Court of Justice in the 1966 *South West Africa* cases²⁴² holding that a State may not bring legal proceedings to protect the rights of non-nationals has to be qualified in the light of the articles on Responsibility of States for internationally wrongful acts.²⁴³

Article 48 (1) (b) of the articles on Responsibility of States for Internationally Wrongful Acts permits a State other than the injured State to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole,²⁴⁴ without complying with the requirements for the exercise of diplomatic protection.²⁴⁵

(3) The individual is also endowed with rights and remedies to protect him or herself against the injuring State, whether the individual's State of nationality or another State, in terms of

²³⁶ United Nations, *Treaty Series*, vol. 999, p. 171, art. 41.

²³⁷ Article 11.

²³⁸ United Nations, *Treaty Series*, vol. 1465, p. 85, art. 21.

²³⁹ Article 24.

²⁴⁰ Article 45.

²⁴¹ United Nations, *Treaty Series*, vol. 1520, p. 217, arts. 47-54.

²⁴² *Second Phase*, Judgment, *I.C.J. Reports 1966*, p. 6.

²⁴³ Commentary to article 48, footnote 766.

²⁴⁴ See further the separate opinion of Judge Simma in the *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, *I.C.J. Reports 2005*, paras. 35-41.

²⁴⁵ Article 48 (1) (b) is not subject to article 44 of the articles on Responsibility of States for internationally wrongful acts which requires a State invoking the responsibility of another State to comply with the rules relating to the nationality of claims and to exhaust local remedies. Nor is it subject to the present draft articles (cf. E. Milano "Diplomatic Protection and Human Rights before the International Court of Justice: Re-Fashioning Tradition", *Netherlands Yearbook of International Law*, vol. 35 (2005), p. 85 at pp. 103-108).

international human rights conventions. This is most frequently achieved by the right to petition an international human rights monitoring body.²⁴⁶

(4) Individual rights under international law may also arise outside the framework of human rights. In the *La Grand* case the International Court of Justice held that article 36 of the Vienna Convention on Consular Relations “creates individual rights, which by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person”;²⁴⁷ and in the *Avena* case the Court further observed “that violations of the rights of the individual under article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual”.²⁴⁸ A saving clause was inserted in the articles on Responsibility of States for internationally wrongful acts - article 33 - to take account of this development in international law.²⁴⁹

(5) The actions or procedures referred to in draft article 16 include those available under both universal and regional human rights treaties as well as any other relevant treaty. Draft article 16 does not, however, deal with domestic remedies.

(6) The right to assert remedies other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act will normally vest in a State, natural or legal person, with the term “legal person” including both corporations and other legal persons of the kind contemplated in draft article 13. However, there may be “other legal entities” not enjoying legal personality that may be endowed with the right to bring claims for injuries suffered as a result of an internationally wrongful act. Loosely-formed victims’ associations

²⁴⁶ See, for example, the Optional Protocol to the International Covenant on Civil and Political Rights, *United Nations, Treaty Series*, vol. 999, p. 171; article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination; articles 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *United Nations, Treaty Series*, vol. 1465, p. 85; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, *United Nations, Treaty Series*, vol. 2131, p. 83.

²⁴⁷ *La Grand (Germany v. United States of America)*, at p. 494, para. 77.

²⁴⁸ *Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, at p. 26, para. 40.

²⁴⁹ This article reads: “This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”.

provide an example of such “another entity” which have on occasion been given standing before international bodies charged with the enforcement of human rights. Intergovernmental bodies may also in certain circumstances belong to this category; so too may national liberation movements.

(7) Draft article 16 makes it clear that the present draft articles are without prejudice to the rights that States, natural and legal persons or other entities may have to secure redress for injury suffered as a result of an internationally wrongful act by procedures other than diplomatic protection. Where, however, a State resorts to such procedures it does not necessarily abandon its right to exercise diplomatic protection in respect of a person if that person should be a national or person referred to in draft article 8.

Article 17

Special rules of international law

The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.

Commentary

(1) Some treaties, particularly those dealing with the protection of foreign investment, contain special rules on the settlement of disputes which exclude or depart substantially from the rules governing diplomatic protection. Such treaties abandon or relax the conditions relating to the exercise of diplomatic protection, particularly the rules relating to the nationality of claims and the exhaustion of local remedies. Bilateral investment treaties (BITs) and the multilateral Convention on the Settlement of Investment Disputes between States and Nationals of Other States are the primary examples of such treaties.

(2) Today foreign investment is largely regulated and protected by BITs.²⁵⁰ The number of BITs has grown considerably in recent years and it is today estimated that there are nearly 2,000 such agreements in existence. An important feature of the BIT is its procedure for the settlement of investment disputes. Some BITs provide for the direct settlement of the investment dispute between the investor and the host State, before either an *ad hoc* tribunal or a tribunal established

²⁵⁰ This was acknowledged by the International Court of Justice in the *Barcelona Traction* case, at p. 47, para. 90.

by the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Other BITs provide for the settlement of investment disputes by means of arbitration between the State of nationality of the investor (corporation or shareholder) and the host State over the interpretation or application of the relevant provision of the BIT. The dispute settlement procedures provided for in BITs and ICSID offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration, avoid the political uncertainty inherent in the discretionary nature of diplomatic protection and dispense with the conditions for the exercise of diplomatic protection.²⁵¹

(3) Draft article 17 makes it clear that the present draft articles do not apply to the alternative special regime for the protection of foreign investors provided for in bilateral and multilateral investment treaties. The provision is formulated so that the draft articles do not apply “to the extent that” they are inconsistent with the provisions of a BIT. To the extent that the draft articles remain consistent with the BIT in question, they continue to apply.

201 (4) Draft article 17 refers to “treaty provisions” rather than to “treaties” as treaties other than those specifically designed for the protection of investments may regulate the protection of investments, such as treaties of Friendship, Commerce and Navigation.

Article 18

Protection of ships’ crews

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

²⁵¹ Article 27 (1) of the ICSID Convention provides: “No contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.”

Commentary

(1) The purpose of draft article 18 is to affirm the right of the State or States of nationality of a ship’s crew to exercise diplomatic protection on their behalf, while at the same time acknowledging that the State of nationality of the ship also has a right to seek redress on their behalf, irrespective of their nationality, when they have been injured in the course of an injury to a vessel resulting from an internationally wrongful act. It has become necessary to affirm the right of the State of nationality to exercise diplomatic protection on behalf of the members of a ship’s crew in order to preclude any suggestion that this right has been replaced by that of the State of nationality of the ship. At the same time it is necessary to recognize the right of the State of nationality of the ship to seek redress in respect of the members of the ship’s crew. Although this cannot be characterized as diplomatic protection in the absence of the bond of nationality between the flag State of a ship and the members of a ship’s crew, there is nevertheless a close resemblance between this type of protection and diplomatic protection.

(2) There is support in the practice of States, in judicial decisions and in the writings of publicists,²⁵² for the position that the State of nationality of a ship (the flag State) may seek redress for members of the crew of the ship who do not have its nationality. There are also policy considerations in favour of such an approach.

(3) The early practice of the United States, in particular, lends support to such a custom. Under American law foreign seamen were traditionally entitled to the protection of the United States while serving on American vessels. The American view was that once a seaman enlisted on a ship, the only relevant nationality was that of the flag State.²⁵³ This unique status of foreigners serving on American vessels was traditionally reaffirmed in diplomatic

²⁵² H. Myers, *The Nationality of Ships* (1967), pp. 90-108; R. Dolzer, “Diplomatic Protection of Foreign Nationals” in *Encyclopaedia of Public International Law* (1992), vol. 1, p. 1068; I. Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press 2003), p. 460.

²⁵³ *Ross v. McIntyre*, 140 U.S. 453 (1891).

communications and consular regulations of the United States.²⁵⁴ Doubts have, however, been raised, including by the United States,²⁵⁵ as to whether this practice provides evidence of a customary rule.²⁵⁶

(4) International arbitral awards are inconclusive on the right of a State to extend protection to non-national seamen, but tend to lean in favour of such right rather than against it. In *McCready (US) v. Mexico* the umpire, Sir Edward Thornton, held that “seamen serving in the naval or mercantile marine under a flag not their own are entitled, for the duration of that service, to the protection of the flag under which they serve”.²⁵⁷ In the “*I m Alone*” case,²⁵⁸ which arose from the sinking of a Canadian vessel by a United States coast guard ship, the Canadian Government successfully claimed compensation on behalf of three non-national crew members, asserting that where a claim was on behalf of a vessel, members of the crew were to be deemed, for the purposes of the claim, to be of the same nationality as the vessel. In the *Reparation for Injuries* advisory opinion two judges, in their separate opinions, accepted the right of a State to exercise protection on behalf of alien crew members.²⁵⁹

(5) In 1999, the International Tribunal for the Law of the Sea handed down its decision in *The M/V “Saiga” (No. 2) case (Saint Vincent and the Grenadines v. Guinea)*²⁶⁰ which provides support for the right of the flag State to seek redress for non-national crew members. The dispute in this case arose out of the arrest and detention of the *Saiga* by Guinea, while it was supplying oil to fishing vessels off the coast of Guinea. The *Saiga* was registered in St. Vincent and the Grenadines (“St. Vincent”) and its master and crew were Ukrainian nationals. There were also three Senegalese workers on board at the time of the arrest. Following the arrest, Guinea detained the ship and crew. In proceedings before the International Tribunal for the Law of the Sea, Guinea objected to the admissibility of St. Vincent’s claim, *inter alia*, on the ground

that the injured crew members were not nationals of St. Vincent. The Tribunal dismissed these challenges to the admissibility of the claim and held that Guinea had violated the rights of St. Vincent by arresting and detaining the ship and its crew. It ordered Guinea to pay compensation to St. Vincent for damages to the *Saiga* and for injury to the crew.

(6) Although the Tribunal treated the dispute mainly as one of direct injury to St. Vincent,²⁶¹ the Tribunal’s reasoning suggests that it also saw the matter as a case involving the protection of the crew something akin to, but different from, diplomatic protection. Guinea clearly objected to the admissibility of the claim in respect of the crew on the ground that it constituted a claim for diplomatic protection in respect of non-nationals of St. Vincent.²⁶² St. Vincent, equally clearly, insisted that it had the right to protect the crew of a ship flying its flag “irrespective of their nationality”.²⁶³ In dismissing Guinea’s objection the Tribunal stated that the United Nations Convention on the Law of the Sea²⁶⁴ in a number of relevant provisions, including article 292, drew no distinction between nationals and non-nationals of the flag State.²⁶⁵ It stressed that “the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant”.²⁶⁶

(7) There are cogent policy reasons for allowing the flag State to seek redress for the ship’s crew. This was recognized by the Law of the Sea Tribunal in *Saiga* when it called attention to “the transient and multinational composition of ships’ crews” and stated that large ships “could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such a person is a national, undue hardship would ensue”.²⁶⁷ Practical considerations relating to the bringing of claims should not be

²⁵⁴ G.H. Hackworth, *Digest of International Law* (1942), vol. 3, p. 418, vol. 4, pp. 883-884.

²⁵⁵ Communication dated 20 May 2003 to the International Law Commission (on file with the Codification Division of the Office of Legal Affairs of the United Nations).

²⁵⁶ See Arthur Watts, “The Protection of Alien Seamen”, ICLQ vol. 7 (1958), p. 691.

²⁵⁷ J.B. Moore, *International Arbitrations*, vol. 3, p. 2536.

²⁵⁸ AJIL vol. 29 (1935), 326.

²⁵⁹ *I.C.J. Reports 1949*, p. 174 at pp. 202-203, Judge Hackworth and pp. 206-207, Judge Badawi Pasha.

²⁶⁰ Judgment, *ITLOS Reports 1999*, p. 10.

²⁶¹ *Ibid.*, para. 98.

²⁶² *Ibid.*, para. 103.

²⁶³ *Ibid.*, para. 104.

²⁶⁴ United Nations, *Treaty Series*, vol. 1833, p. 3.

²⁶⁵ Judgment, *ITLOS Reports 1999*, para. 105.

²⁶⁶ *Ibid.*, para. 106.

²⁶⁷ *Ibid.*, para. 107.

overlooked. It is much easier and more efficient for one State to seek redress on behalf of all crew members than to require the States of nationality of all crew members to bring separate claims on behalf of their nationals.

(8) Support for the right of the flag State to seek redress for the ship's crew is substantial and justified. It cannot, however, be categorized as diplomatic protection. Nor should it be seen as having replaced diplomatic protection. Both diplomatic protection by the State of nationality and the right of the flag State to seek redress for the crew should be recognized, without priority being accorded to either. Ships' crews are often exposed to hardships emanating from the flag State, in the form of poor working conditions, or from third States, in the event of the ship being arrested. In these circumstances they should receive the maximum protection that international law can offer.

(9) The right of the flag State to seek redress for the ship's crew is not limited to redress for injuries sustained during or in the course of an injury to the vessel but extends also to injuries sustained in connection with an injury to the vessel resulting from an internationally wrongful act, that is as a consequence of the injury to the vessel. Thus such a right would arise where members of the ship's crew are illegally arrested and detained after the illegal arrest of the ship itself.

Article 19

Recommended practice

A State entitled to exercise diplomatic protection according to the present draft articles, should:

- (a) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;
- (b) Take into account, wherever feasible, the views of injured persons with regard to diplomatic protection and the reparation to be sought; and
- (c) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.

Commentary

- (1) There are certain practices on the part of States in the field of diplomatic protection which have not yet acquired the status of customary rules and which are not susceptible to

transformation into rules of law in the exercise of progressive development of the law. Nevertheless they are desirable practices, constituting necessary features of diplomatic protection, that add strength to diplomatic protection as a means for the protection of human rights and foreign investment. These practices are recommended to States for their consideration in the exercise of diplomatic protection in draft article 19, which recommends that States "should" follow certain practices. The use of recommendatory, and not prescriptive, language of this kind is not unknown to treaties, although it cannot be described as a common feature of treaties.²⁶⁸

(2) Subparagraph (a), recommends to States that they should give consideration to the possibility of exercising diplomatic protection on behalf of a national who suffers significant injury. The protection of human beings by means of international law is today one of the principal goals of the international legal order, as was reaffirmed by the 2005 World Summit Outcome resolution adopted by the General Assembly on 24 October 2005.²⁶⁹ This protection may be achieved by many means, including consular protection, resort to international human rights treaties mechanisms, criminal prosecution or action by the Security Council or other international bodies - and diplomatic protection. Which procedure or remedy is most likely to achieve the goal of effective protection will, inevitably, depend on the circumstances of each case. When the protection of foreign nationals is in issue, diplomatic protection is an obvious remedy to which States should give serious consideration. After all it is the remedy with the longest history and has a proven record of effectiveness. Draft article 19, subparagraph (a), serves as a reminder to States that they should consider the possibility of resorting to this remedial procedure.

(3) A State is not under international law obliged to exercise diplomatic protection on behalf of a national who has been injured as a result of an internationally wrongful act attributable to

²⁶⁸ Article 36 (3) of the Charter of the United Nations, for instance, provides that in recommending appropriate procedures for the settlement of disputes, "the Security Council *should* also take into consideration that legal disputes *should* as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court" (emphasis added). Conventions on the law of the sea also employ the term "should" rather than "shall". Article 3 of the 1958 Geneva Convention on the High Seas, United Nations *Treaty Series*, vol. 450, p. 11, provides that "in order to enjoy freedom of the seas on equal terms with coastal States, States having no sea coast *should* have free access to the sea" (emphasis added). See, too, articles 27, 28, 43 and 123 of the 1982 United Nations Convention on the Law of the Sea.

²⁶⁹ A/RES/60/1, paras. 119-120, 138-140.

another State. The discretionary nature of the State's right to exercise diplomatic protection is affirmed by draft article 2 of the present draft articles and has been asserted by the International Court of Justice²⁷⁰ and national courts,²⁷¹ as shown in the commentary to draft article 2. Despite this there is growing support for the view that there is some obligation, however imperfect, on States, either under international law or national law, to protect their nationals abroad when they are subjected to significant human rights violations. The Constitutions of many States recognize the right of the individual to receive diplomatic protection for injuries suffered abroad,²⁷² which must carry with it the corresponding duty of the State to exercise protection. Moreover, a number of national court decisions indicate that although a State has a discretion whether to exercise diplomatic protection or not, there is an obligation on that State, subject to judicial review, to do something to assist its nationals, which may include an obligation to give due consideration to the possibility of exercising diplomatic protection.²⁷³ In *Kaunda and Others v. President of the Republic of South Africa* the South Africa Constitutional Court stated that:

“There may be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable and a court would order the government to take appropriate action.”²⁷⁴

In these circumstances it is possible to seriously suggest that international law already recognizes the existence of some obligation on the part of a State to consider the possibility of exercising

diplomatic protection on behalf of a national who has suffered a significant injury abroad. If customary international law has not yet reached this stage of development then draft article 19, subparagraph (a), must be seen as an exercise in progressive development.

(4) Subparagraph (b), provides that a State “should”, in the exercise of diplomatic protection, “take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought”. In practice States exercising diplomatic protection do have regard to the moral and material consequences of an injury to an alien in assessing the damages to be claimed.²⁷⁵ In order to do this it is obviously necessary to consult with the injured person. So, too, with the decision whether to demand satisfaction, restitution or compensation by way of reparation. This has led some scholars to contend that the admonition contained in draft article 19, subparagraph (b), is already a rule of customary international law.²⁷⁶ If it is not, draft article 19, subparagraph (b), must also be seen as an exercise in progressive development.

(5) Subparagraph (c) provides that States should transfer any compensation received from the responsible State in respect of an injury to a national to the injured national. This recommendation is designed to encourage the widespread perception that States have an absolute discretion in such matters and are under no obligation to transfer moneys received for a claim based on diplomatic protection to the injured national. This perception has its roots in the *Mavrommatis* rule and a number of judicial pronouncements. In terms of the *Mavrommatis Palestine Concessions* dictum a State asserts its own right in exercising diplomatic protection and becomes “the sole claimant”.²⁷⁷ Consequently, logic dictates that no restraints are placed on the State, in the interests of the individual, in the settlement of the claim or the payment of any compensation received. That the State has “complete freedom of action” in its exercise of diplomatic protection is confirmed by the *Barcelona Traction* case.²⁷⁸ Despite the fact that the logic of *Mavrommatis* is undermined by the practice of calculating the amount of damages

²⁷⁰ *Barcelona Traction* case, at p. 44.

²⁷¹ See, for example, *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598; *Kaunda v. President of the Republic of South Africa* 2005 (4) South African Law Reports 235 (CC), ILM, vol. 44 (2005), p. 173.

²⁷² See First Report of the Special Rapporteur on Diplomatic Protection, document A/CN.4/506, p. 30.

²⁷³ *Rudolf Hess* case ILR vol. 90 p. 387 at pp. 392, 396; *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598 and ILR vol. 125 p. 685, paras. 69, 79, 80, 82-83, 107-8. See, generally, A. Vermeer-Künzli “Restricting Discretion: Judicial Review of Diplomatic Protection” *Nordic Journal of International Law* vol. 75 (2006), p. 93.

²⁷⁴ 2005 (4) South African Law Reports 235 (CC); ILM vol. 44 (2005), p. 173, para. 69.

²⁷⁵ *Chorzow Factory* case (*Merits*), *P.C.I.J. Reports*, Series A, No. 17, p. 28; separate opinion of Judge Morelli in *Barcelona Traction* case, *I.C.J. Reports* 1970, p. 223.

²⁷⁶ B. Bollecker-Stern *Le Préjudice dans la Théorie de la Responsabilité Internationale* (Paris: A. Pedone, 1973), p. 98; L. Dubois “La distinction entre le droit de l’Etat réclamant et le droit au ressortissant dans la protection diplomatique” *Revue critique de Droit International Privé*, (1978) pp. 615, 624.

²⁷⁷ *P.C.I.J. Reports* 1924, Series A, No. 2, p. 2.

²⁷⁸ *I.C.J. Reports* 1970, p. 3 at p. 44.

claimed on the basis of the injury suffered by the individual,²⁷⁹ which is claimed to be a rule of customary international law,²⁸⁰ the view persists that the State has an absolute discretion in the disposal of compensation received. This is illustrated by the dictum of Umpire Parker in the US-German Mixed Claims Commission in *Administrative Decision V*:

“In exercising such control [the nation] is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation and must exercise an untrammelled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised and the private owner will be bound by the action taken. *Even if payment is made to the espousing nation in pursuance of the award, it has complete control over the fund so paid to and held by it and may, to prevent fraud, correct a mistake or protect the national honour, at its election return the fund to the nation paying it or otherwise dispose of it.*”²⁸¹

Similar statements are to be found in a number of English judicial decisions,²⁸² which are seen by some to be an accurate statement of international law.²⁸³

205 (26) It is by no means clear that State practice accords with the above view. On the one hand, States agree to lump sum settlements in respect of multiple individual claims which in practice result in individual claims receiving considerably less than was claimed.²⁸⁴ On the other hand, some States have enacted legislation to ensure that compensation awards are fairly distributed to

individual claimants. Moreover, there is clear evidence that in practice States do pay moneys received in diplomatic claims to their injured nationals. In *Administrative Decision V*, Umpire Parker stated:

“... But where a demand is made on behalf of a designated national, and an award and payment is made on that specific demand, the fund so paid is not a national fund in the sense that the title vests in the nation receiving it entirely free from any obligation to account to the private claimant, on whose behalf the claim was asserted and paid and who is the real owner thereof. Broad and misleading statements susceptible of this construction are found in cases where lump-sum awards and payments have been made to the demanding nation covering numerous claims put forward by it and where the tribunal making the award did not undertake to adjudicate each claim or to allocate any specified amount to any designated claim. It is not believed that any case can be cited in which an award has been made by an international tribunal in favour of the demanding nation on behalf of its designated national in which the nation receiving payment of such award has, in the absence of fraud or mistake, hesitated to account to the national designated, or those claiming under him, for the full amount of the award received. So far as the United States is concerned it would seem that the Congress has treated funds paid the nation in satisfaction of specific claims as held ‘in trust for citizens of the United States or others.’”²⁸⁵

That this is the practice of States is confirmed by scholars.²⁸⁶ Further evidence of the erosion of the State’s discretion is to be found in the decisions of arbitral tribunals which prescribe how the award is to be divided.²⁸⁷ Moreover in 1994 the European Court of Human Rights decided in *Beaumarain v. France*²⁸⁸ that an international agreement making provision for compensation could give rise to an enforceable right on the part of the injured persons to compensation.

²⁸⁵ UNRIIAA, vol. VII, p. 119, at p. 152.

²⁸⁶ W.K. Geck “Diplomatic Protection” in *Encyclopedia of Public International Law* (1992), vol. 1 at p. 1057; F.V. Garcia-Amador, Louis B. Sohn & R.R. Baxter, *Recent Codification of the Law of the State Responsibility for Injuries to Aliens* (Dobbs Ferry, N.Y.: Oceana Publishers, 1974), p. 151.

²⁸⁷ See B. Bollecker-Stern, *Le Préjudice dans la Théorie de la Responsabilité Internationale*, p. 109.

²⁸⁸ Case No. 15287/89; [1994] ECHR 40.

²⁷⁹ *Chorzow Factory* case (Merits) *P.C.I.J. Reports 1928*, Series A, No. 17, at p. 28.

²⁸⁰ See the authors cited in footnote 276 above.

²⁸¹ UNRIIAA vol. VII., p. 119 at p. 152 (Emphasis added).

²⁸² *Civilian War Claimants Association v. R* [1932] AC p. 14; *Lomrho Exports Ltd. v. Export Credits Guarantee Department* [1996] 4 All E.R., p. 673; at p. 687.

²⁸³ American Law Institute, *Restatement of the Law, Third, Foreign Law of the United States* (1987), at §902, pp. 348-9; *Distribution of the Aslop Award*, Opinion of J. Reuben Clark, Department of State, cited in Hackworth, *Digest of International Law*, vol. 5, p. 766; B. Bollecker-Stern *Le Préjudice dans la Théorie de la Responsabilité Internationale*, p. 108.

²⁸⁴ W.K. Geck “Diplomatic Protection”, in *Encyclopaedia of Public International Law* (1992), vol. 1 at p. 1058; D. Bederman “Interim Report on ‘Lump Sum Agreements and Diplomatic Protection’” *International Law Association, Report of the Seventieth Conference, New Delhi* (2002), p. 230; R. Lillich “The United States-Hungarian Claims Agreement of 1973” (1975), *AJIL* vol. 69, p. 534; R. Lillich & B. Weston *International Claims: Their Settlement by Lump-Sum Agreements* (Charlottesville: University Press of Virginia 1975).

- (7) Subparagraph (c) acknowledges that it would not be inappropriate for a State to make reasonable deductions from the compensation transferred to injured persons. The most obvious justification for such deductions would be to recoup the costs of State efforts to obtain compensation for its nationals, or to recover the cost of goods or services provided by the State to them.
- (8) Although there is some support for curtailing the absolute right of the State to withhold payment of compensation received to the injured national in national legislation, judicial decisions and doctrine, this probably does not constitute a settled practice. Nor is there any sense of obligation on the part of States to limit their freedom of disposal of compensation awards. On the other hand, public policy, equity and respect for human rights support the curtailment of the States discretion in the disbursement of compensation. It is against this background that draft article 19, subparagraph (c), has been adopted. While it is an exercise in progressive development it is supported by State practice and equity.

**United Nations General Assembly resolutions 56/83 of 12
December 2001, 59/35 of 2 December 2004, 62/61 and 62/67 of
6 December 2007, 65/19 and 65/27 of 6 December 2010, and
68/104 and 68/113 of 16 December 2013**



General Assembly

Distr.: General
28 January 2002

Fifty-sixth session
Agenda item 162

Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/56/589 and Corr.1)]

56/83. Responsibility of States for internationally wrongful acts

The General Assembly,

Having considered chapter IV of the report of the International Law Commission on the work of its fifty-third session,¹ which contains the draft articles on responsibility of States for internationally wrongful acts,

Noting that the International Law Commission decided to recommend to the General Assembly that it should take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution and annex the draft articles to that resolution, and that it should consider at a later stage, in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic,²

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in the relations of States,

1. *Welcomes* the conclusion of the work of the International Law Commission on responsibility of States for internationally wrongful acts and its adoption of the draft articles and a detailed commentary on the subject;

2. *Expresses its appreciation* to the International Law Commission for its continuing contribution to the codification and progressive development of international law;

3. *Takes note* of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action;

4. *Decides* to include in the provisional agenda of its fifty-ninth session an item entitled "Responsibility of States for internationally wrongful acts".

*85th plenary meeting
12 December 2001*

Annex

Responsibility of States for internationally wrongful acts

PART ONE THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Chapter I General principles

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

Article 3

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Chapter II Attribution of conduct to a State

Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

¹ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 and corrigendum (A/56/10 and Corr.1).*

² *Ibid.*, paras. 72 and 73.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6

Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7

Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9

Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10

Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11

Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Chapter III

Breach of an international obligation

Article 12

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13

International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Chapter IV Responsibility of a State in connection with the act of another State

Article 16

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Article 17

Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Article 18

Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

- (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and
- (b) The coercing State does so with knowledge of the circumstances of the act.

Article 19

Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

Chapter V Circumstances precluding wrongfulness

Article 20

Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21

Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22

Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.

Article 23

Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

- (a) The situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
- (b) The State has assumed the risk of that situation occurring.

Article 24

Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

- (a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
- (b) The act in question is likely to create a comparable or greater peril.

Article 25

Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

- (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
- (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

- (a) The international obligation in question excludes the possibility of invoking necessity; or
- (b) The State has contributed to the situation of necessity.

Article 26

Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

- (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
- (b) The question of compensation for any material loss caused by the act in question.

PART TWO

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Chapter I

General principles

Article 28

Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.

Article 29

Continued duty of performance

The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30

Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

- (a) To cease that act, if it is continuing;
- (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31

Reparation

- 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
- 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32

Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.

Article 33

Scope of international obligations set out in this part

- 1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
- 2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

Chapter II

Reparation for injury

Article 34

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35

Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) Is not materially impossible;
- (b) Does not involve a burden of all proportion to the benefit deriving from restitution instead of compensation.

Article 36

Compensation

- 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
- 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37
Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 38
Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39
Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

Chapter III
Serious breaches of obligations under peremptory norms of general international law

Article 40
Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41
Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

PART THREE

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Chapter I
Invocation of the responsibility of a State

Article 42

Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) That State individually; or
- (b) A group of States including that State, or the international community as a whole, and the breach of the obligation:
 - (i) Specially affects that State; or
 - (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 43

Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
2. The injured State may specify in particular:
 - (a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
 - (b) What form reparation should take in accordance with the provisions of part two.

Article 44

Admissibility of claims

The responsibility of a State may not be invoked if:

- (a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
- (b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45

Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

- (a) The injured State has validly waived the claim;
- (b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

*Article 46
Plurality of injured States*

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

*Article 47
Plurality of responsible States*

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

- (a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;
- (b) Is without prejudice to any right of recourse against the other responsible States.

*Article 48
Invocation of responsibility by a State other than an injured State*

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

- (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
- (b) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

- (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
- (b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

**Chapter II
Countermeasures**

*Article 49
Object and limits of countermeasures*

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

*Article 50
Obligations not affected by countermeasures*

1. Countermeasures shall not affect:
 - (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
 - (b) Obligations for the protection of fundamental human rights;
 - (c) Obligations of a humanitarian character prohibiting reprisals;
 - (d) Other obligations under peremptory norms of general international law.
2. A State taking countermeasures is not relieved from fulfilling its obligations:
 - (a) Under any dispute settlement procedure applicable between it and the responsible State;
 - (b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

*Article 51
Proportionality*

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

*Article 52
Conditions relating to resort to countermeasures*

1. Before taking countermeasures, an injured State shall:
 - (a) Call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;
 - (b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.
2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.
3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:
 - (a) The internationally wrongful act has ceased; and
 - (b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.
4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

*Article 53
Termination of countermeasures*

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act.

*Article 54**Measures taken by States other than an injured State*

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

**PART FOUR
GENERAL PROVISIONS***Article 55**Lex specialis*

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

*Article 56**Questions of State responsibility not regulated by these articles*

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

*Article 57**Responsibility of an international organization*

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

*Article 58**Individual responsibility*

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

*Article 59**Charter of the United Nations*

These articles are without prejudice to the Charter of the United Nations.



General Assembly

Distr.: General
16 December 2004

Fifty-ninth session
Agenda item 139

Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/59/505)]

59/35. Responsibility of States for internationally wrongful acts

The General Assembly,

Recalling its resolution 56/83 of 12 December 2001, the annex to which contains the text of the articles on responsibility of States for internationally wrongful acts,

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in relations between States,

1. *Commends once again* the articles on responsibility of States for internationally wrongful acts to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action;

2. *Requests* the Secretary-General to invite Governments to submit their written comments on any future action regarding the articles;

3. *Also requests* the Secretary-General to prepare an initial compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite Governments to submit information on their practice in this regard, and further requests the Secretary-General to submit this material well in advance of its sixty-second session;

4. *Decides* to include in the provisional agenda of its sixty-second session the item entitled "Responsibility of States for internationally wrongful acts".

65th plenary meeting
2 December 2004



General Assembly

Distr.: General
8 January 2008

Sixty-second session
Agenda item 78

Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/62/446)]

62/61. Responsibility of States for internationally wrongful acts

The General Assembly,

Recalling its resolution 56/83 of 12 December 2001, the annex to which contains the text of the articles on responsibility of States for internationally wrongful acts, and further recalling its resolution 59/35 of 2 December 2004 commending the articles to the attention of Governments,

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in relations between States,

Noting with appreciation the compilation of decisions of international courts, tribunals and other bodies referring to the articles, prepared by the Secretary-General,¹

1. *Commends once again* the articles on responsibility of States for internationally wrongful acts, to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action;

2. *Requests* the Secretary-General to invite Governments to submit their written comments on any future action regarding the articles;

3. *Also requests* the Secretary-General to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite Governments to submit information on their practice in this regard, and further requests the Secretary-General to submit this material well in advance of its sixty-fifth session;

4. *Decides* to include in the provisional agenda of its sixty-fifth session the item entitled "Responsibility of States for internationally wrongful acts" and to further examine, within the framework of a working group of the Sixth Committee, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles.

¹ A/62/62 and Corr.1 and Add.1.

*62nd plenary meeting
6 December 2007*



General Assembly

Distr.: General
8 January 2008

Sixty-second session
Agenda item 83

Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/62/451)]

62/67. Diplomatic protection

The General Assembly,

Having considered chapter IV of the report of the International Law Commission on the work of its fifty-eighth session,¹ which contains the draft articles on diplomatic protection,²

Noting that the Commission decided to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles on diplomatic protection,³

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of diplomatic protection is of major importance in the relations of States,

Taking into account the comments and observations of Governments⁴ and the discussion held in the Sixth Committee at the sixty-second session of the General Assembly on diplomatic protection,

1. Welcomes the conclusion of the work of the International Law Commission on diplomatic protection and its adoption of the draft articles and commentary on the topic;⁵
2. Expresses its appreciation to the Commission for its continuing contribution to the codification and progressive development of international law;
3. Commends the articles on diplomatic protection presented by the Commission, the text of which is annexed to the present resolution, to the attention of Governments, and invites them to submit in writing to the Secretary-General any

further comments concerning the recommendation by the Commission to elaborate a convention on the basis of the articles;

4. Decides to include in the provisional agenda of its sixty-fifth session an item entitled "Diplomatic protection" and to further examine, within the framework of a working group of the Sixth Committee, in light of the written comments of Governments, as well as views expressed in the debates held at the sixty-second session of the General Assembly, the question of a convention on diplomatic protection, or any other appropriate action, on the basis of the above-mentioned articles.

62nd plenary meeting
6 December 2007

Annex

Diplomatic protection

Part one General provisions

Article 1 Definition and scope

For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

Article 2

Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with the present draft articles.

Part two Nationality

Chapter I General principles

Article 3

Protection by the State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.
2. Notwithstanding paragraph 1, diplomatic protection may be exercised by a State in respect of a person that is not its national in accordance with draft article 8.

¹ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10).*

² *Ibid.*, para. 49.

³ *Ibid.*, para. 46.

⁴ A/62/118 and Add.1.

⁵ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, paras. 43 and 44.

Chapter II Natural persons

Article 4

State of nationality of a natural person

For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law.

Article 5

Continuous nationality of a natural person

1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury caused when that person was a national of the former State of nationality and not of the present State of nationality.

4. A State is no longer entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the date of the official presentation of the claim.

Article 6

Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Article 7

Multiple nationality and claim against a State of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.

Article 8

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

Chapter III Legal persons

Article 9

State of nationality of a corporation

For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

Article 10

Continuous nationality of a corporation

1. A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. A State is no longer entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim.

3. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the date of injury and which, as the result of the injury, has ceased to exist according to the law of the State of incorporation.

Article 11

Protection of shareholders

A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:

(a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or

(b) The corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.

Article 12

Direct injury to shareholders

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself,

the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

Article 13
Other legal persons

The principles contained in this chapter shall be applicable, as appropriate, to the diplomatic protection of legal persons other than corporations.

Part three
Local remedies

Article 14
Exhaustion of local remedies

1. A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.
2. "Local remedies" means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.
3. Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.

Article 15
Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

- (a) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;
- (b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;
- (c) There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;
- (d) The injured person is manifestly precluded from pursuing local remedies; or
- (e) The State alleged to be responsible has waived the requirement that local remedies be exhausted.

Part four
Miscellaneous provisions

Article 16
Actions or procedures other than diplomatic protection

The rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

Article 17
Special rules of international law

The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.

Article 18
Protection of ships' crews

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

Article 19
Recommended practice

A State entitled to exercise diplomatic protection according to the present draft articles, should:

- (a) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;
- (b) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and
- (c) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.



General Assembly

Distr.: General
10 January 2011

Sixty-fifth session
Agenda item 75

Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/65/463)]

65/19. Responsibility of States for internationally wrongful acts

The General Assembly,

Recalling its resolution 56/83 of 12 December 2001, the annex to which contains the text of the articles on responsibility of States for internationally wrongful acts, and its resolutions 59/35 of 2 December 2004 and 62/61 of 6 December 2007 commending the articles to the attention of Governments,

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in relations between States,

Taking into account the comments and observations of Governments¹ and the discussions held in the Sixth Committee, at the fifty-sixth, fifty-ninth, sixty-second and sixty-fifth sessions of the General Assembly, on responsibility of States for internationally wrongful acts,

Noting with appreciation the compilation of decisions of international courts, tribunals and other bodies referring to the articles, prepared by the Secretary-General,²

1. *Acknowledges* the importance of the articles on responsibility of States for internationally wrongful acts, and commends them once again to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action;

2. *Requests* the Secretary-General to invite Governments to submit further written comments on any future action regarding the articles;

3. *Also requests* the Secretary-General to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles

¹ See A/62/63 and Add.1 and A/65/96 and Add.1.

² See A/62/62 and Corr.1 and Add.1 and A/65/76.



and to invite Governments to submit information on their practice in this regard, and further requests the Secretary-General to submit this material well in advance of its sixty-eighth session;

4. *Decides* to include in the provisional agenda of its sixty-eighth session the item entitled “Responsibility of States for internationally wrongful acts” and to further examine, within the framework of a working group of the Sixth Committee and with a view to taking a decision, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles.

*57th plenary meeting
6 December 2010*



General Assembly

Distr.: General
10 January 2011

Sixty-fifth session
Agenda item 80

Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/65/468)]

65/27. Diplomatic protection

The General Assembly,

Recalling its resolution 62/67 of 6 December 2007, the annex to which contains the text of the articles on diplomatic protection, commending the articles to the attention of Governments,

Recalling also that the International Law Commission decided to recommend to the General Assembly the elaboration of a convention on the basis of the articles on diplomatic protection,¹

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of diplomatic protection is of major importance in relations between States,

Taking into account the comments and observations of Governments² and the discussions held in the Sixth Committee, at the sixty-second and sixty-fifth sessions of the General Assembly, on diplomatic protection,

1. *Commends once again* the articles on diplomatic protection to the attention of Governments, and invites them to submit in writing to the Secretary-General any further comments, including comments concerning the recommendation by the Commission to elaborate a convention on the basis of the articles;¹

2. *Decides* to include in the provisional agenda of its sixty-eighth session the item entitled "Diplomatic protection" and, within the framework of a working group of the Sixth Committee, in the light of the written comments of Governments, as well as views expressed in the debates held at the sixty-second and sixty-fifth sessions of the General Assembly, to further examine the question of a convention on diplomatic protection, or any other appropriate action, on the basis of the above-mentioned articles and to also identify any difference of opinion on the articles.

¹ See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 46.

² See A/62/118 and Add.1 and A/65/182 and Add.1.



*57th plenary meeting
6 December 2010*



General Assembly

Distr.: General
18 December 2013

Sixty-eighth session
Agenda item 77

Resolution adopted by the General Assembly on 16 December 2013

[on the report of the Sixth Committee (A/68/460)]

68/104. Responsibility of States for internationally wrongful acts

The General Assembly,

Recalling its resolution [56/83](#) of 12 December 2001, the annex to which contains the text of the articles on responsibility of States for internationally wrongful acts, and its resolutions [59/35](#) of 2 December 2004, [62/61](#) of 6 December 2007 and [65/19](#) of 6 December 2010 commending the articles to the attention of Governments,

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in relations between States,

Taking into account the comments and observations of Governments¹ and the discussions held in the Sixth Committee, at the fifty-sixth, fifty-ninth, sixty-second, sixty-fifth and sixty-eighth sessions of the General Assembly, on responsibility of States for internationally wrongful acts,

Noting with appreciation the compilation of decisions of international courts, tribunals and other bodies referring to the articles, prepared by the Secretary-General,²

1. *Acknowledges* that a growing number of decisions of international courts, tribunals and other bodies refer to the articles on responsibility of States for internationally wrongful acts;

2. *Continues to acknowledge* the importance and usefulness of the articles, and commends them once again to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action;

3. *Requests* the Secretary-General to invite Governments to submit further written comments on any future action regarding the articles;

¹ See [A/62/63](#) and Add.1, [A/65/96](#) and Add.1 and [A/68/69](#) and Add.1.

² See [A/62/62](#) and Corr.1 and Add.1, [A/65/76](#) and [A/68/72](#).

13-44569



Please recycle The universal recycling symbol, consisting of three chasing arrows forming a triangle.



4. *Also requests* the Secretary-General to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite Governments to submit information on their practice in this regard, and further requests the Secretary-General to submit this material well in advance of its seventy-first session;

5. *Decides* to include in the provisional agenda of its seventy-first session the item entitled “Responsibility of States for internationally wrongful acts” and to further examine, within the framework of a working group of the Sixth Committee and with a view to taking a decision, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles.

*68th plenary meeting
16 December 2013*



General Assembly

Distr.: General
18 December 2013

Sixty-eighth session
Agenda item 82

Resolution adopted by the General Assembly on 16 December 2013

[on the report of the Sixth Committee (A/68/465)]

68/113. Diplomatic protection

The General Assembly,

Recalling its resolution [62/67](#) of 6 December 2007, the annex to which contains the text of the articles on diplomatic protection, commending the articles to the attention of Governments,

Recalling also that the International Law Commission decided to recommend to the General Assembly the elaboration of a convention on the basis of the articles on diplomatic protection,¹

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of diplomatic protection is of major importance in relations between States,

Taking into account the comments and observations of Governments² and the discussions held in the Sixth Committee, at the sixty-second, sixty-fifth and sixty-eighth sessions of the General Assembly, on diplomatic protection,

1. *Commends once again* the articles on diplomatic protection³ to the attention of Governments, and invites them to submit in writing to the Secretary-General any further comments, including comments concerning the recommendation by the International Law Commission to elaborate a convention on the basis of the articles;¹

2. *Decides* to include in the provisional agenda of its seventy-first session the item entitled “Diplomatic protection” and, within the framework of a working group of the Sixth Committee, in the light of the written comments of Governments,

¹ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 46.

² See [A/62/118](#) and Add.1, [A/65/182](#) and Add.1 and [A/68/115](#) and Add.1.

³ Resolution [62/67](#), annex.

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as well as views expressed in the debates held at the sixty-second, sixty-fifth and sixty-eighth sessions of the General Assembly, to continue to examine the question of a convention on diplomatic protection, or any other appropriate action, on the basis of the above-mentioned articles and to also identify any difference of opinion on the articles.

*68th plenary meeting
16 December 2013*

International Court of Justice

**Ahmadou Sadio Diallo (Republic of Guinea *v.* Democratic
Republic of the Congo)
Preliminary Objections, Judgment**

I.C.J. Reports 2007

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

**AFFAIRE
AHMADOU SADIO DIALLO**

(RÉPUBLIQUE DE GUINÉE c. RÉPUBLIQUE DÉMOCRATIQUE
DU CONGO)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 24 MAI 2007

2007

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

**CASE CONCERNING
AHMADOU SADIO DIALLO**

(REPUBLIC OF GUINEA v. DEMOCRATIC REPUBLIC
OF THE CONGO)

PRELIMINARY OBJECTIONS

JUDGMENT OF 24 MAY 2007

Mode officiel de citation :

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INTERNATIONAL COURT OF JUSTICE

YEAR 2007

24 May 2007

CASE CONCERNING
AHMADOU SADIO DIALLO(REPUBLIC OF GUINEA v. DEMOCRATIC
REPUBLIC OF THE CONGO)

PRELIMINARY OBJECTIONS

Facts underlying the case — Disputes between Africom-Zaire and Africotainers-Zaire, two sociétés privées à responsabilité limitée (SPRLs) incorporated under Zairean law, on the one hand, and the Zairean State and other business partners on the other — Arrest, detention and expulsion of Mr. Diallo, a Guinean citizen, associé and gérant of the companies, on the ground that his presence and conduct breached public order in Zaire — Disagreement between the Parties on the circumstances of Mr. Diallo's arrest, detention and expulsion.

* *

Object of the Application — Diplomatic protection on behalf of Mr. Diallo for the violation of three categories of rights — Mr. Diallo's individual personal rights — Mr. Diallo's direct rights as associé in Africom-Zaire and Africotainers-Zaire — Rights of the companies.

* *

Basis of the Court's jurisdiction — Declarations made by the Parties under Article 36, paragraph 2, of the Statute.

* *

Preliminary objections raised by the DRC to the admissibility of the Application — Guinea's standing — Non-exhaustion of local remedies — Examination by the Court in respect of each of the three different categories of rights alleged by Guinea to have been violated.

*

24 MAI 2007

ARRÊT

AHMADOU SADIO DIALLO
(RÉPUBLIQUE DE GUINÉE c. RÉPUBLIQUE DÉMOCRATIQUE
DU CONGO)

EXCEPTIONS PRÉLIMINAIRES

AHMADOU SADIO DIALLO
(REPUBLIC OF GUINEA v. DEMOCRATIC REPUBLIC
OF THE CONGO)

PRELIMINARY OBJECTIONS

24 MAY 2007

JUDGMENT

Mr. Diallo's individual personal rights.
DRC's contention that Guinea's Application is inadmissible on the ground that local remedies have not been exhausted — Scope ratione materiae of diplomatic protection — Conditions of exercise — Mr. Diallo's Guinean nationality — Burden of proof as regards local remedies — Guinea required to prove exhaustion by Mr. Diallo of local remedies available in the DRC or the existence of exceptional circumstances justifying the failure to exhaust them — DRC required to prove existence and non-exhaustion of available and effective local remedies — Examination by the Court confined to the question of local remedies in respect of Mr. Diallo's expulsion — Expulsion characterized as "refusal of entry" ("refoulement") when carried out — Refusals of entry not appealable under Congolese law — DRC cannot rely on error in designation — Request for reconsideration by the administrative authority having taken the decision not a local remedy to be exhausted — Objection based on failure to exhaust local remedies rejected.

*

Protection of Mr. Diallo's direct rights as associé in Africom-Zaire and Africontainers-Zaire.

DRC's contention that Guinea's Application is inadmissible for lack of standing, Mr. Diallo's expulsion not having injured his direct rights as associé — Guinea's contention that the effect of and motive for Mr. Diallo's expulsion was to prevent him from exercising his direct rights as associé in Africom-Zaire and Africontainers-Zaire and his rights as their gérant — Legal nature of the companies governed by Congolese law — Independent legal personality of SPRLs distinct from that of their associates — National State of associates entitled to exercise diplomatic protection in respect of infringements of their direct rights — Definition of rights appertaining to the status of associé and to the position of gérant of an SPRL under Congolese law and assessment of the effects on these rights of the actions taken against Mr. Diallo, being substantive matters — Objection based on Guinea's lack of standing rejected.

DRC's contention that Guinea's Application is inadmissible for failure to exhaust local remedies — Alleged violations of Mr. Diallo's direct rights as associé described by Guinea as a direct consequence of his expulsion — Court having found that the DRC has not proved the existence under Congolese law of effective remedies against Mr. Diallo's expulsion — DRC not having shown the existence of distinct remedies against the alleged violations of Mr. Diallo's direct rights as associé — Objection as to inadmissibility based on failure to exhaust local remedies rejected.

*

Diplomatic protection with respect to Mr. Diallo "by substitution" for Africom-Zaire and Africontainers-Zaire.

DRC's contention that Guinea's Application is inadmissible for lack of standing — Guinea's argument that customary international law of diplomatic protection by a company by its State of nationality is subject to an exception allowing for diplomatic protection of shareholders by their national State "by

substitution" for the company when the State whose responsibility is at issue is the national State of the company — Exception not, at present, established in customary international law — Question whether customary international law contains a more limited rule of protection "by substitution", such as that proposed by the International Law Commission (ILC) in Article 11 (b) of its draft Articles on Diplomatic Protection — Does not arise for decision on present facts — Diplomatic protection of Africom-Zaire and Africontainers-Zaire governed by the normal rule of the nationality of the claims — Congolese nationality of the companies — Objection based on Guinea's lack of standing upheld.

DRC's objection based on failure to exhaust local remedies without object.

* * *

Application admissible in so far as it concerns protection of Mr. Diallo's rights as an individual and his direct rights as associé in Africom-Zaire and Africontainers-Zaire.

JUDGMENT

Present: President HIGGINS; Vice-President AL-KHASAWNEH; Judges RANJEVA, SHI, KOROMA, BUERGENTHAL, OWADA, SIMMA, TOMKA, ABRAHAM, KEITH, BENNOUNA, SKOTNIKOV; Judges ad hoc MAHIU, MAMPUYA; Registrar COUVREUR.

In the case concerning Ahmadou Sadio Diallo,
between

the Republic of Guinea,
 represented by

Mr. Mohamed Camara, Chargé d'affaires a.i. at the Embassy of the Republic of Guinea, Brussels,
 as Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission of the United Nations,

as Deputy Agent, Counsel and Advocate;

Mr. Mathias Forteau, Professor at the University of Lille 2,
 Mr. Jean-Marc Thouvenin, Professor at the University of Paris X-Nanterre, member of the Paris Bar, Cabinet Sygna Partners,
 Mr. Samuel Wordsworth, member of the English Bar, Essex Court Chambers,
 as Counsel and Advocates;

Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris X-Nanterre,
Mr. Luke Vidal, member of the Paris Bar, Cabinet Sygna Partners,
as Advisers,

and

the Democratic Republic of the Congo,

represented by

H.E. Mr. Pierre Ilunga M'Bundu wa Biloba, Minister of Justice and Keeper of the Seals, Democratic Republic of the Congo,

as Head of Delegation;

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands,

as Agent;

Maitre Tshibangu Kalala, Deputy, Congolese Parliament, member of the Kinshasa and Brussels Bars, Cabinet Tshibangu et Associés,

as Co-Agent, Counsel and Advocate;

Mr. André Mazvambo Makengo Kisala, Professor of International Law, University of Kinshasa,

as Counsel and Advocate;

Mr. Yenyi Olungu, Principal Advocate-General of the Republic, Directeur de cabinet of the Minister of Justice and Keeper of the Seals,

Mr. Victor Musompo Kasongo, Private Secretary to the Minister of Justice and Keeper of the Seals,

Mr. Nsingi-zi-Mayemba, Minister-Counsellor, Embassy of the Democratic Republic of the Congo in the Netherlands,

Mr. Bamana Kalonji Jerry, Second Counsellor, Embassy of the Democratic Republic of the Congo in the Netherlands,

Maitre Kikangala Ngote, member of the Brussels Bar,

as Advisers;

Maitre Kadima Mukadi, member of the Kinshasa Bar, Cabinet Tshibangu et Associés,

Maitre Lufuilwabo Tshimpangila, member of the Brussels Bar,

Maitre Tshibwabwa Mbuyi, member of the Brussels Bar,

as Research Assistants;

Ms Ngoya Tshibangu,

as Assistant,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 28 December 1998, the Government of the Republic of Guinea (hereinafter “Guinea”) filed in the Registry of the Court an Application instituting

proceedings against the Democratic Republic of the Congo (hereinafter the “DRC”) in respect of a dispute concerning “serious violations of international law” allegedly committed “upon the person of a Guinean national”. The Application consisted of two parts, each signed by Guinea’s Minister for Foreign Affairs. The first part, entitled “Application” (hereinafter the “Application (Part One)”), contained a succinct statement of the subject of the dispute, the basis of the Court’s jurisdiction and the legal grounds relied on. The second part, entitled “Memorial of the Republic of Guinea” (hereinafter the “Application (Part Two)”), set out the facts underlying the dispute, expanded on the legal grounds put forward by Guinea and stated Guinea’s claims. In the Application (Part One) Guinea maintained:

“Mr. Ahmadou Sadio Diallo, a businessman of Guinean nationality, was unjustly imprisoned by the authorities of the Democratic Republic of the Congo, after being resident in that State for thirty-two (32) years, despoiled of his sizable investments, businesses, movable and immovable property and bank accounts, and then expelled.”

Guinea added:

“[t]his expulsion came at a time when Mr. Ahmadou Sadio Diallo was pursuing recovery of substantial debts owed to his businesses by the State and by oil companies established in its territory and of which the State is a shareholder”.

Mr. Diallo’s arrest, detention and expulsion are alleged to constitute, *inter alia*, violations of

“the principle that aliens should be treated in accordance with a minimum standard of civilization”, [of] the obligation to respect the freedom and property of aliens, [and of] the right of aliens accused of an offence to a fair trial on adversarial principles by an impartial court”.

To found the jurisdiction of the Court, Guinea invoked in the Application (Part One) the declarations whereby the two States have recognized the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was immediately communicated to the Government of the DRC by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. By an Order of 25 November 1999, the Court fixed 11 September 2000 as the time-limit for the filing of a Memorial by Guinea and 11 September 2001 as the time-limit for the filing of a Counter-Memorial by the DRC. By an Order of 8 September 2000, the President of the Court, at Guinea’s request, extended the time-limit for the filing of the Memorial to 23 March 2001; in the same Order the time-limit for the filing of the Counter-Memorial was extended to 4 October 2002. Guinea duly filed its Memorial within the time-limit as thus extended.

4. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each of them availed itself of its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Guinea chose Mr. Mohammed Bedjaoui and the DRC Mr. Auguste Mampuya Kanunk’a-Ishiabo. Following Mr. Bedjaoui’s resignation on 10 September 2002, Guinea chose Mr. Ahmed Mahiou.

5. On 3 October 2002, within the time-limit set in Article 79, paragraph 1, of the Rules of Court as adopted on 14 April 1978, the DRC raised preliminary objections in respect of the admissibility of Guinea's Application. In accordance with Article 79, paragraph 3, of the Rules of Court, the proceedings on the merits were then suspended. By an Order of 7 November 2002, the Court, taking account of the particular circumstances of the case and of the agreement of the Parties, fixed 7 July 2003 as the time-limit for the presentation by Guinea of a written statement of its observations and submissions on the preliminary objections raised by the DRC. Guinea filed such a statement within the time-limit fixed and the case thus became ready for hearing on the preliminary objections.

6. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

7. Public sittings were held from 27 November 2006 to 1 December 2006, at which the Court heard the oral arguments and replies of:

For the DRC: H.E. Mr. Jacques Masangu-a-Mwanza,
Maître Tshibangu Kalala,
Mr. André Mazyambo Makengo Kisala.

For Guinea: Mr. Mohamed Camara,
Mr. Mathias Forteau,
Mr. Samuel Wordsworth,
Mr. Alain Pellet,
Mr. Jean-Marc Thouvenin.

8. A Member of the Court put a question at the hearing on 28 November 2006, which the Parties answered orally, in accordance with Article 61, paragraph 4, of the Rules of Court.

9. By a letter dated 1 December 2006, the Court, acting pursuant to Article 62, paragraph 1, of the Rules of Court, asked the DRC to furnish it with certain additional documents.

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10. In the Application (Part Two), the following requests were made by Guinea:

“As to the form: To admit the present Application.

As to the merits: To order the authorities of the Democratic Republic of the Congo to make an official public apology to the State of Guinea for the numerous wrongs done to it in the person of its national Ahmadou Sadio Diallo;

To find that the sums claimed are certain, liquidated and legally due;

To find that the Congolese State must assume responsibility for the payment of these debts, in accordance with the principles of State responsibility and civil liability;

To order the Congolese State to pay to the State of Guinea on behalf of its national Ahmadou Sadio Diallo the sums of US \$31,334,685,888.45 and Z 14,207,082,872.7 in respect of the financial loss suffered by him;

To pay also to the State of Guinea damages equal to 15 per cent of the principal award, that is to say US \$4,700,202,883.26 and Z 2,131,062,430.9;

To award to the applicant State bank and moratory interest at respective annual rates of 15 per cent and 26 per cent from the end of the year 1995 until the date of payment in full;

To order the said State to return to the Applicant all the unvalued assets set out in the list of miscellaneous claims;

To order the Democratic Republic of the Congo to submit within one month an acceptable schedule for the repayment of the above sums;

In the event that the said schedule is not produced by the date indicated or is not respected, to authorize the State of Guinea to seize the assets of the Congolese State wherever they may be found, up to an amount equal to the principal sum due and such further amounts as the Court shall have ordered.

To order that the costs of the present proceedings be borne by the Congolese State.” (Emphasis in the original.)

11. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Guinea,

in the Memorial on the merits:

“The Republic of Guinea has the honour to request that it may please the International Court of Justice to adjudge and declare:

(1) that, in arbitrarily arresting and expelling its national, Mr. Ahmadou Sadio Diallo; in not at that time respecting his right to the benefit of the provisions of the [1963] Vienna Convention on Consular Relations; in subjecting him to humiliating and degrading treatment; in depriving him of the exercise of his rights of ownership and management in respect of the companies founded by him in the DRC; in preventing him from pursuing recovery of the numerous debts owed to him — to himself personally and to the said companies — both by the DRC itself and by other contractual partners; in not paying its own debts to him and to his companies, the Democratic Republic of the Congo has committed internationally wrongful acts which engage its responsibility to the Republic of Guinea;

(2) that the Democratic Republic of the Congo is accordingly bound to make full reparation on account of the injury suffered by the Republic of Guinea in the person of its national;

(3) that such reparation shall take the form of compensation covering the totality of the injuries caused by the internationally wrongful acts of the Democratic Republic of the Congo including loss of earnings, and shall also include interest.

The Republic of Guinea further requests the Court kindly to authorize it to submit an assessment of the amount of the compensation due to it on this account from the Democratic Republic of the Congo in a subsequent phase of the proceedings in the event that the two Parties should be unable to agree on the amount thereof within a period of six months following delivery of the Judgment.”

On behalf of the Government of the DRC,
in the preliminary objections:

“The Democratic Republic of the Congo respectfully requests the Court to adjudge and declare that the Application of the Republic of Guinea is inadmissible,

- (1) on the ground that the Republic of Guinea lacks standing to exercise diplomatic protection in the present proceedings, since its Application seeks essentially to secure reparation for injury suffered on account of the alleged violation of rights of companies not possessing its nationality;
- (2) on the ground that, in any event, neither the companies in question nor Mr. Diallo have exhausted the available and effective local remedies existing in Zaire, and subsequently in the Democratic Republic of the Congo.”

On behalf of the Government of Guinea,

in the written statement containing its observations and submissions on the preliminary objections raised by the DRC:

“For the reasons set out above, the Republic of Guinea kindly requests the Court to:

1. Reject the preliminary objections raised by the Democratic Republic of the Congo, and
2. Declare the Application of the Republic of Guinea admissible.”

12. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the DRC,
at the hearing of 29 November 2006:

“The Democratic Republic of the Congo respectfully requests the Court to adjudge and declare that the Application of the Republic of Guinea is inadmissible,

- (1) on the ground that the Republic of Guinea lacks standing to exercise diplomatic protection in the present proceedings, since its Application seeks essentially to secure reparation for injury suffered on account of the violation of rights of companies not possessing its nationality;
- (2) on the ground that, in any event, neither the companies in question nor Mr. Diallo have exhausted the available and effective local remedies existing in the Democratic Republic of the Congo.”

On behalf of the Government of Guinea,
at the hearing of 1 December 2006:

“For the reasons set out in its Observations of 7 July 2003 and in oral argument, the Republic of Guinea kindly requests the International Court of Justice:

- (1) to reject the preliminary objections raised by the Democratic Republic of the Congo;
- (2) to declare the Application of the Republic of Guinea admissible; and

(3) to fix time-limits for the further proceedings.”

* * *

13. The Court will begin with a brief description of the factual background to the present case.

14. As set out in their written pleadings, the Parties are in agreement as to the following facts. Mr. Ahmadou Sadio Diallo, a Guinean citizen, settled in the DRC (called “Congo” between 1960 and 1971 and “Zaire” between 1971 and 1997) in 1964. There, in 1974, he founded an import-export company, Africom-Zaire, a *société privée à responsabilité limitée* (private limited liability company, hereinafter “SPRL”) incorporated under Zairean law and entered in the Trade Register of the city of Kinshasa, and he became its *gérant* (manager). In 1979 Mr. Diallo expanded his activities, taking part, as *gérant* of Africom-Zaire and with backing from two private partners, in the founding of another Zairean SPRL, specializing in the containerized transport of goods. The capital in the new company, Africontainers-Zaire, was held as follows: 40 per cent by Mr. Zala, a Zairean national; 30 per cent by Ms Dewast, a French national; and 30 per cent by Africom-Zaire. It too was entered in the Trade Register of the city of Kinshasa. In 1980 Africom-Zaire’s two partners in Africontainers-Zaire withdrew. The *parts sociales* (see paragraph 25 hereunder) in Africontainers-Zaire were then held as follows: 60 per cent by Africom-Zaire and 40 per cent by Mr. Diallo. At the same time Mr. Diallo became the *gérant* of Africontainers-Zaire. Towards the end of the 1980s, Africom-Zaire’s and Africontainers-Zaire’s relationships with their business partners started to deteriorate. The two companies, acting through their *gérant*, Mr. Diallo, then initiated various steps, including judicial ones, in an attempt to recover alleged debts. The various disputes between Africom-Zaire or Africontainers-Zaire, on the one hand, and their business partners, on the other, continued throughout the 1990s and for the most part remain unresolved today. Thus, Africom-Zaire claims payment from the DRC of a debt (acknowledged by the DRC) resulting from default in payment for deliveries of listing paper to the Zairean State between 1983 and 1986. Africom-Zaire is involved in another dispute, concerning arrears or overpayments of rent, with Planation Lever au Zaire (“PLZ”). Africontainers-Zaire is in dispute with the companies Zaire Fina, Zaire Shell and Zaire Mobil Oil, as well as with the Office National des Transports (“ONATRA”) and Générale des Carrières et des Mines (“Gécamines”). For the most part these differences concern alleged violations of contractual exclusivity clauses and the lay-up, improper use or destruction or loss of containers.

15. The Court considers the following facts also to be established. On 31 October 1995, the Prime Minister of Zaire issued an expulsion Order against Mr. Diallo. The Order gave the following reason for the expuls-

sion: Mr. Diallo's "presence and conduct have breached public order in Zaire, especially in the economic, financial and monetary areas, and continue to do so". On 31 January 1996, Mr. Diallo, already under arrest, was deported from Zaire and returned to Guinea by air. The removal from Zaire was formalized and served on Mr. Diallo in the shape of a notice of refusal of entry (*refoulement*) on account of "illegal residence" (*séjour irrégulier*) that had been drawn up at the Kinshasa airport on the same day.

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16. Throughout the proceedings Guinea and the DRC have continued to differ on a number of other facts.

17. In respect of the specific circumstances of Mr. Diallo's arrest, detention and expulsion, Guinea maintains that Mr. Diallo was "secretly placed in detention, without any form of judicial process or even examination" on 5 November 1995. He allegedly remained imprisoned first for two months, before being released on 10 January 1996, "further to intervention by the [Zairean] President himself", only then to be "immediately rearrested and imprisoned for two [more] weeks" before being expelled. Mr. Diallo is thus said to have been detained for 75 days in all. Guinea adds that he was mistreated while in prison and was "deprived of the benefit of the 1963 Vienna Convention on Consular Relations". According to Guinea, Mr. Diallo has been without means of support since his expulsion and he has been unable to fulfil his functions as executive officer (*dirigeant*) of, or exercise his rights as shareholder in, Africom-Zaire and Africontainers-Zaire.

18. Guinea further maintains that Mr. Diallo's arrest, detention and expulsion were the culmination of a DRC policy to prevent him from recovering the debts owed to his companies, including judgment debts. Guinea claims that, before arresting Mr. Diallo and expelling him in January 1996, the Congolese authorities repeatedly interfered in the affairs of his companies. Guinea contends that Mr. Diallo had already suffered one year of imprisonment, in 1988, after trying to recover debts owed to Africom-Zaire by the Zairean State. Guinea also cites certain steps taken by the DRC in the course of 1995 "arbitrarily to stay the domestic proceedings for the enforcement of decisions handed down in favour of Mr. Diallo's companies". It thus explains:

"Enforcement of the judgment [by the Kinshasa *Tribunal de grande instance*] in the *Africontainers[-Zaire] v. Zaire Shell* case was stayed, on 13 September [1995], by order of the [Zairean Vice-] Minister of Justice, without any legal basis."

After the stay was lifted, property belonging to Zaire Shell was attached but "the attachments were once again revoked on 13 October [1995], this

time permanently, on 'oral instructions' from the Minister of Justice and outside the law". Guinea adds that Mr. Diallo's arrest, detention and expulsion took place just as Zaire Shell, for its part, and Zaire Fina and Zaire Mobil Oil, for theirs, approached Zaire's Minister of Justice, by letters dated 29 August 1995 and 15 November 1995, respectively, "seeking the intervention of the Government to warn the courts and tribunals about Mr. Ahmadou Sadio Diallo's conduct in his campaign to destabilize commercial companies".

19. The DRC rejects these allegations by Guinea and argues that the duration and conditions of Mr. Diallo's detention during the expulsion process were in conformity with Zairean law. In particular, it contends that the statutory maximum of eight days' detention was not exceeded. The DRC adds that the decision expelling Mr. Diallo was justified by his "manifestly groundless" and increasingly exaggerated financial claims against Zairean public undertakings and private companies operating in Zaire and by the disinformation campaign he had launched there "aimed at the highest levels of the Zairean State, as well as very prominent figures abroad". The DRC notes that

"the total sum claimed by Mr. Diallo as owed to the companies run by him came to over 36 billion United States dollars . . . , which represents nearly three times the [DRC's] total foreign debt".

It adds: "the Zairean authorities also discovered that Mr. Diallo had been involved in currency trafficking and that he was moreover guilty of a number of attempts at bribery". Mr. Diallo's actions thus allegedly threatened seriously to compromise not only the operation of the undertakings concerned but also public order in Zaire.

20. The DRC further claims not to have interfered in the affairs of Africom-Zaire and Africontainers-Zaire or to have expelled Mr. Diallo with a view to preventing the companies from completing the legal proceedings they had brought to recover monies owed them. The DRC does not deny that in September 1995 the Minister of Justice ordered a stay of execution of the judgment rendered by the Kinshasa *Tribunal de grande instance* in the *Africontainers-Zaire v. Zaire Shell* case. It nevertheless explains that, "when the enforcement of a judicial decision is liable to . . . lead to serious public disorder", Zairean law allows the Minister of Justice to "stay its execution and request the *Inspecteurat général des services judiciaires* (Inspectorate-General of Courts) to review it for legality". It adds that procedures of this type, "found . . . in a number of African States", are "in no way contrary to the principle of separation of powers, as it is understood in that part of the world". The DRC points out that the stay of execution of the judgment in question "was of very short

duration”, because a few days after the stay took effect the Minister of Justice “requested the president of the Court of Appeal to ‘take the necessary measures to execute’ the judgment . . . [on the ground that] ‘there had been no manifest error’”. The DRC moreover stresses that Mr. Diallo should not be confused with Africom-Zaire and Africontainers-Zaire, that the companies are separate legal entities and that the actions taken against Mr. Diallo cannot be equated with actions against the companies. Specifically, the companies remained completely free, after Mr. Diallo’s expulsion, to pursue any and all legal proceedings they had begun and did in fact do so, according to the DRC.

21. At the hearings the DRC made reference to various problems said to exist in connection with Africom-Zaire. Thus, in response to the question put by Judge Bennouna at the end of the first round of oral argument, seeking clarification from both Parties as to

“whether the legislation of the Democratic Republic of the Congo or the jurisprudence of the courts of the country authorizes the creation of a *société privée à responsabilité limitée* with a single shareholder and by one person” (see paragraph 8 above),

the DRC explained that “Congolese legislation in force does not permit the incorporation of a *société privée à responsabilité limitée* by just one person” and that, contrary to Guinea’s contention, Mr. Diallo could not therefore be the sole *associé* in Africom-Zaire.

22. The DRC next argued, for the first time, that in reality Mr. Diallo was not an *associé* at all in Africom-Zaire. In support it cited, and produced at the hearing, the articles of incorporation of a company called “Africom”, claiming to have discovered them just a few days earlier in the files of the Trade Register of the city of Kinshasa. After the oral proceedings had closed, the Court, acting pursuant to Article 62 of the Rules of Court, asked the DRC to provide it with the articles of incorporation of “Africom-Zaire”. In response, the DRC, by a letter of 20 December 2006, transmitted to the Registry a document identical to the one it had produced at the hearings, accompanied by a note stating that it had been unable to find any reference to Africom-Zaire in the Trade Register of the city of Kinshasa. After Guinea submitted observations on the letter and its annexes, the DRC communicated to the Court, by a letter of 31 January 2007, comments in reply, in which it acknowledged that Africom-Zaire had indeed existed and been registered in the Trade Register of the city of Kinshasa but explained that the company had ceased all activity in the mid-1980s. The DRC stated in that letter that “under Congolese law, a commercial company in such a situation [of inactivity] is automatically struck off the Trade Register as having ceased trading”, so that it was “highly possible that [the Africom-Zaire] file was removed from the files, lost or destroyed by the [Congolese] administrative staff”.

23. While admitting that Congolese legislation does not allow for the incorporation of an SPRL by one person, Guinea, in answering the question put by Judge Bennouna (see paragraphs 8 and 21 above), rejected the DRC’s argument that Mr. Diallo could not be the sole shareholder in Africom-Zaire. It maintained that “the fact of not being able to create a one-person company in no way prevents . . . a company becoming unipersonal subsequently” and in support cited the Decree of 6 March 1951 establishing Zaire’s trade register, which “does not mention a company’s becoming unipersonal as a case necessitating the cancellation of its registration in the trade register”.

24. Guinea further stated that the document referred to by the DRC at the hearing and provided to the Court concerns another company, one “not connected with Mr. Diallo’s company”. As proof thereof, it pointed out that the registered office addresses, registration numbers in the Trade Register and *gerants* of the two companies are different, as are their corporate purposes and dates of incorporation. Guinea argued that “the existence of [the] company [Africom-Zaire] and its articles of incorporation is beyond dispute”. In this connection it pointed out that the validity of the filing of the company’s articles of incorporation had been confirmed by the public prosecutor before the Supreme Court of Justice of the DRC, and it cited “many official documents issued by Zairean authorities” recognizing “Mr. Diallo to be the *gérant* of Africom-Zaire”. Finally, Guinea maintained that the DRC had acknowledged not only the existence of the two companies in question but also the fact that Mr. Diallo had “become, in fact, the sole executive officer of these two companies incorporated under the laws of Zaire”.

* * *

25. The Court notes at the outset that Africom-Zaire and Africontainers-Zaire are *sociétés privées à responsabilité limitée* (SPRLs) incorporated under Congolese law, i.e. companies

“which are formed by persons whose liability is limited to their capital contributions; which are not publicly held companies; and in which the *parts sociales* (shares), required to be uniform and in registered form, are not freely transferable” (Article 36 of the Decree of 27 February 1887 on commercial companies).

Under Congolese law, holders of *parts sociales* (“not freely transferable” shares) in SPRLs, like Mr. Diallo, are termed “*associés*” (see, for example, Articles 43, 44, 45, and 51 of the Decree of 27 February 1887). In their written pleadings and at the hearings, the Parties have however often employed the generic term “shareholder” in referring to Mr. Diallo’s status as *associé* in the two companies. In light of the foregoing,

“*associé*” will be the term primarily used by the Court in the present Judgment, except where it is referring to the Parties’ arguments and when they themselves used the generic term “shareholder”.

* * *

26. The Court observes that the dispute between Guinea and the DRC comprises many aspects and that the Parties have focused on the one or the other of these at different stages in the proceedings.

27. Thus, the greater part of Guinea’s Application concerns the disputes between Africom-Zaire and Africontainers-Zaire, on the one hand, and their public and private business partners, on the other. Specifically, Guinea devotes a lengthy part of its Application to describing the debts allegedly owed to the companies and Mr. Diallo, as well as to expounding the legal grounds on which the DRC is alleged to be liable for all these debts. The claims put forward by Guinea in its Application (Part Two) are also aimed for the most part at obtaining payment of the debts (see paragraph 10 above).

28. Guinea nevertheless also states in its Application that it seeks to exercise its diplomatic protection on behalf of Mr. Diallo “with a view to obtaining [from the Court] a finding that the [DRC] is guilty of serious violations of international law committed upon [his] person”. It asserts that the DRC has violated

“the principle that aliens should be treated in accordance with ‘a minimum standard of civilization’, the obligation to respect the freedom and property of aliens, [and] the right of aliens accused of an offence to a fair trial on adversarial principles by an impartial court”.

In support of these claims, Guinea cites “numerous international agreements concerning the treatment of aliens and the free movement of goods and persons”, including in particular the Universal Declaration of Human Rights of 10 December 1948 and the International Covenant on Civil and Political Rights of 19 December 1966. It states that “these various violations of human rights must be construed as breaches of norms of *jus cogens*”.

29. In its Memorial on the merits, Guinea continues to devote considerable attention to the issue of the debts allegedly owed to Africom-Zaire and Africontainers-Zaire and to Mr. Diallo. But Guinea also places renewed emphasis on the exercise of its diplomatic protection on behalf of Mr. Diallo and states that it

“is taking up the cause of one of its nationals, and is acting to enforce his direct rights as an individual and as shareholder and executive officer of companies which he founded . . . and of which he is the sole or principal owner, to the exclusion of distinct rights which these companies may have against the DRC”.

It divides Mr. Diallo’s rights which it seeks to protect into two separate categories, according to their nature. In the first, it places Mr. Diallo’s rights as an individual, including, in addition to those referred to in the Application, Mr. Diallo’s right not to be subjected to inhuman and degrading treatment and his right to the benefit of the provisions of the 1963 Vienna Convention on Consular Relations, both of which rights were allegedly violated at the time of his arrest, detention and expulsion. In the second category of rights which Guinea seeks to protect it places the “direct rights” allegedly enjoyed by Mr. Diallo as a shareholder (rights also sometimes called by Guinea “shareholder’s rights”) in Africom-Zaire and Africontainers-Zaire, specifically his right to oversee, control and manage the companies.

30. Guinea further states in its Application that it is seeking to protect, in addition to Mr. Diallo, “the companies which he founded and owns”. In its Memorial on the merits, it makes clear that it seeks to exercise its diplomatic protection on behalf of Mr. Diallo by “substitution” for Africom-Zaire and Africontainers-Zaire. Guinea explains that by “substitution” or “protection by substitution” it means the right of a State to exercise its diplomatic protection on behalf of nationals who are shareholders in a foreign company whenever the company has been a victim of wrongful acts committed by the State under whose law it has been incorporated. Thus Guinea does not confine itself to exercising protection of Mr. Diallo in respect of the violations of his direct rights as shareholder in Africom-Zaire and Africontainers-Zaire but seeks to protect him “in respect of the injuries suffered by [these] companies [themselves]”.

31. In sum, Guinea seeks through its action to exercise its diplomatic protection on behalf of Mr. Diallo for the violation, alleged to have occurred at the time of his arrest, detention and expulsion, or to have derived therefrom, of three categories of rights: his individual personal rights, his direct rights as *associé* in Africom-Zaire and Africontainers-Zaire and the rights of those companies, by “substitution”.

* * *

32. To establish the jurisdiction of the Court, Guinea relies on the declarations made by the Parties under Article 36, paragraph 2, of the Statute. The DRC acknowledges that the declarations are sufficient to found the jurisdiction of the Court in the present case. The DRC nevertheless challenges the admissibility of Guinea’s Application and raises two preliminary objections in doing so. First of all, according to the DRC, Guinea lacks standing to act in the current proceedings since the rights which it seeks to protect belong to Africom-Zaire and Africontainers-Zaire, Congolese companies, not to Mr. Diallo. Guinea, it is argued, is further precluded from exercising its diplomatic protection on the ground that neither Mr. Diallo nor the companies have exhausted the remedies

available in the Congolese legal system to obtain reparation for the injuries claimed by Guinea before the Court.

* * *

33. The Court will now examine the preliminary objections to admissibility raised by the DRC, in respect of each of the various categories of rights alleged by Guinea to have been violated in the present case.

* * *

34. The Court will first address the question of the admissibility of Guinea's Application in so far as it concerns protection of Mr. Diallo's rights as an individual.

35. According to the DRC, Guinea's claims in respect of Mr. Diallo's rights as an individual are inadmissible because he "[has not] exhausted the available and effective local remedies existing in Zaire, and subsequently in the Democratic Republic of the Congo". While this objection, presented by the DRC in its written pleadings and at the hearings, is very broadly worded, in the course of the present proceedings the DRC elaborated on only a single aspect of it: that concerning his expulsion from Congolese territory.

36. On this subject the DRC maintains that its domestic legal system provided for available, effective remedies which Mr. Diallo should have exhausted before his cause could be espoused by Guinea. It first observes that, contrary to Guinea's contention, Mr. Diallo's expulsion from the territory was lawful. The DRC acknowledges that the notice signed by the immigration officer "inadvertently" refers to "refusal of entry" (*refoulement*) instead of "expulsion". Further, it does not challenge Guinea's assertion that Congolese law provides that refusals of entry are not appealable. The DRC nevertheless maintains that "despite this error, it is indisputable . . . that this was indeed an expulsion and not a refusal of entry". According to the DRC, calling the action a refusal of entry was therefore not intended to deprive Mr. Diallo of a remedy; on the contrary, "if Mr. Diallo had appealed to the Congolese authorities for permission to return to the DRC, that appeal would have had some prospect of success". The DRC cites the general principle of Congolese law that reconsideration of a decision can in all cases be requested from the authority having taken it and, if necessary, from that authority's superior. It maintains that Mr. Diallo never asked the competent authorities to reconsider their position and to allow him to return to the DRC. According to the DRC, such a request would have had a good chance of success, especially after the change in régime in the country in 1997. The effectiveness of requests for redress in respect of expulsion decisions in the DRC is alleged to be confirmed moreover by a substantial practice, the DRC citing in this regard two applications made by foreign nationals

appealing their removal from Zairean territory, each of which led to withdrawal of the removal Order.

37. Guinea responds that "[a]fter eight years of proceedings the DRC has shown itself to be incapable of invoking so much as a single real remedy that would have been available to Mr. Diallo" in respect of the violation of his rights as an individual. On the subject of Mr. Diallo's expulsion from the Congolese territory, Guinea states that there were no effective remedies first in Zaire, nor in the later DRC, against this measure, recalling in this regard that the expulsion Order against Mr. Diallo was carried out by way of an action denominated "refusal of entry" and that, "under Article 13 of the Legislative Order of 12 September 1983 concerning immigration control [in Zaire]; [a] measure refusing entry shall not be subject to appeal". Guinea adds that the possibility Mr. Diallo had to approach the Zairean authority having issued the expulsion Order "is not[, in any event,] a remedy within the meaning of the local remedies rule". It asserts that, on the contrary, this is merely an "extra-legal procedure that may be characterized as an appeal to the indulgence of the governmental authorities". And, according to Guinea, "[a]dministrative or other remedies which are neither judicial nor quasi-judicial and are discretionary in nature are not . . . taken into account by the local remedies rule". Guinea observes moreover that the two instances of remedies against expulsion cited by the DRC in support of its position are not germane since one case involved expulsion on grounds of illegal immigration, in respect of which a remedy of grace (*recours gracieux*) is available, and the other involved a "decision on grounds of undesirability" the reason for which is not specified in the Order revoking the decision.

38. Guinea further contends that, even though some remedies may in theory have been available to Mr. Diallo in the Congolese legal system, they would in any event have offered him no reasonable possibility of protection at the time. Guinea thus notes that the objective in expelling Mr. Diallo was precisely to prevent him from pursuing legal proceedings and argues that

"if a State deliberately chooses to remove an alien from its territory . . . because that alien is seeking local redress, that State can no longer reasonably demand that the alien seek redress only through legal avenues available in its territory".

Lastly, it notes that any action taken by Mr. Diallo would have been doomed to fail owing to the personal animosity towards him harboured by certain members of the Congolese Government.

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39. The Court will recall that under customary international law, as reflected in Article 1 of the draft Articles on Diplomatic Protection of the International Law Commission (hereinafter the “ILC”),

“diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility” (Article 1 of the draft Articles on Diplomatic Protection adopted by the ILC at its Fifty-eighth Session (2006), ILC Report, doc. A/61/10, p. 24).

Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.

40. In the present case Guinea seeks to exercise its diplomatic protection on behalf of Mr. Diallo in respect of the DRC’s alleged violation of his rights as a result of his arrest, detention and expulsion, that violation allegedly constituting an internationally wrongful act by the DRC giving rise to its responsibility. It therefore falls to the Court to ascertain whether the Applicant has met the requirements for the exercise of diplomatic protection, that is to say whether Mr. Diallo is a national of Guinea and whether he has exhausted the local remedies available in the DRC.

41. To begin with, the Court observes that it is not disputed by the DRC that Mr. Diallo’s sole nationality is that of Guinea and that he has continuously held that nationality from the date of the alleged injury to the date the proceedings were initiated. The Parties have however devoted much argument to the issue of exhaustion of local remedies.

42. As the Court stated in the *Interhandel (Switzerland v. United States of America)* case,

“[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.” (*I.C.J. Reports 1959*, p. 27.)

43. The Parties do not question the local remedies rule; they do however differ as to whether the Congolese legal system actually offered local remedies which Mr. Diallo should have exhausted before his cause could be espoused by Guinea before the Court.

44. In matters of diplomatic protection, it is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust available local remedies (see *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, *I.C.J. Reports 1989*, pp. 43-44, para. 53). It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted (see *ibid.*, p. 46, para. 59). Thus, in the present case, Guinea must establish that Mr. Diallo exhausted any available local remedies or, if not, must show that exceptional circumstances justified the fact that he did not do so; it is, on the other hand, for the DRC to prove that there were available and effective remedies in its domestic legal system against the decision to remove Mr. Diallo from the territory and that he did not exhaust them.

45. The Court will recall at this stage that, in its Memorial on the merits, Guinea described in detail the violations of international law allegedly committed by the DRC against Mr. Diallo. Among those cited is the claim that Mr. Diallo was arbitrarily arrested and detained on two occasions, first in 1988 and then in 1995. It states that he suffered inhuman and degrading treatment during those periods in detention and adds that his rights under the 1963 Vienna Convention on Consular Relations were not respected. The Court observes however that Guinea has not, in any way, developed the question of the admissibility of the claims concerning this inhuman and degrading treatment or relating to the 1963 Vienna Convention on Consular Relations. As the Court has already noted (see paragraph 36), the DRC has for its part endeavoured in the present proceedings to show that remedies to challenge the decision to remove Mr. Diallo from Zaire are institutionally provided for in its domestic legal system. By contrast, the DRC did not address the issue of exhaustion of local remedies in respect of Mr. Diallo’s arrest, his detention or the alleged violations of his other rights, as an individual, said to have resulted from those measures, and from his expulsion, or to have accompanied them. In view of the above, the Court will address the question of local remedies solely in respect of Mr. Diallo’s expulsion.

46. The Court notes that the expulsion was characterized as a “refusal of entry” when it was carried out, as both Parties have acknowledged and as is confirmed by the notice drawn up on 31 January 1996 by the national immigration service of Zaire. It is apparent that refusals of entry

are not appealable under Congolese law. Article 13 of Legislative Order No. 83-033 of 12 September 1983, concerning immigration control, expressly states that the “measure [refusing entry] shall not be subject to appeal”. The Court considers that the DRC cannot now rely on an error allegedly made by its administrative agencies at the time Mr. Diallo was “refused entry” to claim that he should have treated the measure as an expulsion. Mr. Diallo, as the subject of the refusal of entry, was justified in relying on the consequences of the legal characterization thus given by the Zairean authorities, including for purposes of the local remedies rule.

47. The Court further observes that, even if this was a case of expulsion and not refusal of entry, as the DRC maintains, the DRC has also failed to show that means of redress against expulsion decisions are available under its domestic law. The DRC did, it is true, cite the possibility of requesting reconsideration by the competent administrative authority (see paragraph 36 above). The Court nevertheless recalls that, while the local remedies that must be exhausted include all remedies of a legal nature, judicial redress as well as redress before administrative bodies, administrative remedies can only be taken into consideration for purposes of the local remedies rule if they are aimed at vindicating a right and not at obtaining a favour, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. Thus, the possibility open to Mr. Diallo of submitting a request for reconsideration of the expulsion decision to the administrative authority having taken it, that is to say the Prime Minister, in the hope that he would retract his decision as a matter of grace cannot be deemed a local remedy to be exhausted.

48. Having established that the DRC has not proved the existence in its domestic legal system of available and effective remedies allowing Mr. Diallo to challenge his expulsion, the Court concludes that the DRC’s objection to admissibility based on the failure to exhaust local remedies cannot be upheld in respect of that expulsion.

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49. The Court now turns to the question of the admissibility of Guinea’s Application in so far as it concerns protection of Mr. Diallo’s rights as *associé* of the two companies Africom-Zaire and Africontainers-Zaire. The DRC raises two objections to admissibility regarding this aspect of the Application: it contests Guinea’s standing, and it suggests that Mr. Diallo has not exhausted the local remedies that were available to him in the DRC to assert his rights. The Court will deal

with these objections in turn, beginning with that relating to Guinea’s standing.

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50. The DRC accepts that under international law the State of nationality has the right to exercise its diplomatic protection in favour of *associés* or shareholders when there is an injury to their direct rights as such. It nonetheless contends that “international law allows for [this] protection . . . only under very limited conditions which are not fulfilled in the present case”.

51. The DRC maintains first of all that Guinea is not seeking, in this case, to protect the direct rights of Mr. Diallo as *associé*. It takes the view that Guinea “identifies an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights” or, more specifically, that it identifies a violation of the rights of Africom-Zaire and Africontainers-Zaire with a violation of the rights of Mr. Diallo. The DRC states as proof that “in several passages in its written pleadings, Guinea considers claims held by Africom-Zaire and Africontainers-Zaire to be claims held by Mr. Diallo”. Such confusion between the rights of the companies and the rights of the shareholders is described by the DRC not only as “contrary to positive international law” but also as “contrary to the logic itself of the institution of diplomatic protection”; it is said to have been expressly “rejected by the Court in the *Barcelona Traction* case”.

52. The DRC further asserts that, in any event, action to protect the direct rights of shareholders as such applies to only very limited cases. Since shareholders “can claim to derive their shareholders rights [only from the company]”, “by definition, what is envisaged here can only be the rights of shareholders in their relations with the company”. According to the DRC:

“[t]his interpretation is confirmed by the list of examples provided by the Court [in the *Barcelona Traction* case]: the right to dividends, the right to attend and vote at general meetings, and the right to share in the residual assets of the company on liquidation are rights which by definition the shareholder can invoke only against the company, subject to certain conditions and in accordance with certain procedures laid down in the company’s articles and in the commercial law of the legal order concerned”.

The only acts capable of violating the direct rights of shareholders would consequently be “acts of interference in relations between the company and its shareholders”. For the DRC, therefore, the arrest, detention and expulsion of Mr. Diallo could not constitute acts of interference on its part in relations between the *associé* Mr. Diallo and the companies Africom-Zaire and Africontainers-Zaire. As a result, they could not injure Mr. Diallo’s direct rights.

53. The DRC agrees, as suggested by Guinea, that

“the rights listed in the 1970 Judgment [in the *Barcelona Traction* case] are no more than examples, and that the rights in question must be sought in the domestic legislation of the States concerned”.

The DRC also agrees with Guinea on the fact that, in terms of Congolese law, the direct rights of *associés* are determined by the Decree of the Independent State of Congo of 27 February 1887 on commercial corporations. The rights of Mr. Diallo as *associé* of the companies Africom-Zaire and Africontainers-Zaire are therefore theoretically as follows: “the right to dividends and to the proceeds of liquidation”, “the right to be appointed manager (*gérant*)”, “the right of the *associé* manager (*gérant*) not to be removed without cause”, “the right of the manager to represent the company”, “the right of oversight [of the management] and “the right to participate in general meetings”. However, the DRC notes that in practice, Mr. Diallo “was unable to exercise . . . the right of oversight of the two companies” since “the statutory oversight is oversight of the management [*(gérance)*]” and “such oversight cannot be entrusted to an individual who is already manager [*(gérant)*]”. The DRC further maintains that, contrary to what is claimed by Guinea, none of the other rights accorded to Mr. Diallo could have been affected by his expulsion. Hence it points out that the right of “being paid dividends and liquidation bonuses does not require as a condition of its enjoyment that the holder live in the Congo”. Likewise, “the functional rights [of the *associé*] . . . are not such as to be essentially affected by the physical absence of the holder from the headquarters of the company”. Mr. Diallo could very well have exercised them from foreign territory. He would have had every opportunity of “delegating executive tasks to local administrators, including through the appointment of a new manager”. The DRC also notes on this subject

“that Mr. Diallo himself continued to run Africontainers[-Zaire] and pursued recovery of the debts owed to that company well after his expulsion . . . [by appointing] representatives and lawyers to act on his behalf and on his instructions”.

54. In support of its diplomatic protection claim on behalf of Mr. Diallo as *associé*, Guinea refers to the Judgment in the *Barcelona Traction* case, where, having ruled that “an act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected” (*I.C.J. Reports 1970*, p. 36, para. 46), the Court added that “[t]he situation is different if the act complained of is aimed at the direct rights of the shareholder as such” (*ibid.*, p. 36, para. 47). Guinea further claims that this position of the Court was taken up in Article 12 of the ILC’s draft Articles on Diplomatic Protection, which provides that:

“To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.”

55. According to Guinea, the direct rights of Mr. Diallo as a shareholder of Africom-Zaire and Africontainers-Zaire are essentially determined by the Decree of 27 February 1887 on commercial corporations. This text is said to confer on him firstly a series of “property rights”, including the right to dividends from these companies, and secondly a series of “functional rights”, including the right to control, supervise and manage the companies. Guinea claims that the Congolese investment code also affords Mr. Diallo certain additional rights as shareholder, for example “the right to a share of the profits of his companies” and “a right of ownership in his companies, in particular in respect of his shares”. Guinea thus takes the view that it is confining itself, in its claim, to the violation of the rights enjoyed by Mr. Diallo in respect of the companies, including his rights of supervision, control and management, and that it is therefore not confusing his rights with those of the company.

56. Guinea also points out that, in SPRs, the *parts sociales* “are not freely transferable”, which “considerably accentuates the *intuitu personae* character of these companies, very different in this respect from public limited companies”. It argues that this character is seen as even more marked in the case of Africom-Zaire and Africontainers-Zaire, since Mr. Diallo was their “sole manager (*gérant*) and sole *associé* (directly or indirectly)”. According to Guinea, “in fact and in law it was virtually impossible to distinguish Mr. Diallo from his companies”.

57. Guinea considers that the arrest, detention and expulsion of Mr. Diallo not only had the effect “of preventing him from continuing to administer, manage and control any of the operations of the companies Africom-Zaire and Africontainers-Zaire”, but were specifically motivated by the intent to prevent him from exercising these rights, from pursuing the legal proceedings brought on behalf of the companies, and thereby from recovering their debts. Such intent is said to emerge from the text of the Order of 31 October 1995, which refers to “[Mr. Diallo.] whose presence and conduct have breached Zairean law and order, especially in the economic, financial and monetary areas, and continue to do so”. These measures, moreover, are said to have followed on from moves by the Zairean authorities seeking a stay of execution on a judgment of the *Tribunal de Grande Instance* of Kinshasa ordering Zaire Shell to pay compensation to Africontainers-Zaire.

58. Finally, Guinea maintains that, contrary to what is claimed by the DRC, Mr. Diallo could not validly exercise his direct rights as shareholder from his country of origin. Consequently,

“[e]ven if he had been in a position to appoint a new ‘gérant’ and a ‘commissaire’ — and he was not, given his lack of funds — he was still being deprived of the right to appoint the management of his choice in violation of . . . the 1887 Decree, and he could not be expected to confer or abandon the management to some third party”.

Guinea adds that it is unrealistic to claim, as the DRC does, that Mr. Diallo could have exercised, from abroad, his rights of supervision and control, or indeed convoked, taken part in and voted at the general meetings.

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59. The Court begins by noting the existence of a disagreement between the Parties on the circumstances surrounding the establishment of Africom-Zaire and the conduct of its activities, on the continuation of those activities after the 1980s, and on the consequences these questions may have under Congolese law. It nonetheless takes the view that this disagreement essentially relates to the merits and that it has no bearing on the question of the admissibility of Guinea’s Application as challenged in the Congo’s objections.

60. The Court notes that the Parties have referred frequently to the case concerning the *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*. This involved a public limited company whose capital was represented by shares. The present case concerns SPRLs whose capital is composed of *parts sociales* (see paragraph 25 above).

61. As the Court recalled in the *Barcelona Traction* case, “[t]here is . . . no need to investigate the many different forms of legal entity provided for by the municipal laws of States” (*I.C.J. Reports 1970*, p. 34, para. 40). What matters, from the point of view of international law, is to determine whether or not these have a legal personality independent of their members. Conferring independent corporate personality on a company implies granting it rights over its own property, rights which it alone is capable of protecting. As a result, only the State of nationality may exercise diplomatic protection on behalf of the company when its rights are injured by a wrongful act of another State. In determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law.

62. The Court, in order to establish the precise legal nature of Africom-Zaire and Africontainers-Zaire, must refer to the domestic law of the DRC and, in particular, to the Decree of 27 February 1887 on commercial corporations. This text states, in Article 1, that “commercial corporations recognized by law in accordance with this Decree shall constitute legal persons having a personality distinct from that of their members”.

63. Congolese law accords an SPRL independent legal personality distinct from that of its *associés*, particularly in that the property of the *associés* is completely separate from that of the company, and in that the *associés* are responsible for the debts of the company only to the extent of the resources they have subscribed. Consequently, the company’s debts receivable from and owing to third parties relate to its respective rights and obligations. As the Court pointed out in the *Barcelona Traction* case: “So long as the company is in existence the shareholder has no right to the corporate assets.” (*I.C.J. Reports 1970*, p. 34, para. 41.) This remains the fundamental rule in this respect, whether for a SPRL or for a public limited company.

64. The exercise by a State of diplomatic protection on behalf of a natural or legal person, who is *associé* or shareholder, having its nationality, seeks to engage the responsibility of another State for an injury caused to that person by an internationally wrongful act committed by that State. Ultimately, this is no more than the diplomatic protection of a natural or legal person as defined by Article 1 of the ILC draft Articles; what amounts to the internationally wrongful act, in the case of *associés* or shareholders, is the violation by the respondent State of their direct rights in relation to a legal person, direct rights that are defined by the domestic law of that State, as accepted by both Parties, moreover. On this basis, diplomatic protection of the direct rights of *associés* of a SPRL or shareholders of a public limited company is not to be regarded as an exception to the general legal régime of diplomatic protection for natural or legal persons, as derived from customary international law.

65. Having considered all of the arguments advanced by the Parties, the Court finds that Guinea does indeed have standing in this case in so far as its action involves a person of its nationality, Mr. Diallo, and is directed against the allegedly unlawful acts of the DRC which are said to have infringed his rights, particularly his direct rights as *associé* of the two companies Africom-Zaire and Africontainers-Zaire.

66. The Court notes that Mr. Diallo, who was *associé* in Africom-Zaire and Africontainers-Zaire, also held the position of *gérant* in each of them. An *associé* of an SPRL holds *parts sociales* in its capital, while the *gérant* is an organ of the company acting on its behalf. It is not for the Court to determine, at this stage in the proceedings, which specific rights appertain to the status of *associé* and which to the position of *gérant* of an SPRL under Congolese law. It is at the merits stage, as appropriate, that the Court will have to define the precise nature, content and limits of these rights. It is also at that stage of the proceedings that it will be for the Court, if need be, to assess the effects on these various rights of the action against Mr. Diallo. There is no need for the Court to rule on these substantive matters in order to be able to dispose of the preliminary objections raised by the Respondent.

67. In view of the foregoing, the Court concludes that the objection of inadmissibility raised by the DRC due to Guinea's lack of standing to protect Mr. Diallo cannot be upheld in so far as it concerns his direct rights as *associé* of Africom-Zaire and Africontainers-Zaire.

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68. The DRC further claims that Guinea cannot exercise its diplomatic protection for the violation of Mr. Diallo's direct rights as *associé* of Africom-Zaire and Africontainers-Zaire in so far as he has not attempted to exhaust the local remedies available in Congolese law for the alleged breach of those specific rights.

69. The DRC points out that Guinea

“does not dispute . . . that there are procedures and machinery for redress, judicial or otherwise, within the legal system of the DRC which would have enabled the companies in question or Mr. Diallo himself to safeguard their rights”.

It adds that

“[i]n the circumstances of the present case, however, there is nothing . . . to warrant the conclusion that it was impossible for Mr. Diallo to avail himself of the machinery and procedures offered by Congolese law which would have enabled him to safeguard his rights”.

70. The DRC thus submits first that “Mr. Diallo's absence from Congolese territory was not an obstacle [in Congolese law] to the proceedings already initiated when Mr. Diallo was still in the Congo” or for him to bring other proceedings. Mr. Diallo could also have “giv[en] one or more representatives power of attorney to act in legal proceedings instituted” or to “institute fresh proceedings in other disputes”. In that connection, the DRC observes that in reality the

“proceedings already set in motion by Mr. Diallo on behalf of the companies of which he was managing director were not interrupted because of his removal from the national territory”.

It also notes that

“the alleged ‘extreme poverty’ of Mr. Diallo and his finding it ‘materially impossible to initiate further . . . proceedings’ [, as claimed by Guinea] . . . are affirmations lacking in credibility and quite without evidential value”.

In any event, poverty does not constitute “a new exception to the fundamental principle of the prior exhaustion of local remedies”.

71. The DRC also asserts that the existing remedies available in the Congolese legal system are effective. It emphasizes in that respect the fact that “the ‘effectiveness’ of a remedy in no way implies that the plaintiff wins the case”, adding that

“there can clearly be no question of contesting the effectiveness of local remedies simply because Mr. Diallo's initial claims were not upheld in full or were subsequently rejected”.

It also points out that in fact

“the local remedies available within the Congolese legal system have been shown to be effective with respect to the disputes submitted to the ordinary Congolese courts by the companies Africontainers-Zaire and Africom-Zaire”

in which those companies obtained rulings in their favour. Moreover, the DRC considers that, given “the particular situation in which the Democratic Republic of the Congo . . . found itself for some years”, it does not appear that the duration of proceedings before its domestic courts was unreasonable.

72. For its part, Guinea alleges that “the Congolese State deliberately chose to deny access to its territory to Mr. Diallo because of the legal proceedings that he had initiated on behalf of his companies”. It maintains that

“[i]n these circumstances, to accuse Mr. Diallo of not having exhausted the remedies would not only be manifestly ‘unreasonable’ and ‘unfair’, but also an abuse of the rule regarding the exhaustion of local remedies”.

Guinea adds that the circumstances of Mr. Diallo's expulsion also precluded him from pursuing local remedies on his own behalf or on that of his companies. It recalls that Mr. Diallo was first arrested and imprisoned in 1988, then in 1995 and finally expelled from the territory of the Congo for having “ventured . . . to bring administrative and legal claims”. The threat weighing on Mr. Diallo and his exclusion from Congolese territory constituted, according to Guinea, “a factual denial of access to local remedies”. The expulsion of Mr. Diallo from Congolese territory is also said to have put him in a financial position in which it was “materially impossible for him to pursue any remedy whatsoever in Zaire”. As for the possibility referred to by the DRC of appointing another *gérant* or giving someone else power of attorney to pursue the proceedings already initiated or institute fresh proceedings, Guinea points out that, in the circumstances of the case, “no one could be called upon to take over so dangerous a managerial post” and that “[t]he possible successor . . . would have had good reason to think that he was ‘manifestly precluded from pursuing local remedies’”.

73. Guinea further emphasizes that the existing remedies in the Con-

golese legal system must, in any event, be regarded as ineffective in view, *inter alia*, of the excessive delays of the Congolese judicial authorities in the settlement of the cases brought before them and the “unlawful administrative practices” allegedly inherent in the Congolese legal system, particularly the obstacles placed by the Government authorities to impede the enforcement of court rulings. Guinea notes in support of these arguments that there has still been no final ruling in two of the cases brought before the Congolese courts by Africom-Zaire and Africontainers-Zaire 14 and 13 years ago respectively. According to Guinea such “excessive lengths were general and probably not exceptional”; they demonstrate, it is claimed, “the futility of the remedies which Mr. Diallo’s companies, or indeed he himself, might have done their utmost to seek”. Guinea also recalls that, irrespective of the duration of proceedings before Congolese courts, “at the time of the events, the enforcement of legal decisions depended solely on the government’s goodwill”. It illustrates its argument by referring to “the interference by the Zairean Government in the legal proceedings brought by Mr. Diallo’s companies” and more particularly the repeated stays of execution on the ruling of the Kinshasa *Tribunal de Grande Instance* in the case between Africontainers-Zaire and Zaire Shell. According to Guinea,

“[t]he upshot of this is that any legal action that Mr. Diallo or his companies might have brought against the government could only result in a decision by that government based on political considerations”.

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74. The Court notes that the alleged violation of Mr. Diallo’s direct rights as *associé* was dealt with by Guinea as a direct consequence of his expulsion given the circumstances in which that expulsion occurred. The Court has already found above (see paragraph 48), that the DRC has not proved that there were effective remedies, under Congolese law, against the expulsion Order against Mr. Diallo. The Court further observes that at no time has the DRC argued that remedies distinct from those in respect of Mr. Diallo’s expulsion existed in the Congolese legal system against the alleged violations of his direct rights as *associé* and that he should have exhausted them. The Parties have indeed devoted discussion to the question of the effectiveness of local remedies in the DRC but have confined themselves in it to examining remedies open to Africom-Zaire and Africontainers-Zaire, without considering any which may have been open to Mr. Diallo as *associé* in the companies. Inasmuch as it has not been argued that there were remedies that Mr. Diallo should have exhausted in respect of his direct rights as *associé*, the question of the effectiveness of those remedies does not in any case arise.

75. The Court concludes from the foregoing that the objection as to inadmissibility raised by the DRC on the ground of the failure to exhaust the local remedies against the alleged violations of Mr. Diallo’s direct rights as *associé* of the two companies Africom-Zaire and Africontainers-Zaire cannot be upheld.

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76. The Court will now consider the question of the admissibility of Guinea’s Application as it relates to the exercise of diplomatic protection with respect to Mr. Diallo “by substitution” for Africom-Zaire and Africontainers-Zaire and in defence of their rights. Here too the DRC raises two objections to the admissibility of Guinea’s Application, derived respectively from Guinea’s lack of standing and the failure to exhaust local remedies. The Court will again address these issues in turn, beginning with Guinea’s standing.

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77. The DRC contends that Guinea cannot invoke, as it does in the present case,

“‘considerations of equity’ in order to justify ‘the right to exercise its diplomatic protection [in favour of Mr. Diallo and by substitution for Africom-Zaire and Africontainers-Zaire] independently of the violation of the direct rights [of Mr. Diallo]’”

on the ground that the State whose responsibility is at issue is also the State of nationality of the companies concerned. It recalls that the institution of diplomatic protection is based on the premise “whereby any violation of the rights of a foreign national is also a violation of the rights of his State of nationality”. “It is this circumstance, and this circumstance alone, which justifies recourse to diplomatic protection.” And the DRC emphasizes that “[c]onversely, if no right of its nationals is violated then no right of the State is violated and, in consequence, that State can in no circumstances have standing”. The diplomatic protection “by substitution” proposed by Guinea is thus said to go “far beyond what positive international law provides”.

78. The DRC adds that “contrary to what Guinea says, neither the Court’s jurisprudence nor State practice recognizes the possibility of diplomatic protection by substitution”. It explains that, although it touched upon this possibility in the *Barcelona Traction* case, the Court nevertheless did not “conclude that such a possibility existed under positive international law”. On the contrary, the DRC contends that certain judges were “fiercely opposed to it”. The DRC submits that

“Guinea vainly seeks acceptance of the notion of a customary basis for such protection [by substitution] by relying in turn on: arbitral

awards; decisions of the European Commission of Human Rights; the requirements of Article 25 of the Washington Convention; ICSID jurisprudence; and bilateral treaties for the promotion and protection of investments”.

According to the DRC, the arbitral awards to which Guinea refers are of no relevance, on the one hand, because of their age and, on the other, because, in each of the cases concerned, the issue of the right to claim on behalf of the shareholders had been settled in a convention enabling the arbitrators to adjudicate without limiting themselves to the application of general international law and which also contained a waiver by the respondent State of any right to raise an objection preventing the tribunal from ruling on the merits. The decisions of the European Commission of Human Rights, “given within a quite specific institutional and conventional framework, applicable at regional level, [are said to be no more] . . . relevant to the circumstances of the present case”. As for the ICSID Convention, bilateral and multilateral treaties for the promotion and protection of investments and, ICSID decisions, they are also said to lack relevance, as they “do not constitute the direct application of the principles and rules governing diplomatic protection”.

79. According to the DRC, Guinea is in reality asking the Court to authorize it to exercise its diplomatic protection in a manner contrary to international law. In this connection, the DRC referred to the Judgment delivered by a Chamber of the Court in the case concerning *Frontier Dispute (Burkina Faso/Republic of Mali)*, and observed that, since the Parties had not, in the present case, requested a decision *ex aequo et bono* under Article 38, paragraph 2, of the Statute, the Court must “also dismiss any possibility of resorting to equity *contra legem*” (*I.C.J. Reports 1986*, p. 567, para. 28). The DRC adds that none of the particular circumstances of the case warrants calling that conclusion into question.

80. The DRC further contends that, even supposing that the Court agreed to take account of the considerations of equity relied on by Guinea, Guinea has not demonstrated that protection of the shareholder “in substitution” for the company which possesses the nationality of the respondent State would be justified in the present case. In this connection, the DRC contends first that it has not been established that the solution advocated by Guinea is equitable in principle. On the contrary, the DRC suggests that such protection by substitution would in fact lead to a discriminatory régime of protection, resulting as it would in the unequal treatment of the shareholders. Some shareholders, such as Mr. Diallo in this case, might enjoy the protection of their national State by virtue of their alien status and of the good relations which they enjoy with their national authorities, whereas the other shareholders, either because they have the same nationality as the companies, or because their country of origin does not wish to exercise diplomatic protection in

respect of them, could have recourse only to domestic law and domestic courts to assert their rights. According to the DRC, such a difference in treatment lacks any objective and reasonable basis and thus constitutes true discrimination.

81. Lastly, the DRC maintains that “even assuming that ‘protection by substitution’ were accepted as justified, application of this principle to the case of Mr. Diallo would prove fundamentally inequitable”. According to the DRC, “Mr. Diallo’s personality and the conduct adopted by him since the start of this case are far from irreproachable”. Moreover, the DRC alleges that it was those “activities [of Mr. Diallo], fraudulent and detrimental to public order, which motivated his removal from Zairean territory”. It adds that Mr. Diallo’s refusal to exhaust the available local remedies would also render diplomatic protection by substitution inequitable in this case.

82. For its part, Guinea observes that it is not asking the Court to resort to equity *contra legem* to decide the present case when invoking Mr. Diallo’s protection by substitution for Africom-Zaire and Africontainers-Zaire. Rather, Guinea contends that, in the *Barcelona Traction* case, the Court referred, in a dictum, to the possibility of an exception, founded on reasons of equity, to the general rule of the protection of a company by its national State, “when the State whose responsibility is invoked is the national State of the company”. In this connection, it quotes the following passage from the Judgment, which it considers apposite:

“On the other hand, the Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State.” (*I.C.J. Reports 1970*, p. 48, para. 93.)

According to Guinea, the equity concerned in this case is equity *infra legem*. The alleged purpose of such recourse is to permit “a reasonable application” . . . of the rules relating to diplomatic protection”, in order “not to deprive foreign shareholders in a company having the nationality of the State responsible for the internationally wrongful act of all possibility of protection”. Guinea recognizes that the Court did not definitively settle the question of the existence of diplomatic protection by substitution in the *Barcelona Traction* case. It nevertheless considers that the text of the Judgment, read in the light of the opinions of the Members of the Court appended to it, leads one “to believe that a majority of the Judges regarded the exception as established in law”.

83. Guinea contends that the existence of the rule of protection by substitution and its customary nature are confirmed by numerous arbitral awards establishing

“that the shareholders of a company can enjoy the diplomatic protection of their own national State as regards the national State of the company when that State is responsible for an internationally wrongful act against it”.

Further, according to Guinea, “[s]ubsequent practice [following *Barcelona Traction*], conventional or jurisprudential . . . has dispelled any uncertainty . . . on the positive nature of the ‘exception’”. Guinea thus refers to certain decisions of the European Commission of Human Rights, to the Washington Convention establishing the ICSID, to the latter’s jurisprudence and to the jurisprudence of the Iran-United States Claims Tribunal.

84. In Guinea’s view, the application of protection by substitution is particularly appropriate in this case. Guinea again emphasizes that Africa-Zaire and Africontainers-Zaire are SPRLs, which have a marked *intuitu personae* character and which, moreover, are statutorily controlled and managed by one and the same person. Further, it especially points out that Mr. Diallo was bound, under Zairean legislation, and in particular Article 1 of the Legislative Order of 7 June 1966 concerning the registered office and the administrative seat of companies “whose main centre of operations is situated in the Congo”, to incorporate the companies in Zaire. In this regard, Guinea refers to Article 11, paragraph (b), of the draft Articles on Diplomatic Protection adopted in 2006 by the ILC, providing that the rule of protection by substitution applies specifically in situations where the shareholders in a company have been required to form the company in the State having committed the alleged violation of international law. Under Article 11, paragraph (b):

“A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:

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- (b) the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.”

85. Guinea also submits that the accusations made by the DRC against Mr. Diallo are not supported by any facts. On the contrary, it describes Mr. Diallo as “a shrewd and serious investor and businessman”, who has never been accused of not honouring his own commitments to the Zairean State and private companies, and who has rendered great services to the economic development of Zaire by making substantial investments there. Lastly, Guinea rejects as not only inaccurate but also irrelevant in the present context the allegation that Mr. Diallo refused to exhaust all the remedies available in the DRC, this being a

claim concerning a condition for admissibility different from that which is here examined.

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86. The Court recalls that, as regards diplomatic protection, the principle as emphasized in the *Barcelona Traction* case, is that:

“Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected.” (*I.C.J. Reports 1970*, p. 36, para. 46.)

87. Since its dictum in the *Barcelona Traction* case (*ibid.*, p. 48, para. 93) (see paragraph 82 above), the Court has not had occasion to rule on whether, in international law, there is indeed an exception to the general rule “that the right of diplomatic protection of a company belongs to its national State” (*ibid.*, p. 48, para. 93), which allows for protection of the shareholders by their own national State “by substitution”, and on the reach of any such exception. It is true that in the case concerning *Eletronica Sicula S.p.A. (ELSI)* (*United States of America v. Italy*), the Chamber of the Court allowed a claim by the United States of America on behalf of two United States corporations (who held 100 per cent of the shares in an Italian company), in relation to alleged acts by the Italian authorities injuring the rights of the latter company. However, in doing so, the Chamber based itself not on customary international law but on a Treaty of Friendship, Commerce and Navigation between the two countries directly granting to their nationals, corporations and associations certain rights in relation to their participation in corporations and associations having the nationality of the other State. The Court will now examine whether the exception invoked by Guinea is part of customary international law, as claimed by the latter.

88. The Court is bound to note that, in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors. In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative. It is in this particular and relatively limited context that the question of protection by

substitution might be raised. The theory of protection by substitution seeks indeed to offer protection to the foreign shareholders of a company who could not rely on the benefit of an international treaty and to whom no other remedy is available, the allegedly unlawful acts having been committed against the company by the State of its nationality. Protection by “substitution” would therefore appear to constitute the very last resort for the protection of foreign investments.

89. The Court, having carefully examined State practice and decisions of international courts and tribunals in respect of diplomatic protection of *associés* and shareholders, is of the opinion that these do not reveal — at least at the present time — an exception in customary international law allowing for protection by substitution, such as is relied on by Guinea.

90. The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary. The arbitrations relied on by Guinea are also special cases, whether based on specific international agreements between two or more States, including the one responsible for the allegedly unlawful acts regarding the companies concerned (see, for example, the special agreement concluded between the American, British and Portuguese Governments in the *Delagoa* case or the one concluded between El Salvador and the United States of America in the *Salvador Commercial Company* case) or based on agreements concluded directly between a company and the State allegedly responsible for the prejudice to it (see the *Biloume v. Ghana Investments Centre* case).

91. It is a separate question whether customary international law contains a more limited rule of protection by substitution, such as that set out by the ILC in its draft Articles on Diplomatic Protection, which would apply only where a company’s incorporation in the State having committed the alleged violation of international law “was required by it as a precondition for doing business there” (Art. 11, para. (b)).

92. However, this very special case does not seem to correspond to the one the Court is dealing with here. It is a fact that Mr. Diallo, a Guinean citizen, settled in Zaire in 1964, when he was 17 years of age, and that he did not set up his first company, Africom-Zaire, until ten years later, in 1974. In addition, when, in 1979, Mr. Diallo took part in the creation of Africontainers-Zaire, it was in fact only as manager (*gérant*) of Africom-

Zaire, a company under Congolese law. When Africontainers-Zaire was set up, 70 per cent of its capital was held by *associés* of Congolese nationality, and only in 1980, one year later, did Mr. Diallo become an *associé* in his own name of that company, holding 40 per cent of the capital, following the withdrawal of the other two *associés*, the company Africom-Zaire holding the remaining *parts sociales*. It appears natural, against this background, that Africom-Zaire and Africontainers-Zaire were created in Zaire and entered in the Trade Register of the city of Kinshasa by Mr. Diallo, who was already engaged in commercial activities. Furthermore, and above all it has not satisfactorily been established before the Court that their incorporation in that country, as legal entities of Congolese nationality, would have been required of their founders to enable the founders to operate in the economic sectors concerned.

93. The Court concludes on the facts before it that the companies, Africom-Zaire and Africontainers-Zaire, were not incorporated in such a way that they would fall within the scope of protection by substitution in the sense of Article 11, paragraph (b), of the ILC draft Articles on Diplomatic Protection referred to by Guinea. Therefore, the question of whether or not this paragraph of Article 11 reflects customary international law does not arise in this case.

94. In view of the foregoing, the Court cannot accept Guinea’s claim to exercise diplomatic protection by substitution. It is therefore the normal rule of the nationality of the claims which governs the question of the diplomatic protection of Africom-Zaire and Africontainers-Zaire. The companies in question have Congolese nationality. The objection as to inadmissibility raised by the DRC owing to Guinea’s lack of standing to offer Mr. Diallo diplomatic protection as regards the alleged unlawful acts of the DRC against the rights of the two companies Africom-Zaire and Africontainers-Zaire is consequently well founded and must be upheld.

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95. Having concluded that Guinea is without standing to offer Mr. Diallo diplomatic protection as regards the alleged unlawful acts of the DRC against the rights of the companies Africom-Zaire and Africontainers-Zaire, the Court need not further consider the DRC’s objection based on the non-exhaustion of local remedies.

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96. In view of all the foregoing, the Court concludes that Guinea’s Application is admissible in so far as it concerns protection of Mr. Diallo’s rights as an individual and his direct rights as *associé* in Africom-Zaire and Africontainers-Zaire.

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97. In accordance with Article 79, paragraph 7, of the Rules of Court as adopted on 14 April 1978, time-limits for the further proceedings shall subsequently be fixed by Order of the Court.

* * *

98. For these reasons,

THE COURT,

(1) As regards the preliminary objection to admissibility raised by the Democratic Republic of the Congo for lack of standing by the Republic of Guinea to exercise diplomatic protection in the present case:

(a) unanimously,

Rejects the objection in so far as it concerns protection of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;

(b) by fourteen votes to one,

Upholds the objection in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mampuya;*

AGAINST: *Judge ad hoc Mahiou;*

(2) As regards the preliminary objection to admissibility raised by the Democratic Republic of the Congo on account of non-exhaustion by Mr. Diallo of local remedies:

(a) unanimously,

Rejects the objection in so far as it concerns protection of Mr. Diallo's rights as an individual;

(b) by fourteen votes to one,

Rejects the objection in so far as it concerns protection of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mahiou;*

AGAINST: *Judge ad hoc Mampuya;*

(3) In consequence:

(a) unanimously,

Declares the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Diallo's rights as an individual;

(b) by fourteen votes to one,

Declares the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mahiou;*

AGAINST: *Judge ad hoc Mampuya;*

(c) by fourteen votes to one,

Declares the Application of the Republic of Guinea to be inadmissible in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire.

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mampuya;*

AGAINST: *Judge ad hoc Mahiou.*

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-fourth day of May, two thousand and seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Guinea and the Government of the Democratic Republic of the Congo, respectively.

(*Signed*) Rosalyn HIGGINS,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

Judge *ad hoc* MAHIOU appends a declaration to the Judgment of the Court; Judge *ad hoc* MAMPUYA appends a separate opinion to the Judgment of the Court.

(*Initialed*) R.H.

(*Initialed*) Ph.C.