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Law of treaties - comments by Governments on parts I and II of the draft articles on the law of treaties drawn up by the Commission at its fourteenth and fifteenth session (2 vol.)

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LAW OF TREATIES

Comments by Governments on parts I and II of
the draft articles on the law of treaties
drawn up by the Commission at its fourteenth
and fifteenth sessions

Addendum

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SECTION I

WRITTEN COMMENTS BY GOVERNMENTS

22. NETHERLANDS

Transmitted by a letter of 26 February 1965 from the
Permanent Representative to the United Nations

[Original: English]

[Part I]

The scope of the draft articles

Although the Netherlands Government endorses the principle on which, in paragraph 21 of its report, the Commission bases its commentary on the introduction, it believes it would be better if no mention were made yet in articles 1, 2 and 3 of the draft of the fact that the provisions apply to treaties entered into by international organizations and if the question as to which articles could be made to apply in their original form to treaties concluded by international organizations, and to what extent special articles would have to be drafted for those organizations, were gone into later. The Netherlands Government has in mind the method adopted for laying down the "Régime Relating to Honorary Consular Officers" in the Vienna Convention on Consular Relations of 24 April 1963.

Article 1

The Netherlands Government believes the word "party" should be defined; it occurs so frequently in the draft that some definition is essential. The Government would suggest the following:

"'Party' to a treaty means a State that is bound by the provisions of the treaty."

Quite apart from the adoption of the definition of the word "party" proposed above, the Netherlands Government believes it is self-evident that the same meaning should be attached to the word "party" in all the articles; if a definition of the word "party" is given, it even becomes essential to do so. The Netherlands

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Government would draw attention to the anomalous meaning of the word "party" in paragraph 2 (a) of article 15 and to the suggested amendment.

The Netherlands Government would prefer to have the words "concluded between two or more States or other subjects of international law and" deleted from the definition of the word "treaty" in paragraph 1 (a), because the term "subjects of international law" can be interpreted in different ways in view of the provisions of article 3.

If it is deleted, the last sentence in paragraph (8) of the commentary should also be deleted, for the question as to whether individuals and corporations can be considered as subjects of international law is a different matter altogether and had better not be dealt with in this context; it certainly cannot be disposed of in a single definition.

Other amendments suggested are:

- paragraph 1 (c): "... deals with other matters of general interest to the community of States";
- paragraph 1 (d): in the first and second lines, "Acceptance" and "Approval" to be replaced by "and Acceptance" (see below under article 14);
- paragraph 1 (f): "accepting or approving" to be replaced by "or accepting".

Article 3

Paragraph 1

The Netherlands Government doubts whether everyone will attach the same meaning to the term "other subjects of international law", even in the light of the interpretation in paragraph (2) of the commentary.

Paragraph 2

The Netherlands Government would point out that this paragraph may also be applicable to other forms of States than "federal unions", for instance, to the Kingdom of the Netherlands with its three autonomous countries. The Statute of the Kingdom provides for the delegation by the Government of the Kingdom to the Governments of the individual countries of powers to conclude certain categories

of treaties. The Netherlands Government would be glad if the Commission would refer in its commentary to this example of a form of State that is different from the better known federal form.

Paragraph 3

With reference to the above remarks under the heading "The scope of the draft articles", it is suggested that this matter be dealt with in connexion with rules with regard to international organizations.

Article 4

The Netherlands Government would suggest deleting "approve" in the title and "approval" in paragraph 5 of this article (see below under article 14).

Article 5

This article can hardly be interpreted as a treaty rule; it would be more appropriate in a code. Apart from that, the Netherlands Government would observe that the word "representatives" in the first sentence should read "government representatives".

Article 6

The Netherlands Government believes that the Commission's reason for including this article, the need for which is also felt by the Netherlands Government, was to provide for the adoption of treaties at large international conferences. The growing practice of following the procedure of majority vote referred to in paragraph (2) of the Commission's commentary indeed applies to the adoption of the texts of general multilateral treaties.

However, at smaller conferences such as regional ones, or conferences on some specific subject in which only a limited number of States are interested, it is still the general rule for texts to be adopted by unanimous vote. Though the unanimity rule may sometimes cause trouble at small conferences, making the majority vote the general rule at all conferences, including those of a small group of States to each of whom settlement of the problem under discussion may be of vital concern is likely to have much more serious consequences.

Accordingly, it is suggested that the scope of article 6 be restricted to the drawing up of general multilateral treaties. It might also be stipulated in this paragraph that replacement of the majority rule by some other voting rule may only be decided upon at the opening of a conference.

In view of the fact that general multilateral treaties are in the minority among the aggregate of bilateral and multilateral treaties, it would seem more correct if paragraph (c) came first as being the general rule. The present paragraphs (a) and (b) give special provisions that apply only in the particular circumstances described therein.

It is not impossible that in actual practice the principle of unanimity will be dropped in favour of some special voting rule that is also suitable for smaller conferences. However, this special voting rule may differ from that now being put forward by the Commission for large international conferences. The Netherlands Government would therefore prefer, at this stage of the development of international law, not to lay down any hard and fast rules in respect of small conferences.

Accordingly, it is suggested that the following alterations be made to the text:

"The adoption of the text of a treaty shall take place:

(a) As a general rule, by agreement between the States taking part in the negotiations;

(b) In the case of a general multilateral treaty drawn up at an international conference ... (thenceforth reading as the text of paragraph (a) up to:) ... shall decide at the beginning of the conference to adopt another voting rule;

(c) In the case of a treaty drawn up within an international organization, by ... (thenceforth reading as the text of paragraph (b))."

Article 3

Paragraph 1

The Netherlands Government shares the views of the members whose opinion is quoted in paragraph (4) of the Commission's commentary on article 2.

Paragraph 2

There is no Commission commentary on paragraph 2 of this article, which deals with becoming a party to treaties other than "general multilateral" treaties.

The Netherlands Government believes that sub-paragraph (b) gives the main rule and that other contingencies are mentioned under (a) and (c), unless the treaty should stipulate otherwise. The right order would therefore appear to be:

(a) becomes (b);

(b) becomes (a) and "unless the treaty states otherwise, or" should be inserted after "text";

(c) unaltered.

Article 9

A new principle underlies this article. It concerns the modification of the participation clause in the event such a clause appears in or is implied in a multilateral treaty (paragraph 1) or in a treaty concluded between a small number of States (paragraph 2). Needless to say, it is always possible to make the necessary changes in a treaty in the normal way by obtaining the approval of all the parties to the treaty. It is therefore only a question of deciding whether a more "simple" procedure should be laid down for extending participation in a treaty. The Netherlands Government doubts whether a procedure of this type is really necessary.

At any rate, it would like to see its application restricted to future general multilateral treaties (unless there is an express stipulation in the treaty itself that debars its application), while special procedures might be made for treaties to which the provisions governing accession can no longer be applied on account of changed circumstances, as is the case, for instance, with treaties concluded under the auspices of the League of Nations.

Suggested modification of text:

The Netherlands Government would prefer to have six years inserted in paragraphs 1 and 2 instead of the four years proposed by Sir Humphrey Waldock.

Article 11

See comments on paragraph 1 of article 17 regarding the obligation referred to in paragraph 2 (b).

Suggested modifications of text:

In line 2 of paragraph 2, in line 2 of paragraph 2 (a) and in line 2 of paragraph 3: "acceptance or approval" to be replaced by "or acceptance" (see below under article 14).

Article 12

The unsystematic arrangement of this article may cause some confusion for a clear distinction has not been made between cases in which the obligation or otherwise to ratify a treaty does not apply in equal measure to all the States that have taken part in drafting the text and cases in which one of the parties signs a treaty.

Accordingly it might be better to start with the cases described in paragraphs 3 (a) and (b), which now appear as exceptions to exceptions of the general rule. That would make it clear that further provisions would have to be made only for cases where the treaty is silent upon the question of ratification and the common intention of the drafters of the treaty cannot be gathered from the circumstances either. The Netherlands Government feels some hesitation as to the words "statements ... or other circumstances evidencing such an intention", unless these words are elucidated.

The following text is proposed:

Article 12

Ratification

1. A treaty requires ratification where:

(a) The treaty itself expressly contemplates that it shall be subject to ratification by the signatory States;

(b) The common intention that the treaty shall be subject to ratification by the signatory States clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

(c) It does not fall within one of the exceptions provided for in paragraph 2 below.

2. A treaty shall not be subject to ratification by the signatory States where:

(a) The common intention to dispense with ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

(b) The treaty is one in simplified form;

(c) The treaty itself provides that it shall definitively come into force upon signature.

3. In cases not covered by paragraphs 1 (a) and (b) a signatory State will become bound by the treaty by signature alone, if the credentials, full powers, or other instrument issued to the representative of the State in question authorize him by his signature alone to establish the consent of the State to be bound by the treaty without ratification.

4. In cases covered by paragraph 2 above, a signatory State shall nevertheless become bound by the treaty only upon ratification, if the representative of the State in question has expressly signed "subject to ratification".

Article 13

It would appear that the first six words of paragraph (a) apply equally to paragraph (b). Accordingly, the words "it has not signed the treaty and" might be deleted from paragraph (a) if the words "it is not a signatory State and" are added to the opening sentence of the article.

This article does not provide for States becoming a party to a treaty by accession in accordance with the provisions of article 8 in so far as article 8 refers to treaties in which it is not expressly stipulated that States can become parties by another procedure than by signing the treaty (either followed by ratification or not). Consequently, the article should be supplemented.

The Netherlands Government would also observe that in the text no account has been taken of the not unusual case of a signatory State not ratifying the treaty within the time-limit, but becoming a party to the treaty all the same because the latter provides for accession thereto. (See article 28 of the Revised Berne Convention for the Protection of Literary and Artistic Works, dated 26 June 1948.^{1/})

The Commission's commentary might also make mention of the fact that a State can also become a party to a treaty by virtue of a later treaty providing for such a contingency.

^{1/} United Nations, Treaty Series, vol. 331, p. 245.

Article 14

The Netherlands Government feels that the new term "approval" should not be adopted. The term does not denote a form that differs essentially from "acceptance"; its use might cause confusion in national procedures and it cannot be regarded as a common term. Accordingly, article 14 might be restricted to "acceptance".

This article does not provide for States becoming parties to treaties by "acceptance" in accordance with the provisions of article 8 in so far as article 8 refers to treaties in which it is not expressly stipulated that States can become parties by "acceptance". Consequently, the article needs supplementing.

It is proposed that the text be modified as follows:

- the words "or (by) approval" to be deleted in four places, viz. in the title and in the second, fifth and eighth lines.

Article 15

Suggested modifications to the text:

- the words "acceptance and (or) approval" to be replaced by "and (or) acceptance" in four places, viz. in the title, in paragraph 1 (a) and in paragraphs 2 and 3;

- the words "two differing texts" in paragraph 1 (c) to be replaced by "two alternative texts";

- the words "party or parties" in paragraph 2 (a) to be replaced either by "signatory States" or by the phrase used in article 18, paragraph 3 (a).

Article 16

The Netherlands Government believes there have been two instances (one within the United Nations and one connected with the Greek ratification of the IMCO Treaty) of instruments of ratification having been withdrawn a short time after they had been deposited. Opinions may vary as to whether depositing an instrument of ratification, accession or acceptance constitutes an irrevocable act. It might be argued that the final formality in the procedure of becoming a party to a treaty is so important (in most countries the relative documents must be signed by the Head of State) that it cannot but be looked upon as an irrevocable act.

Sir Gerald Fitzmaurice, the former Special Rapporteur, endorses this view in paragraph 5 of article 31 of his first report^{1/} in the following words:

"Ratification once made cannot, as such, be withdrawn" (see also paragraph 1 of article 33). On the other hand, it cannot very well be argued that the effect of such an act is irrevocable.

Circumstances may change to such an extent after an instrument of ratification has been deposited that the State concerned may be compelled to withdraw it without waiting for the treaty to come into force and then giving notice of termination. If this line of argument is adopted, the right of withdrawal should only be recognized after three years from the date on which the instrument was deposited.

Since this has become a pressing problem in view of the two precedents already mentioned, the Netherlands Government would suggest that the Commission take it up again, but with due regard for the rules for giving notice of termination of treaties or of withdrawal from international organizations that will be the subject of later discussions.

Suggested modifications:

- the words "acceptance and (or) approval" to be replaced by "and (or) acceptance" in three places, viz. in the title and in the second and fifth lines;
- "article 13" in the third line to be replaced by "articles 12, 13 and 14".

Article 17

Paragraph 1

The Netherlands Government is of the opinion that the "obligation of good faith" mentioned in this paragraph cannot be held to apply to all cases in which a State that has taken part in the negotiation, the drawing up or adoption of a treaty (provided it is a multilateral treaty) does not append its signature to the treaty. An obligation of good faith may only be presumed to exist if a State has signified that it is seriously considering becoming a party to a treaty, either by having signed it or in any other manner. Consequently, the words "which takes part in the negotiation, drawing up or adoption of a treaty, or" should be deleted.

^{1/} Yearbook of the International Law Commission, 1956, vol. II, p. 104.

Paragraphs 1 and 2

The words "acceptance or approval" should be replaced by "or acceptance".

Article 18

The Netherlands Government would point out that this section should also apply to "statements" that are actually reservations. (See paragraph (13) of the Commission's commentary on article 1.)

Suggested modifications of the text:

- the words "accepting or approving" in the second line of paragraph 1 to be replaced by "or accepting";
- the words "acceptance or approval" to be replaced by "or acceptance" in paragraph 2 (a) (iii) and in paragraph 2 (b).

Article 19

The Netherlands Government would suggest that "two years" be substituted for "twelve months" in paragraph 3, and "four years" for "two years" in the fourth line of paragraph 4; the two periods proposed by the Commission are really too short in view of current State practice.

Suggested modification of the text:

- the words "acceptance or approval" in paragraph 2 (a) to be replaced by "or acceptance".

Article 20

The Netherlands Government fears that the expression "a small group of States" in paragraph 3 (and likewise in paragraph 2 of article 9) is not sufficiently clear and might lead to difficulties of interpretation.

Article 22

The Netherlands Government presumes that any notifications of withdrawal of reservations are sent through the authority with whom the relative documents have been deposited.

Article 23

From the brief commentary it might be concluded that a treaty comes into force in its entirety on one particular date. However, some treaties come into force in stages on different dates. If such a contingency is covered by the words "in such manner", there is no need to supplement the text. The Netherlands Government would merely point out that in the next article (article 24) the coming into force of a treaty is qualified by the words "in whole or in part".

Suggested modifications of the text:

- the word "small" in paragraph 2 (b) to be replaced by "same";
- in paragraphs 2 (a) and (b), "acceptance, or approval" to be replaced by "or acceptance";
- the words "accepted or approved" in paragraph 2 (c) to be replaced by "or accepted".

Article 24

The Netherlands Government interprets this article as referring only to cases in which States have legally committed themselves to a provisional entry into force. The signatory States may also enter into a non-binding agreement concerning provisional entry into force (within the limits imposed by their respective national laws, of course). In the latter case as opposed to the former they would be free to suspend the provisional entry into force. Since the term "provisional application" used in article 24 may also be understood to refer to this second, non-binding form of provisional application, it might be advisable to substitute the term "provisional entry into force". The same remarks apply to the use of this term in paragraph (2) of the commentary.

The Netherlands Government is also of the opinion that the terms of article 24 are too stringent since they permit termination of "a provisional entry into force" in two cases only, viz.:

- (1) when the treaty enters into force definitively, and
- (2) if the States concerned agree on its termination.

The Netherlands Government believes that a Government should also be entitled to terminate a provisional entry into force unilaterally if it has decided not to ratify a treaty that has been rejected by Parliament or if it has decided for other similar reasons not to ratify it.

If these suggestions are adopted, the text should be modified as follows:

- the words "acceptance or approval" in the first sentence to be replaced by "or acceptance";
- the second sentence to read "In that case the treaty shall come into force as prescribed and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or the States concerned shall have agreed to terminate the provisional entry into force or one of the States shall have notified the other State or States that it has decided not to become a party to the treaty".

Article 27

The Netherlands Government is of the opinion that the manner of describing States that have to be notified of any amendments to texts is too cumbersome and that it is even too broad in paragraph (b). Accordingly, it would suggest using the phrase "each interested State" everywhere, i.e. in paragraphs 1 (a) (lines 5 to 8) and 1 (b) (last 3 lines), in paragraph 2 (last 2 lines) and in paragraph 4 (fourth line).

Article 29

In this article the Commission uses six expressions to define certain duties of depositaries:

- "to execute a procès-verbal" (paragraph 3 (c));
- "to furnish an acknowledgement in writing" (paragraph 3 (d));
- "to communicate" (paragraphs 5 (a) and (b));
- "to inform" (paragraph 7 (a));
- "to draw up a procès-verbal" (paragraph 7 (b)); and
- "to bring to the attention" (paragraph 8).

The Netherlands Government feels that it would be preferable to use a single, uniform, simplified formula, unless the treaty expressly states otherwise. Another advantage of a uniform formula is that it could include by implication the notifications not mentioned in the article about denunciation, extension of territorial application, amendments, renewal, statements to the effect that States continue to be bound, etc. The Netherlands Government has in mind the text of

article 19 of the Convention on the Recovery Abroad of Maintenance concluded at New York on 20 June 1956^{1/} entitled "Notifications by the Secretary-General", the beginning of which reads:

"1. The Secretary-General shall inform all Members of the United Nations and the non-member States referred to in article 13:

- (a) of communication under paragraph ...
- (b) of information received under paragraph ...
- (c) of declarations and notifications made under ...
- (d) of signatures, ratifications and accessions under ...
- (e) of the date on which the Convention has entered into force under ...
- (f) of denunciations made under ...
- (g) of reservations and notifications made under ...

2. The Secretary-General shall also inform all Contracting Parties of requests for revision and replies thereto received under ..."

Suggested modification of the text:

- the words "acceptance or approval", in paragraph 4, to be replaced by "or acceptance".

^{1/} United Nations Treaty Series, vol. 263, p. 46.

Part II

Terminology

Some inconsistency in terminology was noticed in the second group of articles, different terms being used in various articles to express the same idea.

In articles 31, 33 and 34, for example, we read "invalidate the consent (expressed by the representative of a State)", whereas in articles 32 and 35 it says "the expression of consent shall be without any legal effect". The legal consequences of the contingencies described in those five articles are next referred to in article 52, the provisions of which apply in equal measure to all those contingencies, yet the term used in paragraph 3 of that article to express the same idea is "the nullity of a State's consent".

In articles 36 and 37 on the other hand it is stated that under certain circumstances a treaty will become "void". This "voidness", too, falls under the provisions of article 52 but there it is termed the "nullity of a treaty". (It is only the "voidness" referred to in article 45 that has different legal consequences in virtue of article 53, paragraph 2.)

The expression "nullity" in article 52 (and in articles 30, 46, 47 and 51) therefore applies to all the contingencies described in articles 31 to 37, although these articles come under section II, the title of which is "Invalidity of treaties".

Accordingly, endeavors should be made to secure greater uniformity of terminology.

Section I: General provision

The possible effects of an outbreak of hostilities on the validity and operation of treaties have obviously been deliberately omitted from the Commission's report. Although the Netherlands Government appreciates the Commission's motives for doing so, it feels that a general provision covering this point is indispensable.

Since it is a recognized fact in international law that a state of war invalidates some treaties while it suspends the operation of others, it would be irrational to ignore in part II of the draft articles on the law of treaties the

fact that treaties may be invalidated or rendered inoperative for reasons other than those mentioned in article 31 and subsequent articles, as has been done in article 30.

The same thing is true of the succession of States, which also prompts questions regarding the validity of treaties previously concluded.

The Netherlands Government would suggest that it be made quite clear in the text of the present draft articles that the possible consequences of an outbreak of hostilities or of a succession of States on the validity or operation of treaties have not been dealt with in the following articles.

Article 30

No comment.

Article 31

The Netherlands Government endorses the Commission's guiding principle underlying this article, namely that as a rule the violation of national laws regarding the manner in which the consent of a State to a treaty is to be obtained or the way in which it is to be conveyed does not invalidate consent expressed by a State internationally. The Netherlands Government considers the principle that international law takes precedence of national laws of great importance to the development of the international legal system.

The exception to the rule, which is made in the draft article by the addition of "unless the violation of its internal law was manifest", may, however, seriously undermine the rule itself. It would be easy for States wishing to shirk their obligations under treaties to make every breach of their national regulations appear to other parties as manifest violations of their national laws.

The Netherlands Government would therefore propose that the clause "unless ..., etc." be altered and the word "manifest" replaced by a more objective term. The Netherlands Government would suggest that the wording of part of the Commission's own text of paragraph (7) of the commentary be used as the basis of the new text and that the eighth line of the article, after the comma, should read:

"unless the other parties have been actually aware of the violation of internal law or unless this violation was so manifest that the other parties must be deemed to have been aware of it. Except in ..."

Article 32

No comment.

Article 33

Since paragraph 1 mentions both the defrauded State and the State which has committed the fraud, the reference to "the State in question" in paragraph 2 is not sufficiently clear. It is suggested that "the State in question" in the second line of paragraph 2 be changed into "the injured State".

However, the Netherlands Government believes that paragraph 2 of article 33 should be omitted altogether if its suggestions in regard to the complete revision of article 46 are adopted (see comments on article 46).

Article 34

No comment, except that the suggested revision of article 46 would also affect the text of paragraph 3 of article 34.

Article 35

No comment, except that the suggested revision of article 46 would also affect the text of paragraph 2 of article 35.

Article 36

The Netherlands Government fully endorses the principle underlying this article, but the manner in which it is formulated prompts a few questions.

First, it should be noted that, also in the light of paragraph (3) of the Commission's commentary, a rule like the one in question is only acceptable and can only be applied in practice if the term "use of force" is taken in its strict sense, i.e. to mean "armed aggression", to the exclusion of all forms of coercion of an economic or psychological nature. However reprehensible such forms of coercion may be in certain circumstances, under the present international conditions they cannot be lumped together under a single, general rule prohibiting coercion without creating rather than clearing away uncertainties, in other words, without making the rule of law ineffective even in its strict sense.

Secondly, the question arises to what extent this stipulation would be enforceable with retrospective effect. Would it be assumed that the "principles of the Charter" did not become valid until 1945 when the United Nations Charter came into force?

Article 37

The Netherlands Government endorses the principle underlying this article, i.e. that according to modern ideas the will of the contracting parties is no longer the sole criterion by which to determine what can be lawfully contracted. However, the Netherlands Government feels that it is a pleonasm to say "a peremptory norm from which no derogation is permitted".

Article 38

No comment.

Article 39

With the possible exception of some old treaties, the insertion in which of a clause regulating the termination or the denunciation was simply overlooked, it is hard to imagine that contracting parties nowadays would be so careless as to "forget" to make such provisions. Consequently, the fact that no mention is made of ways in which a modern treaty may be denounced should be ascribed rather to the parties deliberately having avoided the subject. If in such cases the travaux préparatoires were referred to, it would almost invariably be found that the subject had indeed been discussed by the parties, but that for political reasons it was not thought opportune to mention the conditions under which the treaty should cease to operate, or that the parties disagreed on what those conditions should be, or that they took the effect of such conditions as a matter of course, or that there were some other reasons or a combination of reasons for the parties having refrained from making any stipulations in respect of the duration or termination of the treaty.

Accordingly, in all such cases it may be assumed that the contracting parties indeed had the possible termination of the treaty in mind, though often in exceptional circumstances only.

It hardly seems right that all the provisions intended but not actually made in the articles of the treaty in question should be replaced by the single provision that any treaty can be terminated by giving one year's notice. This provision, embodied in the last sentence of article 39, may be diametrically opposed to the contracting parties' intentions. Inclusion of the provision would only be justified on the grounds that it would supply the missing clause in a few old treaties. But it is precisely those treaties to which article 39 does not apply.

It is suggested that article 39 be modified as follows to make it suitable for existing and future treaties:

Seventh line: "... intended to admit under certain conditions denunciation or withdrawal. Under those conditions, a party may denounce or ..."

Article 40

Paragraph 2

No single period can be laid down that would be reasonable for all the different kinds of treaties. The Netherlands Government endorses the opinion voiced by the United States representative at the 784th meeting of the Sixth Committee of the General Assembly that the contracting parties should be at liberty to lay down in the treaties shorter or longer periods to suit each particular case.

The best general period would be ten years, because a shorter period of say five years might constitute a drawback, especially for technical treaties, in that a number of States interested in the project might still be engaged in making the necessary preparations such as adapting their national laws when the contracting parties are discussing the termination of the treaty.

Suggested changes in the text:

- Paragraph 2, last line but one, to read: "... expiry of ten years, or such other period as the treaty may stipulate, the agreement ..."

Article 41

No comment.

Article 42

Paragraph 2 (a)

In the Netherlands Government's opinion the Commission's intention, which is clear from paragraph (7) of its commentary, is not quite realized in paragraph 2 (a) of the above article. Whereas the Commission explains that it is only the injured party that has the right described in paragraph 2 (a), paragraph 2 (a) has the unrestricted term "any other party".

Paragraph 2 (a) could be clarified by modifying the text in the manner suggested by the United States representative at the 784th meeting of the Sixth Committee of the General Assembly, viz.: "Any other party, whose rights or obligations are adversely affected by the breach, to invoke ..."

Paragraph 2 (b)

The same representative's suggestion that a similar alteration be made in paragraph 2 (b) must be due to some misunderstanding. If paragraph 2 (b) were modified in that manner paragraph 2 (b) (i) would have the same effect as paragraph 2 (a), while paragraph 2 (b) (ii) could then be taken to mean that a decision to terminate a treaty could be made by fewer than all the other parties. It should not be possible for so far reaching a decision as that on the termination of a treaty to be made unless there is unanimity among all the other parties. It is therefore suggested that the Commission's draft text for paragraph 2 (b) be left as it is.

Paragraph 4

As regards paragraph 4, see remarks under article 46.

Article 43

No comment, except that the remarks on article 46 also apply to paragraph 3 of article 43.

Article 44

The Netherlands Government agrees with the Commission that the settlement of boundaries should be excepted from the rebus sic stantibus principle (see

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paragraph 3 (a) of article 44 and paragraph (12) of the commentary). However, treaties by which boundaries are settled often cover other points as well. For example, the Netherlands-German treaty of 8 April 1960 settling the boundaries and regulating matters closely connected therewith also contains provisions on matters that have nothing to do with determining territorial boundaries; for instance, on the maintenance in good condition of the waterways forming part of the frontier. Besides, this treaty on boundaries itself forms an integral part of a complex of greatly divergent regulations, all of which are embodied in a single, general treaty.

Accordingly, it would be more rational not to exclude in their entirety from paragraph 3 (a) treaties the main purpose of which is to determine territorial boundaries but only in so far as they regulate transfers of territory or the settlement of boundaries. The text of paragraph 3 (a) might be modified as follows:

"To stipulations of a treaty which effect a transfer of territory or the settlement of a boundary".

On the other hand, one might well ask whether not only treaties concluded to settle territorial boundaries (including treaties concerning transfers of territory) but also other "dispositive" treaties should be excluded from the rebus sic stantibus principle, i.e. treaties by which certain de facto conditions are created or modified, after which they have served their purpose, only the conditions created by them remaining. However, one can rightly say of this category of "executed treaties" that, once treaties have served their purpose, the rebus sic stantibus principle can no longer be applied to them; the most it can be applied to is the condition created, but that is outside the scope of the law of treaties.

If treaties settling territorial boundaries were included in the category of "dispositive" treaties for the purpose of applying the above-mentioned principle, it might be concluded that those treaties, too, would cease to operate and lapse the moment settlement of the boundaries was completed, because they establish a real right to the delimited territory, and that testing that fact against the theory of change of circumstances falls outside the scope of the law of treaties, so that paragraph 3 (a) might be deleted from article 44. Such a theory seems unrealistic, at any rate, it does not agree with the views hitherto expressed in the literature on the subject and in the jurisprudence.

Accordingly, the Netherlands Government believes that it would be more correct to adopt the principle that treaties concerning the settlement of boundaries or transfer of territories constitute a separate category. They are treaties that regulate the territorial delimitation of sovereignty. All other treaties, including those that establish a so-called "easement" or "servitude", regulate in some way or another the exercise of that sovereignty.

The remarks on article 46 also apply to paragraph 4 of the above article.

Article 45

As regards paragraph 2, see remarks on article 46.

Article 46

The Netherlands Government's comments are given in the attached annex and it is suggested that the text of this article be modified accordingly; the reasons that have prompted the Netherlands Government to make this suggestion will also be found in the annex.

If the text of article 46 is modified in the manner suggested, the separate paragraphs regarding the separability of treaties in articles 33, 34, 35, 42, 43, 44 and 45 will become redundant.

Article 47

In the opinion of the Netherlands Government this article should also be made to apply to article 31. The plea of invalidity admitted by way of exception in the clause in article 31 reading: "unless ... etc." should be restricted by article 47. Whether this clause should be left as it is or be modified as suggested in the Netherlands Government's comments on article 31 is irrelevant. Restricting the plea of invalidity is believed to be inherent in the primacy of international law.

The Netherlands Government also wonders whether article 47 should apply to article 36, too. However, assuming that the word "force" in article 36 only means "armed aggression", the Netherlands Government can agree with the Commission's views that article 36 should not be referred to in article 47.

Suggested modifications:

- third line: "... under articles 31 to 35 and ...";
- paragraph (b), second and third lines: "... in the case of articles 31 to 35 ..."

Article 48

The Netherlands Government endorses the provision of this article and would emphasize that under that provision the general rules of part II, section III, shall not apply to the treaties referred to in the article but only in so far as the organizations concerned have their own rules. However, the category of treaties that have been drawn up "within an international organization" might be more clearly defined - in keeping with the gist of paragraph (3) of the commentary - by modifying the phrase "drawn up within an international organization" to read "drawn up by the competent organ of an international organization".

Article 49

No comment.

Article 50

It is stated in paragraph 1 that a right to give notice of termination must be either expressed or implied in the treaty, but no mention is made of the fact that such notice should in the first place be given in the manner prescribed in the treaty. It is therefore suggested that the third line of paragraph 1 be modified to read "provided for in the treaty must, unless the treaty otherwise provides, be communicated ...".

Article 51

This article has once again brought home to the Netherlands Government how desirable it is that it be made obligatory for disputes about points of law that cannot be resolved in any other way to be submitted to the International Court of Justice. In this matter the Netherlands Government agrees wholeheartedly with "some members of the Commission" who voice their opinion in the second half of paragraph (2) of the Commission's commentary.

Article 52

No comment.

Article 53

Paragraph 3 (c)

Since some treaties remain in force for a certain period after notice of termination has been given, the text of the second and third lines of this subsidiary clause might be modified to read:

"... prior to the date upon which the denunciation or withdrawal has taken effect and the validity ..."

Article 54

No comment.

ANNEX

to the Netherlands Government's comments on part III
of the draft articles on the law of treaties

1. If treaties are split up into various parts (in the absence of explicit provisions for such division in the texts of the treaties), difficulties are sure to arise, on the one hand, "subjectively": on balance, the advantages to a party to a treaty would be outweighed by the disadvantages in the event of division per se (if that were not so, agreement would be sure to be reached still on express division), and, on the other hand, "objectively": it is difficult to say whether the effect of a certain division would be compatible with the "object and purpose" of the treaty as a whole.

2. The Commission realizes all this and has endeavoured to find a solution by making a distinction in article 46, which excludes the possibility of splitting up a treaty, between inseparability for "objective" (paragraph 2 (a)) and for "subjective" (paragraph 2 (b)) reasons.

3. The Commission also rules out division in a number of cases where division might theoretically be thought possible (i.e. those described in articles 31, 32, 36, 37 and 39).

4. However, the difficulties outlined under 1 have not been overcome completely by the distinction made under 2. They have not been overcome in respect of the "objective" reasons, because it might well be that the cancellation of part of a

treaty does not "interfere with the operation of the remaining provisions" (see paragraph (6) of the Commission's commentary under article 46), while that cancellation might still run counter to the "object and purpose" of the treaty.

The "subjective" difficulty has not been entirely obviated either, because in article 46, paragraph 2 (b), the subjective inseparability involves both parties, while proof is demanded deriving from either the text of the treaty or from statements made by both the parties during the negotiations culminating in the conclusion of the treaty. This is not very rational, because what may be essential to one party may be precisely the opposite to the other; if during the negotiations no difficulties arise in regard to certain texts, there will be nothing whatever to indicate what is essential to them and what is not; moreover, the parties may well change their minds during the period of operation of a treaty regarding the value they attach to certain of its clauses.

5. If difficulties arise after a treaty has been concluded, either immediately or later, they can be solved only by the parties to the treaty or by judicial settlement. No directives need be given for the solving of difficulties by the parties themselves. If no solution can be found, it would of course be helpful if each party could substantiate its accusations by quoting the provisions of a Convention on the law of treaties, but obviously such provisions (if they are to be just and not merely designed to "cut Gordian knots") can never be so clearcut as to exclude the possibility of the other party coming forward with counter-arguments deriving from the very same provisions. Accordingly, the question is whether the Courts should be given directives.

A very broadly worded article might meet the case (deleting the special provisions regarding separation in articles 33, 34, 35, 42, 43, 44 and 45). Something on the following lines might do:

"1. Except as provided in the treaty itself, the nullity, termination or suspension of the operation of a treaty or withdrawal from a treaty shall in principle relate to the treaty as a whole.

2. If a ground mentioned in articles 31, 32, 33, 34, 35, 36, 37, 39, 42, 43, 44 and 45 for nullity, termination, suspension of the operation of a treaty or withdrawal from a treaty, applies only to particular clauses of a treaty, and a party to the treaty wishes to uphold the remainder of the treaty, the other party or parties shall accept the

continuing validity and operation of the remainder of the treaty, unless such acceptance cannot reasonably and in good faith be required from such other party or parties.

3. The provisions of paragraph 2 shall not apply if:

(a) the clauses in question are not separable from the remainder of the treaty with regard to their application; or

(b) it appears either from the treaty or from the statements made during the negotiations that acceptance of the clauses in question was an essential element of the consent of a party to the treaty as a whole."

Such a text would lay down: (a) the principle of inseparability; (b) separability depending on the circumstances at the moment at which the treaty was concluded and at the moment when difficulties arose; and (c) the limited absolute exclusion of separability if it should simply be impracticable, or if during the negotiations one or more of the parties made it clear that the coherence of the various parts of the treaty was essential. Since paragraphs 1 and 3 of the suggested text were largely modelled on the Commission's draft, the same objections attach to the text as were raised against the corresponding parts of the Commission's text; but it is believed that these objections have been practically eliminated by the text of paragraph 2, which makes the whole matter subject to the rules of good faith between the contracting parties.
