Document:-
A/CN.4/177 and Add.1 & 2

Fourth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1965, vol. II

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# LAW OF TREATIES

[Agenda item 2]

DOCUMENT A/CN.4/177 and Add.1 and 2  
Fourth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur

[Original text : English]  
[19 March, 25 March and 17 June 1965]

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**PART II. INVALIDITY AND TERMINATION OF TREATIES**

**Section I. General provision**

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1. At its fourteenth, fifteenth and sixteenth sessions the Commission provisionally adopted parts I, II and III of its draft articles on the law of treaties, consisting respectively of twenty-nine articles on the conclusion, entry into force and registration of treaties, twenty-five articles on the invalidity and termination of treaties and nineteen articles on the application, effects, modification and interpretation of treaties. In adopting each part the Commission decided, in accordance with articles 16 and 21 of its Statute, to submit it, through the Secretary-General, to Governments for their observations.

2. At the sixteenth session, while recalling its decision of 1958 that it should prepare its final draft only at the second session following that in which its first draft had been prepared, the Commission expressed the hope that the observations of Governments on part III of the law of treaties would be available to it before the commencement of its eighteenth session in 1966. It also asked the Secretariat to request Governments to submit their comments on part II by January 1965 at the latest, in order that the Commission might be in a position to consider them at its seventeenth session. The Commission further stated that it intended at its seventeenth session, after considering the comments received from Governments, to conclude the second reading of the first part, and of as many further articles as possible of the second part, of its draft on the law of treaties.

3. In connexion with its re-examination of the draft articles the Commission noted at its sixteenth session that certain of the articles already adopted required further consideration in order to ensure their proper co-ordination with other articles. It also noted that, while the juxtaposition of some topics had been convenient for purposes of study, it might not necessarily be appropriate in the final arrangement of the draft articles, and that in consequence some readjustment of the material in the different parts might be found to be desirable. At the same time it recognized that special attention would have to be given to ensuring as full consistency as is possible in the use of terminology in the final drafts.

4. At the same session the Commission decided that in its re-examination of part I it would give further consideration to the question whether it should include an article covering the making of treaties by one State on behalf of another or by an international organization on behalf of a Member State.

5. By 1 March 1965 replies had been received from thirty-one Governments:

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Certain of these replies were confined to statements that the Government concerned did not have observations to make at the present stage of the work on the law of treaties. The majority of the replies, however, contained proposals and criticisms with regard to the substance or wording of the draft articles of part I or part II or of both parts. In addition, on 19 February 1965 the Secretariat furnished the Special Rapporteur with extracts from the records of the Sixth Committee at the seventeenth and eighteenth sessions of the General Assembly, setting out the comments of delegations on a number of the articles in part I. The above-mentioned comments of Governments and of delegations have been collected and reproduced by the Secretariat in a separate document (A/CN.4/175 and Add.1)* for use in conjunction with the present report.

6. The present report contains under each article the comments of Governments and delegations directed to that particular article, as well as an introductory summary of the views expressed by Governments regarding the general form to be given to the draft articles. The text of the report indicates in each case whether the source of the comment is the written reply of the Government or the statement of the delegation in the Sixth Committee. The Special Rapporteur has taken all these comments1 into account in his re-examination of the draft articles, even although it has not been possible for him to deal with every comment in the text of his report. One question which confronted the Special Rapporteur was how much weight to attach to the absence of any comments from a Government or to the absence of any comment upon a particular article as an implied endorsement of the Commission's general treatment of the topic under examination. On this question the Special Rapporteur has made the best appreciation that he could of the relative weight of the various elements, including the opinions previously expressed in the Commission itself, and has dealt with the proposals and criticisms of Governments and delegations on what appeared to him to be their merits in relation to the subject-matter of the draft articles provisionally adopted by the Commission.

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1 Mimeographed. 2 The comments of the Netherlands Governments were not received in time to be taken into account by the Special Rapporteur in his re-examination of part I.
7. The order in which the Commission studied the various topics of the law of treaties in parts I, II and III has necessarily determined the order in which Governments and delegations have commented upon those topics. In the present report, therefore, the Special Rapporteur is not in a position to submit the draft articles for re-examination by the Commission in what he thinks should be their final order. On the substance of the matters in question he is bound very largely to follow the order in which the articles were provisionally adopted by the Commission. On the other hand, the order in which the articles are ultimately to be placed may affect the final form of the drafting of certain articles, and it seems desirable that before the end of the next session the Commission should reach some decision, however provisional, as to the final structure and order of the articles. The Special Rapporteur has not yet any fixed opinion on the question of the final order, because drafting and logical considerations may not invariably point to the same conclusion as to the desirable order. Subject to this reservation, however, he suggests that the following might be a possible scheme for the final arrangement of the draft articles:

- **Part I** — General Provisions (article 48 and perhaps one or two further articles should be transferred to this part); **Part II** — Conclusion, Entry into Force and Registration of Treaties; **Part III** — Observance and Interpretation of Treaties, consisting of article 30 (possibly), article 55 (pacta sunt servanda) and articles 69-73; **Part IV** — Application of Treaties, consisting of articles 56-64; **Part V** — Invalidity of Treaties; **Part VI** — Termination of Treaties; **Part VII** — Procedure for invoking a ground of Nullity, Termination, Withdrawal from or Suspension of the Operation of a Treaty; **Part VIII** — Legal Consequences of the Nullity, Termination or Suspension of the Operation of a Treaty; **Part IX** — Modification of Treaties.

**Revision of the draft articles in the light of the comments of Governments**

- **The form of the draft articles**

**A. Previous decisions of the Commission**

In its report for 1959 the Commission stated that, without prejudice to any eventual decision to be taken by the Commission, it had not so far envisaged its work on the law of treaties as taking the form of one or more international conventions but rather as “a code of a general character”. Two principal arguments were mentioned as favouring a “code”:

“First, it seems inappropriate that a code on the law of treaties should itself take the form of a treaty; or rather, it seems more appropriate that it should have an independent basis. In the second place, much of the law relating to treaties is not especially suitable for framing in conventional form. It consists of enunciations of principles and abstract rules, most easily stated in the form of a code; and this also has the advantage of rendering permissible the inclusion of a certain amount of declaratory and explanatory material in the body of the code, in a way that would not be possible if this had to be confined to a strict statement of obligation. Such material has considerable utility in making clear, on the face of the code itself, the legal concepts or reasoning on which the various provisions are based.”

Mention was also made of possible difficulties that might arise if the law of treaties were to be embodied in a multilateral convention and then some States did not become parties to it or, having become parties to it, subsequently denounced it. On the other hand, the Commission recognized that these difficulties arise whenever a convention is drawn up embodying rules of customary law.

In its report for 1961, however, the Commission decided that its aim should be to “prepare draft articles on the law of treaties” intended to serve as the basis for a convention. By this decision it changed the scheme of its work on the law of treaties from a merely expository statement of the law to the preparation of draft articles capable of serving as a basis for a multilateral convention. In its report for 1962 the Commission explained that two considerations had led it to make this change:

“First, an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law; and the consolidation of the law of treaties is of particular importance at the present time when so many new States have recently become members of the international community. Secondly, the codification of the law of treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished; and their participation in the work of codification appears to the Commission to be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundations.”

At the same time, it decided to leave open the question whether the draft articles on the law of treaties should take the form of a single draft convention or of a series of related conventions. Pursuant to this decision, the Commission arranged the draft articles in three separate parts, in its reports for 1962, 1963 and 1964, although deciding for reasons of convenience to number the articles of the three groups in a single consecutive series.

**B. Comments of Governments**

- **Austria.** In the view of the Austrian Government, the law of treaties is complex and not easy to codify, despite

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8 For example, the order in which the articles on application, termination and revision of treaties are placed may necessitate adjustments of the drafting of the various articles.

the uniformity of the underlying legal concepts and the relative clarity of the existing norms of customary law. The problems are problems not of substantive but of adjectival law, since the norms to be codified will govern and define the procedure by which a rule of international law is legally created. The Austrian Government prefers the opinion expressed by the Commission in 1959 that "it seems inappropriate that a code on the law of treaties should itself take the form of a treaty". It considers that the norms of the law of treaties need to be codified, clarified, elucidated and progressively developed, but not to be enshrined in a treaty. It observes that the code would be a constitutional norm, laying down for the future the procedure for the creation of a norm, and would thus rank above other norms or at least take precedence over norms of equal rank; that, if given the form of a convention, it would be concluded in the same manner as any other multilateral treaty; and that there would be no way of distinguishing it from the other multilateral treaties to which, nevertheless, it would always thereafter be applicable. It further points out that, where there are elements of progressive development in the draft articles, the question will arise whether the pre-existing customary law or the new conventional rule should apply; and that difficulties may arise if later on a State which has accepted the new convention on the law of treaties concludes a treaty with a State which has not, and is bound to observe its rules. Finally, the Austrian Government lays particular stress on the probability that the new convention would for a long time lack the "universality" which ought to attach to the "law of treaties"; and that, even if universally acceded to, it might still lack complete universality as some States might accede to it only with reservations. In its view, the result might be to unsettle the existing customary law, which has the sanction of the whole international community, and increase the difficulties of concluding treaties. Austria, therefore, considers that a "code" on the law of treaties, perhaps in the form of a General Assembly resolution, would be preferable to a "convention".

Israel. The Government of Israel regards the Commission's general decision that its draft articles shall serve as the basis for a convention on the law of treaties as acceptable.

Japan. The Japanese Government is of the opinion that the draft articles in their ultimate form should be a "code" rather than a "convention". Although they purport to be concerned only with the international aspect of treaty-making, they will inevitably have repercussions also on the internal aspect; and if they are couched in the form of conventional norms, the effect will be to put a strait-jacket on the procedural formalities of treaty-making in each State. Secondly, an attempt to prescribe treaty-making procedures in great detail will, in its view, have the undesirable result of putting obstacles in the way of the parties' finding acceptable procedures for their actual needs. The Japanese Government does not, however, mean that the authority of an official "code" should be withheld from the draft articles. On the contrary, it has in mind that they should be adopted, after full examination and discussion by Governments, as an authoritative recommendation regarding the procedures to be followed in concluding international agreements. This might, it thinks, be done by inserting in the draft articles the following general provision:

"States parties to the present code recognize that the provisions of the present code are generally declaratory of established principles of international law and practice, and declare that they shall endeavour to conform themselves to these provisions as a common standard of conduct."

In the event that the draft articles should take the form of a "convention" the Japanese Government would like to see it formulated on the basis of the following two principles:

(a) the provisions should be as concise as possible, leaving all the detailed technicalities to the decisions of the parties to any particular international agreement;

(b) a general provision should be included, empowering States to derogate from any of the provisions of the convention by mutual agreement of the parties to any particular international agreement.

The Japanese Government is also of the opinion that the three parts of the draft articles should be amalgamated as the parts are so closely interrelated with one another that it would serve no useful purpose to make them into three separate conventions independent of one another.

Luxembourg. The Luxembourg Government expresses the hope that the Commission's draft articles will soon result in the conclusion of a world-wide convention on the law of treaties.

Sweden. The Swedish Government has no objection to the Commission's decision in favour of a "convention". In its view, however, this decision entails important consequences in regard to the contents of the convention; for it considers that it would be out of place for a convention to contain descriptions of convenient practices and procedures, useful though such descriptions might be in a "code" of recommended practices. The Swedish Government thinks it advisable to omit any provisions of that character from the draft articles, since they appear to it to be unnecessary and capable of proving burdensome in the event of their becoming obsolete. Nor does it feel that there is any need for a convention to cover all the phases of the conclusion of treaties, if legal rules do not attach to all of them. The rules of the law of treaties, it observes, are largely dispositive, i.e., the parties may depart from them by agreement; and it is unnecessary to state examples of the various ways in which such departures may be made. The need is rather for statements of the residuary rules which govern a specific question when the parties have not resolved it and of the obligatory rules from which the parties may not depart at all, if any such there be. In the light of these considerations, the Swedish Government suggests that the following provisions of the draft articles might be omitted or transferred to a code of recommended practices, or else revised so as to state only residual legal rules: article 4, paragraph 6 (a); article 5; article 6 (b) and (c); articles 7 and 8; article 9, paragraph 3 (a); article 10; articles 13 and 14; articles 18 and 19; articles 26 and 27; and article 29, paragraphs 3 to 8.
C. Observations of the Special Rapporteur

1. Clearly, the ultimate decision as to the outcome of the Commission's work rests with States in the General Assembly and arguments can, no doubt, be adduced in favour of more than one solution. But, although the final decision will be a political one, it will necessarily have to take into account considerations that are mainly legal. In consequence, when it has completed its work on the law of treaties, the Commission may wish to examine whether it should express any views on the technical aspects of this question in its final report to the General Assembly. Meanwhile, the basis of the Commission's work must be its decision of 1961 that it should prepare "draft articles on the law of treaties intended to serve as the basis for a convention". In consequence, the Special Rapporteur does not think that it would serve any useful purpose for him to discuss in the present report the objections to a convention raised by the Austrian and Japanese Governments. It suffices at this stage to observe that, while some of these objections have always been recognized by the Commission to have a certain weight, others do not appear to have the weight given to them by the Government concerned.

2. The point made by the Swedish Government, on the other hand, appears to concern very directly the present stage of the Commission's work. That point is that the Commission's decision to prepare draft articles as a basis for a convention entails consequences as to the content of the articles. In brief, the Swedish Government maintains that the texts of the articles require considerable revision so as to eliminate the descriptive element and largely to confine the content of the articles to statements of residuary rules. The Special Rapporteur feels that there is substance in the point that the articles still contain some element of "code" and are not yet fully cast in the form required for a convention. On the other hand, some of the detailed suggestions may, it is thought, go too far in the other direction. The Vienna Conventions on Diplomatic and Consular Relations are not altogether lacking in provisions of an expository nature. With this reservation, the Special Rapporteur has sought to give effect to the Swedish Government's suggestion in his proposals for the revision of a number of the articles in part I.

Terminology and definitions

1. The Commission, as mentioned in paragraph 3 of the introduction to the present report, recognized at its sixteenth session that special attention would have to be given to ensuring as full consistency as is possible in the use of terminology in the final drafts. Governments, and more especially the Government of Israel, have drawn attention to points of terminology in their comments. In some cases slight differences in terminology may be due to the exigencies of the language or, more important, to small differences of nuance; in other cases the difference may merely be the reflection of transient difficulties in arriving at agreement on the substance and of insufficient opportunity at the time to coordinate the language with that used in other parts of the draft articles. The Special Rapporteur, like the Commission, attaches high importance to achieving the maximum consistency and precision in the use of terms. On the other hand, there are still a considerable number of points of substance which, in the light of the comments of Governments, require full reconsideration. The Special Rapporteur accordingly feels that it would be premature for him to try to deal with questions of terminology point by point in the main body of the present report, before the texts on these matters of substance have been reformulated. To adopt that course might also overload and complicate the commentaries on the individual articles. The Special Rapporteur therefore proposes to deal with the questions of terminology in a separate addendum to the present report, where he will deal with the points made by Governments and any further points of his own. Amongst the latter are expressions such as "it appears from the treaty", the "treaty provides", etc., which occur with some frequency in the draft articles. The Special Rapporteur considers it to be of cardinal importance to re-examine these expressions in the light of rules for the interpretation of treaties adopted at the last session and to make it crystal clear in the drafts exactly whether reference is being made only to the text of the treaty or to the treaty as interpreted in the light of the preparatory work and surrounding circumstances, etc. It may be found that the meaning of the particular expressions used should be given precision by defining them in article 1. As to the general question of "definitions", it may be found advisable to add one or two other definitions to those in article 1, such as the term "party". For the reasons given above, the Special Rapporteur thinks it preferable to examine the question of adding new definitions in the separate addendum dealing with points of terminology. Accordingly, they are not discussed in the Special Rapporteur's observations on article 1.

Title — Draft articles on the Law of Treaties

Japan. The Japanese Government, while not holding a strong view on the title to be given to the draft articles, suggests that the term "treaties" should be replaced by "international agreements". Even when, as in the draft articles, the term "treaties" is used in a generic sense, it may, the Japanese Government believes, lead to misunderstanding — a view which it feels to be supported by the discussions in the Commission in its second and third sessions. Consequently, in spite of the proviso in article 1, paragraph 2, the Japanese Government suggests that it would be more appropriate in the title to employ a neutral term like "international agreements".

Observations and proposals of the Special Rapporteur

1. The question whether to use the term "treaty" or "international agreement" in the draft articles was carefully examined by the Commission at its eleventh and fourteenth sessions. On each occasion the Commission decided that several considerations point in favour of using the term "treaty" as the generic term to cover all forms of international agreement in writing. The Special Rapporteur does not feel that the considerations advanced by the

* Suggested by the Netherlands Government.
Japanese Government are of such weight as to call for a reversal of those decisions. The use of the term “international agreement” would not remove any risks of misunderstanding which may exist in municipal law by reason of distinctions made in some systems between agreements and treaties. This point is taken care of in article 1, paragraph 2, of the draft articles, and the Special Rapporteur sees no reason for the Commission to alter its view that "the only real alternative [to the term treaty] would be to use for the generic term the phrase 'international agreement'", which would not only make the drafting more cumbersome but would sound strangely today, when the ‘law of treaties’ is the term almost universally employed to describe this branch of international law.

2. On the other hand, it seems desirable for the Commission to consider whether it should now take account in the title of its decision to confine the draft articles to the treaties of States. It is true that articles 1 and 3, as at present drafted, refer to the treaties of “other subjects of international law”, and that article 3 also deals with the capacity of international organizations to conclude treaties. But all the remaining articles have been drafted for application in the context of treaties concluded between States, and the view of the Special Rapporteur is that for reasons of logic and relevance these two articles ought now to be brought into line with the rest of the draft.

If the Commission accepts this view, the Special Rapporteur suggests that it may be advisable, in order to prevent any misconception, to amend the title to read: “Draft articles on the Law of Treaties concluded between States.”

Part I: (The title describing its contents)

The Special Rapporteur proposes that the title to part I should become “General Provisions”; and that the existing title, “Conclusion, Entry into Force and Registration of Treaties” should be transferred to a new heading, “Part II”, which should be inserted before the present article 4. The existing sub-title at that place, “Section II: Conclusion of Treaties by States”, would then become “Section I: Conclusion of Treaties”. The reason for these changes is, of course, that the “General Provisions” will now apply to all the “Parts” of the draft articles and not merely to the “Conclusion, Entry into Force and Registration of Treaties”.

SECTION I: GENERAL PROVISIONS

Article I. — Definitions

Paragraph 1 (a). — “Treaty”

Comments of Governments

Australia. The Australian Government considers that the definition, as at present worded, may embrace a great quantity of informal understandings reached by exchange of notes which are not intended to give rise to legal rights and whose registration with the United Nations might cause the registration system to break down. It does not think that the phrase “governed by international law” suffices to remove the difficulty, and proposes that the definition should include a reference to the intention of the parties to create legal obligations between themselves.

Austria. The Austrian Government considers that paragraph 1 (a) omits an essential characteristic of a “treaty”, namely, the intention to create, and the actual creation of, rights and obligations under international law between the parties. It recalls that the definitions proposed both by Sir G. Fitzmaurice and Sir H. Lauterpacht included the element of intention to create rights and obligations, and proposes that this element should be added to the definition.

Finland. The Finnish Government observes that the definition in paragraph 1 (a) is for the purpose of the present articles only while the articles themselves deal exclusively with treaties concluded between States. It therefore sees no need to touch upon other subjects of international law and suggests the deletion of the words “or other subjects of international law” from paragraph (a).

Japan. Since the enumeration of the categories of international agreements in this paragraph cannot be exhaustive, the Japanese Government doubts its utility, and suggests its deletion.

Luxembourg. The Luxembourg Government questions whether it is advisable to give a definition of the term “treaty”, and suggests that it may be better to state the idea and leave its definition to doctrine. Paragraph 1 (a), it observes, in essence defines a “treaty” as “any international agreement” but the term “agreement” is nothing else than a synonym of “treaty”. A definition of the term treaty, if included, should in its view concentrate on three elements: (a) the consensual nature of a treaty; (b) the nature of the parties; (c) the binding effect sought by the parties. On the other hand, it doubts the correctness of including two of the elements mentioned in the Commission’s text, namely, the written form and the reference to international law. It states that under paragraph (a), as at present worded, the question may be raised as to whether the written form should be regarded as a matter of substance affecting the validity of treaties or whether the paragraph is simply a way of saying that the future convention is to apply only to treaties in written form. If the latter interpretation is correct, the Luxembourg Government considers that it would be preferable to take the “written form” element out of the definition and to add a new paragraph at the end of the article stating: “The rules laid down by these articles relate only to international treaties in written form.” As to the element “governed by international law”, the Luxembourg Government doubts the need to mention it, as it seems to be implied from the very nature of the contracting parties, and international law could only be made inapplicable exceptionally by the insertion of a specific reference to another system of law or possibly by virtue of the very special subject of the particular agreement. This is such an exceptional case that in the view of the Luxembourg Government it would be better not to complicate the general definition of a “treaty” by a reference to that unlikely hypothesis. In the light of
the above considerations it suggests that paragraph 1 (a) should be revised to read as follows:

“The expression 'treaty' means any agreement between two or more States or other subjects of international law designed to create a mutual obligation for the parties, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation etc.”

United Kingdom. The United Kingdom Government doubts whether the list of expressions contained in the definition of the term “treaty” is either necessary or desirable, and suggests that it would be better for any examples to be mentioned in the commentary. On the other hand, it considers that an intention on the part of the States concerned to create legal obligations is an element which ought to be included in the definition of “treaty”.

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur does not consider it possible to adopt the suggestion that the definition of “treaty” should be omitted from the draft articles and the term left to be defined in the writings of jurists. The suggestion appears to be based on the misconception that the definition in paragraph 1 (a) is intended to be an absolute definition of the term “treaty”. But the purpose of the definition, as the opening words of the article make clear, is only to state the meaning to be assigned to the term in interpreting and applying the provisions of the draft articles. Nor does it appear to be correct to say that the term “agreement” is nothing else than a synonym of “treaty”. On the contrary, while the word “treaty” may be susceptible of being used with that wide meaning, it may also be given a narrower meaning. The Charter itself, in Article 102, speaks of “every treaty and every international agreement”. It was the very fact that the term may be used in more than one sense which led the Commission both at its eleventh and fourteenth sessions to define the sense in which it used the term in the draft articles. 11

2. Four points in the Commission’s definition have been questioned in the comments of Governments. The first is the limitation of the term “treaty” to agreements in written form. The suggestion has been made that, as at present worded, paragraph 1 (a) may leave it doubtful whether the written form is a matter of substance affecting the validity of treaties or whether the paragraph simply provides that the future convention is to apply only to treaties in written form. That suggestion might perhaps have had some possible basis if it were not expressly provided in article 2, paragraph 2, that the exclusion of international agreements not in written form from the scope of the draft articles is not to be understood as affecting their legal force under international law. Having regard to this provision and to the opening words of article 1, it does not appear to the Special Rapporteur that there would be any justification whatever for interpreting the draft articles in the manner suggested.

3. Another suggestion made in the same connexion is that in any event it would be preferable to take the “written form” element out of the definition and instead to add a new paragraph at the end of the article stating: “The rules laid down by these articles relate only to international treaties in written form.” This suggestion again seems to be inspired by a fear that paragraph 1 (a) may be interpreted as containing an “absolute” definition of the term treaty in international law and a wish not to appear in the draft articles to deny that oral agreements partake of the nature of treaties. However much one may sympathize with this point of view, it remains true that, as indicated above, the Commission has already taken account of it in the opening words of article 1 and in article 2, paragraph 2. The question is to some extent one of drafting technique. The suggested solution appears to be open to the objection that the term “treaty” would first be defined “for the purposes of the present articles” in broad terms of universal validity and then it would immediately be provided in the proposed new paragraph that the term is never in fact to have that broad meaning anywhere in the draft articles. Nor would it be an easy task to formulate a definition of the term treaty which would be universally valid. If no solution may be entirely satisfying, it seems preferable in paragraph 1 (a) to define the term as it is used in the draft articles and then, by appropriate provisions, to safeguard the legal position of other transactions falling within the concept of a “treaty” in other contexts. In order to tighten up these safeguards the Special Rapporteur will propose minor modifications of the second paragraphs both of the present article and of article 2, which will be further explained in his observations and proposals regarding those paragraphs.

4. The second point is the suggestion that the words “or other subjects of international law” should be deleted. The Special Rapporteur agrees with this suggestion for the same reasons as those given in the preceding paragraph for opposing the broadening of the definition to cover oral agreements. The Commission, as already mentioned in the Special Rapporteur’s observations and proposals regarding the title to the draft articles, decided at its fourteenth session to confine the draft articles to the treaties of States. It rejected the idea of including a separate section dealing with the treaties of international organizations, preferring not to complicate the drafting of the present articles by trying to deal with the special case of treaties concluded by international organizations. It did not, however, fully draw the consequences which naturally followed from its decision to confine the draft articles to the treaties of States. It retained in article 1, paragraph 1, a reference to the treaties of “other subjects of international law” and in article 3, paragraph 3, it included an express provision regarding the treaty-making capacity of international organizations. The Commission was anxious, it is believed, to make it plain that it accepted the concept of treaty-making by international organizations, even while it preferred not to deal with their treaties in the draft articles. This has already been done in its 1962 report, and can appropriately be emphasized again in the commentary to the final texts of the articles. But the Special Rapporteur considers that, as the articles are designed to

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provide the basis for a convention dealing only with the law of treaties concluded between States, the texts of the articles ought now at all points to be drafted with that design in view. Since the aim of paragraph 1 (a) is to define the term “treaty” for the purpose only of the “present articles”, it seems necessary to eliminate from it the reference to treaties concluded by subjects of international law other than States.

5. The third point is the suggestion that the list of appellations given to treaties set out between brackets “(treaty, convention, protocol, etc)” should be omitted. At the fourteenth session some members of the Commission felt that the passage between brackets was superfluous, but it was retained by the Commission at that stage of its work as having a certain value in aiding the understanding of the definition. At the present stage, however, when it is necessary to refine the text of the articles as far as possible, the Special Rapporteur considers that the list of appellations may, and should, be dispensed with. The words “whatever its particular designation” suffice to cover the point and the Special Rapporteur therefore proposes that this suggestion also should be adopted.

6. The fourth point concerns the words “and governed by international law”, as to which there are two suggestions. One is that this element in the definition should be deleted because it is necessarily to be implied from the nature of the contracting parties, and cases of a specific reference to another system are too exceptional to be taken into account in framing the definition. The other is that the element of intention to create legal obligations should be added. Both these suggestions have previously been put forward and discussed in the Commission. The previous Special Rapporteur proposed the inclusion of the phrases “intended to create rights and obligations, or to establish relationships, under international law”, while the present Special Rapporteur’s first draft contained the phrase “intended to be governed by international law”. The object of these phrases was to distinguish treaties from (a) agreed statements of policy not intended to create legal obligations, and (b) agreements between States, not uncommon in practice, which the parties expressly make subject to the municipal law of a particular country. Some members of the Commission thought mention of the intention of the parties to be unnecessary, and some thought it to be actually undesirable, as they did not consider it always to be open to the parties to choose between international and municipal law, e.g., in a treaty of cession or a treaty concerning the high seas or territorial waters. Certain members thought it unnecessary to have any reference to international law, since in their view the nature of the contracting parties necessarily made the agreement subject, at any rate in the first instance, to international law. The Commission, both in 1959 and 1962, decided that the present articles must be confined to international agreements whose execution is governed by international law and that the phrase “governed by international law” should be included in the definition in order to cover this point. At the same time it omitted any reference to the intention of the parties, considering that, in so far as this may be relevant in any case, the element of intention is embraced in the phrase “governed by international law”. The Special Rapporteur considers that the phrase “governed by international law” should be retained. Although personally not opposed to the inclusion of a reference to the intention of the parties, he does not think that the comments of Governments introduce any new considerations which would justify him in formulating a fresh proposal on this point.

7. In the light of the above observations, the Special Rapporteur proposes that paragraph 1 (a) should be amended to read as follows:

“Treaty’ means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation, concluded between two or more States and governed by international law.”

Paragraph 1 (b). — “Treaty in simplified form”

Comments of Governments

Austria. The Austrian Government does not think that paragraph 1 (b) contains any real definition of a “treaty in simplified form”. In its view, paragraph (11) of the commentary begs the question when it states in the French version “La Commission a défini cette forme de traités en prenant pour critère sa forme simplifiée”. It contends that the essential characteristic of a treaty in simplified form is that it does not require ratification, and proposes that this should be adopted as the basis of the definition.

Japan. The Japanese Government considers the term “treaty in simplified form” to be unnecessary for the purpose of the draft articles.

Luxembourg. The Luxembourg, like the Austrian Government is of the opinion that paragraph 1 (b) does not amount to a real definition of the term; it merely enumerates various formal procedures characteristic of this kind of agreement. It notes that the only places where the term recurs in the draft articles are article 4, paragraph 4 (b), and article 12, paragraph 2 (d). From these provisions it deduces that the true definition of a “treaty in simplified form” is rather “a treaty concluded in circumstances which indicate the willingness of the parties to bind themselves without observing the formalities of full powers and ratification”. It does not think, however, that is is possible to indicate with sufficient precision in what circumstances the parties should properly be considered to have manifested that intention. Accordingly, it proposes that the definition should be omitted from the draft articles.

United Kingdom. The United Kingdom Government expresses itself as not being entirely satisfied with the definition of “treaty in simplified form”.

United States. The United States Government considers that the effect of paragraph 1 (b), if applied to article 4,
paragraph 4 (b), would be to make full powers necessary in connexion with many informal agreements which at present are signed without production of full powers. At the same time, it holds that even the forms of treaty mentioned in paragraph 1 (b) ought not to be regarded as informal treaties, if intended by the parties to be subject to ratification. It proposes that the following be substituted for paragraph 1 (b):

"Informal treaty' means a treaty not subject to ratification or other subsequent approval that is concluded by an exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument."

Observations and proposals of the Special Rapporteur

1. The fact that many treaties are today concluded "in simplified form" is well recognized, and the Commission felt that in one or two instances the distinction between "formal" and "informal" treaties needed to be drawn in setting out the rules governing the conclusion of treaties. In fact, as the Luxembourg Government points out, these instances are only two, article 4 (b) concerning the production of full powers by representatives other than Heads of State, Heads of Government and Foreign Ministers, and article 12, paragraph 2 (d), excepting such treaties from any presumption that they require ratification. Furthermore, the Commission did not find the distinction between formal and informal treaties easy to express, explaining the matter as follows:

"In general, treaties in simplified form identify themselves by the absence of one or more of the characteristics of the formal treaty. But it would be difficult to base the distinction infallibly upon the absence or presence of any one of these characteristics. Ratification, for example, though not usually required for treaties in simplified form is by no means unknown. Nevertheless, the treaty forms falling under the rubric 'treaties in simplified form' do in most cases identify themselves by their simplified procedure. The Commission has, therefore, defined this form of treaty by reference to its simplified procedure and by mentioning typical examples." 13

The five Governments which have commented upon the present paragraph are at one in thinking that the definition of an informal treaty which it contains is inadequate, either in general or as a basis for the rules formulated in articles 4 and 12.

2. On the other hand, none of the three definitions suggested in the comments of these Governments appears to the Special Rapporteur to provide a really satisfactory alternative. The Commission was, he believes, correct in considering that a treaty concluded in simplified form, such as an exchange of letters, is not converted into a formal treaty merely because production of full powers takes place or because it is made subject to ratification or approval. Otherwise, an exchange of letters by diplomatic representatives which is subject to ratification or approval would be a formal treaty, but a similar one by Heads of State, Heads of Government or Foreign Ministers which is not so subject would be an informal treaty. Moreover, none of the definitions suggested by Governments would provide a serviceable basis for drawing distinctions in articles 4 and 12, where differentiating between formal and informal treaties might have facilitated the drafting of the rules.

3. The Special Rapporteur, having re-examined articles 4 and 12 in the light of the comments of Governments, is of the opinion that, if possible, those articles should now be reformulated without framing their provisions in terms of a distinction between formal treaties and treaties in simplified form. If the Commission endorses this conclusion, it will no longer be necessary to include a definition of "treaties in simplified form" in article 1. The Special Rapporteur therefore proposes the deletion of the present paragraph.

Paragraph 1 (c). — "General multilateral treaty"

Comments of Governments

Austria. The reference to "matters of general interest to States as a whole" appear to the Austrian Government to be rather indefinite, and it suggests that the sole criterion should be the establishment of general norms by the treaty (law-making treaty).

Japan. In the view of the Japanese Government, the term "general multilateral treaty" cannot be precisely defined, and its application will cause great difficulty. It considers that the term should be dispensed with.

Luxembourg. The Luxembourg Government observes that the term "general multilateral treaty" is used in only one other place in the draft articles, namely in article 8, paragraph 1, which provides that "every State" may become a party to such a treaty; and that in the present article the term is introduced without any previous definition of the term "multilateral treaty". Moreover, the words "of general interest to States as a whole" are, in its opinion, much too vague a criterion to form the substance of a workable definition. The application of such a debatable criterion might, it thinks, give rise to insoluble conflicts concerning the general nature of the norms established by a multilateral treaty or the question whether they are of interest to States as a whole. It therefore advocates the deletion of paragraph 1 (c) from the definitions in article 1.

Colombian delegation. The delegation considers it doubtful whether the definition would be useful in applying the rules governing the various categories of treaties. For example, it is not clear to the delegation whether an agreement concerning a primary product such as sugar, in which all States have an interest as consumers or producers, would be covered by the definition. 14

Observations and proposals of the Special Rapporteur

In the light of the comments of Governments and having regard to the purpose for which a distinction is

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drawn in article 8 between “general multilateral treaties” and other treaties, the Special Rapporteur is inclined to think that the definition in paragraph 1 (c) is too broad. The justification for the thesis in article 8, paragraph 1, that general multilateral treaties should in principle be, open to participation on as wide a basis as possible is almost invariably put on the ground that general law-making treaties ought in the interests of the international community as a whole to be of universal application. This ground of justification may not necessarily be present in the case of some treaties which might arguably be said to “deal with matters of general interest to States as a whole”. This phrase of the definition, as some Governments have noted, may constitute too uncertain a criterion to provide a workable definition for the purpose of the draft articles. Moreover, article 8, paragraph 1, is the only provision in the draft articles where a distinction is made between general multilateral treaties and other treaties. The Special Rapporteur accordingly suggests that the words “or deals with matters of general interest to States as a whole” should be deleted from the definition.

Paragraph 1 (d). — “Signature”, “ratification”, “accession”, “acceptance” and “approval”

Comments of Governments

Austria. The Austrian Government thinks that it might be useful to define the several terms which are listed baldly in this paragraph. In particular, it considers the absence of any definition of “ratification” to be unfortunate (see the Austrian comments on article 12). It suggests that the definition of this term could well be based on the wording of article 6, paragraph 1, of the draft articles submitted by Sir H. Lauterpacht in his report of 1953:

“Ratification is an act by which a competent organ of a State formally approves as binding the treaty or the signature thereof.”

Luxembourg. The Luxembourg Government observes that, as commonly understood, the term “approval” means the internal formalities to which an international treaty is subject and, more particularly, parliamentary approval of treaties; that it is only as a result of an unfortunate confusion of terms that “approval” has come to be used in international relations as the equivalent of “ratification”; and that a converse confusion has also arisen owing to the frequent use now of the term “ratification” in internal law to mean parliamentary approval. It suggests that advantage should be taken of the present opportunity to perfect the terminology once and for all. As the draft articles are concerned solely with the external and international aspect of the problem, it proposes that all references to “approval” should be systematically eliminated and only the terms “ratification” and “accession” retained.

Panamanian delegation. The delegation questions the inclusion of signature among the acts whereby a State expresses its consent to be bound. It considers that in contemporary international law it is ratification, not signature, which expresses the consent of the State; that signature as a rule constitutes authentication and that consent by signature would be the rare exception. It also maintains that acceptance, approval and accession are merely forms of ratification.14

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur is unable to share the view that “consent by signature is the rare exception”, since a very large number of treaties today are concluded in simplified form and in the case of these treaties consent by signature is the rule rather than the exception.17 On the other hand, having regard to the double use of “signature” in treaty practice, he is inclined to share the view of the delegation of Panama that it would be better to separate it from “ratification, accession, etc.”. In that event the definition of “signature” might read as follows:

“Paragraph (d) (bis): ‘Signature’ means the act by which a representative affixes his signature to the text of a treaty on behalf of his State [with the object, according to the context, of merely authenticating the text or of both authenticating the text and establishing the consent of his State to be bound by the treaty].”

The Special Rapporteur considers that the words between brackets should be omitted, unless their inclusion is thought necessary in order to emphasize the double meaning given to the term signature in international practice. The difference in the legal effects of the two uses of signature is believed to be fully brought out in the provisions of articles 7, 10 and 11.

2. The original draft of the Special Rapporteur contained definitions of “ratification”, “accession” and “acceptance”. The Commission, however, felt that it was difficult to formulate a comprehensive definition of these terms without putting into it the substance of what is contained in articles 12, 13 and 14. Nor is the matter made easier by the fact that “acceptance” and “approval” are both found with a double use in treaty practice, one analogous to “ratification” and the other to “accession” or “signature”. Accordingly, the Commission preferred to give the somewhat bald definitions of these terms contained in article 1, leaving their legal content to be further explained in the articles relating to the procedures in question. The Commission will, no doubt, wish to re-examine these definitions. If it were to contemplate a fuller formulation of the meaning of each term in article 1, the Special Rapporteur would not feel that the definition of ratification mentioned by the Austrian Government should be adopted, since it defines ratification in terms of “approval”, and since the words “approves as binding the treaty or the signature thereof” leave much to be desired. The truth is that the somewhat loose use of terms in treaty practice and the complication introduced by the fact that the texts of some treaties are adopted by “resolution” in an international organization make it difficult to formulate a simple and


17 See also “Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements” (ST/LEG/7), para. 41.
at the same time precise definition of the terms in paragraph 1 (d).

3. As to the term “approval”, the Special Rapporteur shares the regret of the Luxembourg Government at the confusion and duplication of terms which have arisen in international law through the introduction into the terminology of treaty-making on the international plane of expressions found in some systems of national law. But the view taken by the Commission, with which the Special Rapporteur concurs, is that the use of these expressions in treaty practice has now gone so far that it is scarcely possible to exclude them from the draft articles without appearing to disregard the established practice of States. The essential point, the Commission thought, was to distinguish clearly between the procedures of approval and acceptance as international acts operating between States on the international plane and any internal procedures having the same or similar appellations in some national systems. This is all the more essential because there is no exact or necessary correspondence between the use of the procedures in national and international law. Not only do many national systems know nothing of “approval” as a technical term, but in multilateral treaties the international term is often employed without direct or particular reference to internal constitutional requirements. The Special Rapporteur does not, therefore, feel able to endorse the proposal for the elimination of the term “approval” from the draft articles. On the other hand, having regard to the risk of confusion between the use of terms in national and international law, the Special Rapporteur suggests that the Commission should consider expanding the general reservation in paragraph 2 of this article in order to emphasize further that it is only the international procedures with which the present articles on the law of treaties are concerned (see further the Special Rapporteur’s observations on paragraph 2).

**Paragraph 1 (e). — “Full powers”**

**Comments of Governments**

**Japan.** The Japanese Government considers that the distinction between the expressions “full powers” and “credentials” as used in article 4 is not very clear. It suggests that the terminology should be standardized by employing the term “instrument of full powers” in the present paragraph.

**Observations and proposals of the Special Rapporteur**

The Special Rapporteur agrees with the Japanese Government that in article 4 the unexplained difference of terminology between the expressions “written credentials” in paragraph 3 and “instrument of full powers” in paragraphs 4 and 6 should be remedied and the expression “instrument of full powers” used throughout. He accordingly proposes that in the present definition also “instrument of full powers” should be substituted for “Full powers”.

**Paragraph 1 (f). — “Reservation”**

**Comments of Governments**

**Israel.** The Government of Israel points out that the English text of the paragraph “… statement… whereby it purports to exclude or vary the legal effect of some provisions” does not fully correspond to the French text “… déclaration… par laquelle il vise à exclure ou à modifier l’effet juridique de certaines dispositions”; and it suggests that the English text should be brought into line with the French, which appears to be a more precise expression of the Commission’s intention (compare the Spanish text “de algunas disposiciones”).

**Japan.** The Japanese Government considers that the words “or vary” should be replaced by the words “or restrict” because, in its view, only a statement which restricts the legal effect of a provision properly falls within the meaning of the term “reservation”.

**Observations and proposals of the Special Rapporteur**

1. The Special Rapporteur doubts the advisability of changing the word “vary” to “restrict”. A unilateral statement in which a State purports to interpret a provision as conferring upon it a larger right than is apparently created by the language of the provision, or purports to impose a condition enlarging its rights, would seem to require to be treated as a “reservation”.

2. In accordance with the Government of Israel’s suggestion, the Special Rapporteur proposes that the expression “some provisions” in the English text should be amended to “certain provisions”.

**Paragraph 1 (g). — “Depositary”**

No Government has commented on this paragraph, and the Special Rapporteur does not propose any modification of the definition. He doubts whether the precedent of a trinity of depositaries in the Nuclear Test Ban Treaty requires the insertion of the words “or States” between “State” and “or international organization”; for the word “State” in the singular would seem sufficient to cover also “States” in the plural.

**Paragraph 2. — Classification of international agreements under internal law**

**Comments of Governments**

**Israel.** The Government of Israel considers that this paragraph may give rise to difficulties on the internal level, especially in countries in which duly ratified international treaties become part of the law of the land. It doubts whether the provision itself is fully appropriate to an international treaty, and suggests that the matter should be dealt with in the commentary.

**United States.** The disclaimer in paragraph 2 is considered by the United States Government to be satisfactory as far as it goes. It observes that, while the characterizations and classifications given in paragraph 1 are undoubtedly useful in international law, they might be misleading in
that they might be understood by some people as a part of international law that had the effect of modifying internal law. In view of this, it would like to see the paragraph expanded so as to read:

"Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any State or affect the requirements of that law regarding the negotiation, signature and entry into force of such agreements."

Observations and proposals of the Special Rapporteur

1. The Luxembourg Government in its comments upon paragraph 1 (d) underlines the risk of confusion which arises from the transplanting of expressions used for treaty-making procedures in national law into the terminology of treaty-making in international law and vice versa. The Special Rapporteur in his observations on paragraph 1 (d) has suggested that, in order to meet the point of view of that Government to some extent, the Commission should expand the present paragraph so as to emphasize that it is only the international procedures to which the Special Rapporteur feels, might be more awkward than to cover the point in the convention. In the event contemplated, the opening words of article 1 "For the purposes of the present articles" would hardly suffice to achieve the object, nor a paragraph in the Commission's commentary, which would, of course, not be attached in any way to the convention.

3. In the light of the above observations, it is proposed that the paragraph should be maintained in the following expanded form:

"Nothing contained in the present articles shall affect in any way —

(a) the characterization or classification in internal law of international agreements or of the procedures for their conclusion;

(b) the requirements of internal law regarding the negotiation, conclusion or entry into force of such agreements."

Article 2. — Scope of the present articles

Comments of Governments

United States. The United States Government thinks the article to be useful (1) as calling attention to the need to consider the draft articles in their context and (2) as avoiding the question whether the absence of a written text affects the legal force of an international agreement.

Observations and proposals of the Special Rapporteur

No exception has been taken to this article by any Government. On the other hand, the final form of its text must clearly take into account both the decision already arrived at by the Commission to confine the draft articles to the treaties of States and the decision ultimately reached by it regarding the definition of the term "treaty" in article 1, paragraph 1 (a). If the Commission endorses the Special Rapporteur's view that the words "or other subjects of international law" should be deleted from article 1, paragraph 1 (a), and also the provision in paragraph 3 of article 3 regarding the treaty-making capacity of international organizations, then it seems to him desirable that article 2 should contain a reservation respecting treaties concluded by "other subjects of international law" as well as concerning agreements not in written form. He accordingly suggests that article 2 should be revised to read as follows:

"1. The present articles apply to treaties as defined in article 1, paragraph 1 (a).

2. The fact that the present articles do not apply —

(a) to international agreements not in written form,

(b) to international agreements concluded by subjects of international law other than States, shall not be understood as affecting the legal force that such agreements possess under international law nor the rules of international law applicable to them."

Article 3. — Capacity to conclude treaties

Comments of Governments

Austria. In paragraph 3 the Austrian Government considers that the restriction on the treaty-making capacity of international organizations resulting from the words "depends on the constitution of the organization concerned" is not absolutely necessary. In its view, the starting point might rather be that capacity to conclude treaties is an inherent right of any international organization which is a subject of international law; indeed, capacity to conclude treaties appears to it to be the essential criterion of the status of a subject of international law, so that an organization lacking such capacity would not be one. The
constitutions of many international organizations, it observes, do not contain any mention of the capacity of the organization to conclude treaties, yet its organs consider themselves competent to do so on its behalf. When, on the other hand, the constitution contains provisions on the point, they either relate to the question which organ is competent for the purpose or limit the extent of the freedom to conclude treaties. Such restrictions assume that in principle the organization would possess an all-embracing capacity to conclude treaties. The Austrian Government thinks that paragraph 3 is incorrect if it means that the treaty-making capacity of an international organization is derived solely from its constitution. Nor does it think that there is anything to the contrary to be found in the opinions of the Court in the *Reparation for Injuries* and *Certain Expenses of the United Nations* cases. It suggests that paragraph 3 should be deleted; or that, at the very least, the words “depends on the constitution” should be revised so as to indicate that the constitution can only contain restrictions on the freedom of an organization to conclude treaties.

**Finland.** The Finnish Government recalls its proposal for the deletion of the words “or other subjects of international law” from the definition of “treaty” in article 1 (a) because the draft articles deal exclusively with treaties concluded between States. For the same reason it here proposes that the words “and by other subjects of international law” should be deleted from paragraph 1 of this article and that paragraph 3 should be omitted. Another possibility, it suggests, would be to drop the article altogether as superfluous, in accordance with the opinion expressed by some members of the Commission at its fourteenth session. In this connexion it observes that, if desired, statements could be included in the commentaries on certain articles indicating that they would apply by analogy to the Holy See and certain international organizations; and that a new draft convention regarding these bodies could be worked out later on. If the article is retained, it proposes that paragraph 1 should read: “Capacity to conclude treaties under international law is possessed by States which are subjects of international law”; for not all States possess international sovereignty. Paragraph 2 it would like to see read: “In a union of States, the capacity of its members to conclude treaties depends on its constituent treaty or constitution”, because federations are not the only form of composite States to which the member States of which possess capacity to conclude treaties.

**Israel.** The Government of Israel suggests that the question of capacity would be adequately covered by the article without paragraph 2.

**Japan.** The Japanese Government proposes the deletion of paragraph 2, which does not appear to it to add much to paragraph 1. Indeed, in its view, paragraph 2 may even be misleading in that it does not mention another element in international capacity to conclude treaties — the need for recognition of that capacity by the other contracting party or parties. The same may, it thinks, be said of paragraph 3, the deletion of which it also proposes.

**Sweden.** The Swedish Government observes that the rule in paragraph 1 is necessarily stated in broad terms and is evidently not very helpful. On the other hand, it feels that any detailed elaboration of this point is bound to encounter great difficulties and that it may be better to leave the development of the law to take place in the practice of States and international organizations and in the decisions of international tribunals.

**United Kingdom.** The United Kingdom Government considers that the article formulated by the Commission does not adequately define the expression “subjects of international law” and it would prefer a draft along the lines proposed in article 3, paragraph 1, of the Special Rapporteur’s first report. It observes that many States and territories exist which possess less than full sovereignty but which have, in certain cases, enabled themselves to conclude treaties with foreign States by treaty entrustments and similar means. It notes that these means are not mentioned in the article or in the commentary.

**United States.** Unless paragraph 1 is given a wider meaning than that attributed to it in the commentary, the United States Government considers that it will constitute a narrow limitation on areas emerging to independence. To limit the scope of the term “other subjects of international law” to international organizations, the Holy See and cases such as an insurgent community would, in its view, be too restrictive; for colonies and similar entities given some measure of authority in foreign relations, especially when approaching statehood, should not have to be in a state of insurgency to be capable of concluding a valid international agreement. The United States Government observes that where a colony or other subordinate jurisdiction has been entrusted with authority to conduct its foreign relations with respect to certain matters, or to conclude a particular agreement, the new law of treaties should not preclude commitments entered into by it from constituting valid international agreements. It maintains that, so far as such a colony or entity is entrusted with a measure of authority by the parent State in the conduct of its foreign relations, it necessarily becomes a “subject of international law” for the purposes of paragraph 1 of the present article; and that it would be paradoxical if at the present time areas approaching independence could not be encouraged by being entrusted with authority to conclude agreements in their own names. In paragraph 3 the United States Government considers that the word “constitution” may be too limiting, especially in view of the apparently different sense in which it is used in the previous paragraph and of the explanation in the Commission’s commentary (paragraph 4). In its view, a good measure of the treaty-making authority of an international organization can be found in the dictum of the International Court in the *Reparation for Injuries*, opinion mentioned in the commentary:

“Under international law, the organization must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”

It suggests that the word “authority” would be less likely to create confusion than the word “constitution”.

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18 *I.C.J. Reports*, 1949, pp. 174 et seq.
19 *I.C.J. Reports*, 1962, pp. 151 et seq.
which is generally understood to mean a written document. It further suggests that the paragraph should be so worded that its meaning would be clear without reference to the commentary; and that, in particular, the paragraph should be more specific as to what is meant by an "international organization".

Observations and proposals of the Special Rapporteur

1. The draft of this article in the Special Rapporteur’s first report dealt with the treaty-making capacity of federal States, Unions of States and international organizations somewhat more fully than the text adopted by the Commission, as well as including provisions concerning dependent States. Some members of the Commission, however, felt that to try to cover the question of capacity at all fully might necessitate an investigation of the whole law concerning “subjects” of international law, and that some of the questions involved were controversial. They also expressed doubts as to the need for an article on capacity in international law to conclude treaties, pointing out that capacity to enter into diplomatic relations had not been dealt with in the Vienna Convention on Diplomatic Relations. Other members felt that the question of capacity is more prominent in the law of treaties than in the law of diplomatic intercourse, and that at least some general provisions should be included on capacity to conclude treaties. The Commission decided not to enter into all the detailed problems of capacity which may arise but to confine itself to the three broad provisions set out in the present article.

2. After careful consideration of the comments of Governments and of the records of the Commission’s previous discussion of this article, the Special Rapporteur is of the opinion that the entire article should be deleted. He shares the view of those who think that the question of capacity is more prominent in the law of treaties than in that of diplomatic intercourse. But he doubts both the value of the truncated treatment of the question which is found in article 3 as at present drafted and the possibility of formulating more extended provisions that would have a reasonable prospect in present circumstances of meeting with general acceptance. The text of paragraph 2 of the article was adopted by the Commission by the narrow majority of 9 votes to 7, with 3 abstentions; and even then it deals with only one of several similar problems. The text of paragraph 3 was adopted by the even narrower majority of 9 votes to 8, with 2 abstentions. Furthermore, the Commission having decided to confine the specific provisions of the draft articles to the treaties of States, the rules governing the capacity of international organizations to conclude treaties have only the most marginal, if any, claim to be included in the draft articles. Paragraph 1 commanded the almost unanimous support of the Commission, being adopted by 18 votes to none, with 1 abstention. However, the rule stated in the paragraph is already implied in the definition of “treaty” in article 1, paraga
article to represent their State in the conclusion of treaties; but that the presumption should be "a praesumptio juris and not a praesumptio juris ac de jure, thus allowing for the possibility of a disclaimer".

Denmark. Paragraph 3 is thought by the Danish Government not to correspond with the general practice nor to be satisfactory as a new rule. In its view, the normal practice is for the parties to inform each other beforehand through the diplomatic channel of the names of the officials designated to represent them in the negotiations and for this to be regarded as a sufficient introduction of the representatives; in consequence, the question of credentials does not arise until the treaty is to be signed, and sometimes not even then. It proposes that, with the possible exception of treaties drawn up at general international conferences, credentials should not be required for the negotiations, drawing up and authentication of a treaty. As to paragraph 4, dealing with authority to sign, the Danish Government accepts it in substance but considers that it should be formulated differently. It expresses the view that the definition of "treaties in simplified form" in article 1, paragraph 1 (b), is inadequate for the purposes of paragraph 4 of the present article and that in current practice an essential part of the simplified procedure is, in fact, the omission of full powers. It proposes a formulation of the rule which would require the production of full powers only in cases where the other party so requires.

Israel. The Government of Israel considers that the representatives referred to in paragraph 2 (Heads of missions and Heads of permanent missions to international organizations) should be regarded normally as having implied authority not merely to negotiate, draw up and authenticate treaties of the kinds dealt with in that paragraph but also to conclude them, whether they are in solemn or simplified form. On the other hand, with regard to paragraph 4, it suggests that as a matter of principle full powers to conclude a treaty in simplified form should not normally be dispensed with. In the light of these considerations it proposes that in paragraph 4 (a) the word "shall" should be replaced by "may" and that paragraph 4 (b) should be deleted.

Japan. The Japanese Government advocates that in paragraphs 3 and 4 (a) it should be made clear that the requirement of furnishing evidence of authority may always be waived by the other negotiating State or States. It also suggests that paragraph 6 (b) and (c) would be more in accord with current practice if the requirement of the subsequent production of full powers were not made absolute.

Luxembourg. The Luxembourg Government thinks it necessary to underline that the article operates only on the international plane and does not affect the distribution of the treaty-making power in any State under its internal law. It would therefore like to see a further paragraph added at the end of the article as follows:

"The provisions of the present article shall not have the effect of modifying national constitutions, laws or usages of any State as regards the powers of organs of the State in foreign relations."

The Luxembourg Government also takes the view that paragraph 4 (b) might lead to great uncertainty since, in its view, it might be almost impossible to distinguish between treaties which are irregular for lack of full powers and treaties which are valid as being treaties concluded in simplified form. The solution which it proposes is to delete paragraph 4 (b) and then amend paragraph 2 (b) by replacing the reference to "Heads of a permanent mission to an international organization" by the general term "representative".

Sweden. The Swedish Government questions whether the general formulation of the article is wholly satisfactory because it feels that the legally relevant point is whether a representative is competent to bind the authority he purports to represent and that this point does not appear in the article. Paragraph 3 it considers to go too far in apparently requiring the production of full powers by the representative in all cases, saying that in practice they are often dispensed with. It proposes that the paragraph should be reformulated so as to state that the competence of the agents concerned depends upon their being authorized to bind the Governments they purport to represent, and that the existence of such authorization shall be deemed to be conclusively established by the presentation of full powers emanating from a competent authority. In its view, such a formulation would have the advantage of indicating that a State which accepts the signature of certain representatives without calling for their full powers takes the risk of the treaty's being denounced as having been concluded by one who lacked authority or who exceeded the authority granted to him. In paragraph 4 (b), the Swedish Government maintains that the legally interesting question is whether a State which concludes a treaty in simplified form without asking for full powers does this at its own risk, so that the State takes the risk of the treaty's being denounced as having been concluded by one who lacked authority or who exceeded the authority granted to him. As to paragraph 6 (a), the Swedish Government suggests that it should be omitted as being a procedural recommendation rather than a rule. In paragraph 6 (b) it considers that the relevant question is whether a State which accepts telegraphic evidence of full powers without calling for their subsequent confirmation does so at its own risk. The answer, it suggests, depends on whether "telegraphic full powers" are considered to offer adequate guarantees of authenticity.

United States. In paragraph 3 the United States considers that the phrase "shall be required" is too strong and proposes that it should be replaced by "may be required". In commenting upon paragraph 4 (b) it refers to its criticism of the definition of "treaties in simplified form" in article 1 (b). It states that, unless the definition of informal treaties is remodelled in the way which it there advocates, paragraph 4 (b) will have the effect that full powers will be required for many informal agreements which are now signed without the parties' calling for any documentary evidence of authority. Paragraph 5, the United States believes, may have the undesirable effect of encouraging
the preparation “in the field” of many instruments of ratification, accession, or approval. In paragraph 6 (b) it again proposes that the word “shall” should be replaced by “may”. In its view, the acceptance of a letter or telegram pending receipt of full powers is a relatively recent innovation based purely on convenience and courtesy which should not be made a requirement of international law.

Italian delegation. In the view of the Italian delegation, it is generally recognized that the declaration of a State’s contractual intention is governed by its constitution, so that the conclusion of a treaty is not governed exclusively by the rules of international law. The delegation considers it essential that a convention codifying the law of treaties should contain very specific provisions as to how far and with what exceptions compliance with a State’s constitutional law is necessary to enable its representative to conclude a treaty in valid form. It suggests that those provisions should be inserted in the section dealing with authority to ratify, accede to, approve or accept a treaty.

It expresses concern that certain passages in the Commission’s commentaries appear to look with disfavour on the proposition that a State’s consent to be bound by a treaty must be governed by its constitution, a proposition which, in its view, represents the existing rule of international law. It maintains that both the rules of constitutional law and the rules of international law must be observed for a treaty to be validly concluded, and requests that this point be considered with the greatest care during the revision of the draft articles.

Venezuelan delegation. The delegation assumes that, as the article contains no provisions governing the grant of full powers to representatives, the matter is regarded as one of domestic law.

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur does not feel that it is either necessary or desirable for the article to make express mention of the principle that international law leaves it to the internal law of each State to determine the organs and procedures by which its treaty-making powers may be exercised. Mention of the principle is unnecessary because it goes without saying that it is for each State to determine the provision of its own constitution; and in fact there is considerable variety in the constitutional provisions of States affecting the exercise of their treaty-making powers. It is at the same time undesirable because it would be difficult to formulate the principle without appearing to incorporate by reference the provisions of internal law in international law and appearing to make internal constitutional provisions generally relevant in determining the validity of treaties in international law. The Commission in drafting article 31 (Invalidity — Provisions of internal law regarding competence to enter into treaties) has taken the position that provisions of internal law are to be regarded as irrelevant in international law except when the violation of internal law is “manifest”. The considerations leading the Commission to adopt this view are fully set out in its commentary to article 31. They appear to the Special Rapporteur to have great weight and, while drawing the attention of the Commission to the observations of the Italian delegation, he considers that the Commission should maintain its position on this fundamental question.

2. The suggestion that the principle should be expressed in the form of presumptions which allow for the possibility of a “disclaimer” also appears to go too far if what is intended is that the presumption may always be rebutted by proof that in fact constitutional authority was lacking in the particular case. The position taken up by the Commission in drafting the present article and article 31 was that in international law the maintenance of the security of international agreements is a consideration which must prevail over internal constitutional requirements, except when a representative’s lack of authority to conclude a particular treaty is so manifest that reliance on the authority normally attributed to such a representative under international law is inadmissible. Any weakening of that position, it is thought, would be regrettable, and at the fourteenth session some members of the Commission stated that they would have preferred not to qualify the rule in any way, even in cases of “manifest” lack of authority.

3. On the other hand, it may be desirable to have some recourse to presumptions in the article; for there seems to be some substance in the Swedish Government’s suggestion that the article should be reformulated from the opposite point of view of when a State is entitled to rely on the competence of a representative to bind his State without requiring specific evidence of that authority. At present the article is formulated from the point of view of stating when a representative is under an obligation to produce evidence of his authority. Having regard to the way in which the questions of competence and authority are dealt with in articles 31 and 32, the course suggested by the Swedish Government appears logical. Moreover, if this course is adopted, it will become easier to meet some of the detailed points which have been made by Governments regarding paragraphs 3, 4 and 5. The provisions of the article will then define the cases when authority may be presumed from the character of the representative and the cases when it may be presumed only from the production of “full powers”.

4. The Special Rapporteur therefore proposes that paragraph 1 should be revised so as to provide that the three State organs in question may in virtue of their office be considered as possessing authority to negotiate, draw up, etc., a treaty on behalf of their State, thus putting the onus on their State to bring home to other contracting States any restriction on that ostensible authority. The text, as at present drafted, does not mention the signature of instruments of ratification, accession, etc., which are left to be covered by implication from the wording of paragraph 5. The Special Rapporteur thinks that these other acts should be dealt with in paragraph 1, which will then cover the case of Heads of State, etc., completely. It will

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83 Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 743rd meeting, paras. 21 and 22.
also have the advantage of making it possible to amalgamate paragraphs 4 and 5.

5. Paragraph 2 should, it is proposed, be revised in a similar manner. As to the suggestion of the Government of Israel that Heads of mission and of permanent missions to international organizations should be regarded as normally having implied authority to conclude treaties, this appears to go beyond what is usually conceived to be the rule, even though full powers may be dispensed with not infrequently. The question is not whether full powers may be dispensed with but where, in the event of an actual lack of authority, the risk is to lie: on the representative's State or on the State which does not call for full powers. Under the existing law it is believed to fall on the latter, and it does not therefore seem appropriate to extend the scope of the ostensible authority in paragraph 2 to the conclusion of treaties. At the same time, the Special Rapporteur thinks it preferable to confine paragraph 2 to authority to negotiate, draw up and "adopt", because authentication not infrequently involves signature, and it seems better to leave it to be covered in a later paragraph dealing with signature.

6. Paragraph 3 should again, it is proposed, be reformulated in terms of whether the representative may safely be considered as possessing authority, the answer in the present instance being in the negative. In addition, it is felt that this paragraph, like paragraph 2, should be confined to authority to negotiate, draw up and adopt; and that it should become sub-paragraph (c) of that paragraph. If the paragraph is reformulated in the manner proposed, this will meet the point made by four Governments that the rule is too strongly stated as full powers are not infrequently dispensed with in cases falling under this paragraph; for the production of credentials will no longer be presented as an obligatory requirement in these cases. It will also largely cover the particular suggestions of the Swedish and Danish Governments for the revision of the paragraph.

7. Paragraph 4, like the preceding paragraphs, should be reformulated in terms of whether the representative may safely be considered as possessing authority. It is more crucial than paragraphs 2 and 3 because, like paragraph 1, it concerns not merely the preparation of the text but the expression of the State's consent to be bound by the treaty. Here the general rule is believed to be that, except in cases falling under paragraph 1 (Heads of State, etc.), a representative may not be presumed to possess authority to commit his State to be bound by the treaty unless he produces full powers evidencing that authority. No doubt, full powers may sometimes be dispensed with even in the conclusion of formal treaties, but in that case the risk of any lack of authority lies with the State which fails to insist upon their production. The problem is whether any different rule applies in the case of what the Commission has referred to in paragraph 4 as "treaties in simplified form". When dealing with the matter from the point of view of whether a representative is required to produce full powers, the Commission did distinguish between "formal" treaties and treaties in simplified form. When, however, the matter is approached from the point of view of whether another State is entitled to presume the authority of a representative to commit his State without the production of full powers, it does not follow that the same distinction needs to be made. The question is where the risk of lack of authority should lie. In 1962 the Commission was only prepared to say that in the case of treaties in simplified form a representative need not produce full powers, unless called for by the other negotiating State. In other words, it seems to have regarded the responsibility of deciding whether proof of authority is necessary as resting upon the other State, even in these cases.

8. A further consideration is that a number of Governments have questioned the sufficiency of the Commission's definition of a "treaty in simplified form", both generally and in the particular context of the present article. Indeed, the Danish and Luxembourg Governments maintain that the willingness of the parties to dispense with full powers is one of the elements determining the "informal" character of the treaty rather than the other way round. The Commission experienced difficulty in formulating a satisfactory definition of treaties in simplified form, and the Special Rapporteur considers that the criticisms made of that definition are not without substance; nor does it seem that a more viable definition will easily be found.

9. If paragraphs 1 and 4 are revised in the manner proposed, paragraph 5 will become unnecessary.

10. The Special Rapporteur shares the view of the Swedish Government that paragraph 6 (a) is more a procedural recommendation than a rule and should be omitted from this article. The substance of it is, in fact, already contained in the definition of "full powers" in article 1. The Special Rapporteur also shares the view of the Japanese and United States Governments that the word "shall" in paragraph 6 (b) (and therefore also in paragraph 6 (c)) is inappropriate and should be replaced by "may".

11. In the light of the observations in the foregoing paragraphs, the Special Rapporteur proposes that the text of article 4 should be revised on the following lines:

"1. A representative may be considered as possessing authority to act on behalf of his State in the conclusion of a treaty under the conditions set out in the following paragraphs, unless in any particular case his lack of authority is manifest.

"2. A Head of State, Head of Government and a Foreign Minister may be considered as possessing authority to negotiate, draw up, adopt, authenticate, or sign a treaty and to sign any instrument relating to a treaty.

"3. (a) A Head of a diplomatic mission may be considered as possessing authority to negotiate, draw up or adopt a treaty between his State and the State to which he is accredited.

"(b) The rule in paragraph (a) applies also to a Head of a permanent mission to an international organization in regard to treaties drawn up under the auspices of the organization to which he is accredited.

"(c) Other representatives may not be considered in virtue of their office alone as possessing authority to negotiate, draw up or adopt a treaty on behalf of their State; and any other negotiating State may, if it thinks
fit, call for the production of an instrument of full powers.

4. Except as provided in paragraph 2, a representative may be considered as possessing authority to sign a treaty or an instrument relating to a treaty only if —

(a) he produces an instrument of full powers or

(b) it appears from the nature of the treaty, its terms or the circumstances of its conclusion that the intention of the States concerned was to dispense with full powers.

5. (a) In case of delay in the transmission of the instrument of full powers, a letter or telegram evidencing the grant of full powers sent by the competent authority of the State concerned or by the head of its diplomatic mission in the country where the treaty is negotiated may be provisionally accepted, subject to the production in due course of an instrument of full powers, executed in proper form.

(b) The same rule applies to a letter or telegram sent by the Head of a permanent mission to an international organization with reference to a treaty of the kind mentioned in paragraph 3 (b) above.”

Question A. — Conclusion of treaties by one State on behalf of another or by an international organization on behalf of a member State

1. The Commission, as noted in paragraph 4 of the introduction to this report, decided at its sixteenth session to give further consideration to the question of including an article on the above-mentioned topic in the course of its re-examination of part I. The question had been raised by the Special Rapporteur in his third report in a draft article having the number 60 and the title “Application of a treaty concluded by one State on behalf of another”. As he there pointed out, the concept of agency has received comparatively little development in the law of treaties. Although it may not be uncommon for one State to use the diplomatic services of another for the conclusion of a treaty, this takes the form of the other State’s conferring on the diplomatic agent specific authority to act for it as its representative in the particular case. It is not an example of one State acting on behalf of another but of the borrowing by one State of the services of another’s diplomatic agent for the purpose of concluding a treaty. These are not the cases to which the present question relates, and it suffices to say that the Commission did not think it necessary to include any special provision to cover such cases. The phrase “any other representative of a State” in article 4 is completely general and does not exclude the possibility of the representative’s being someone in the diplomatic service of another State.

2. The cases to which the present question relates are rather those where a State itself actually concludes a treaty on behalf of another under an authority conferred upon it by the other State. An example is the conclusion of treaties by Belgium on behalf of Luxembourg in matters touching the Belgo-Luxembourg Economic Union. Article 5 of the Belgo-Luxembourg Convention of 25 July 1921 provides: “Future commercial treaties and economic agreements shall be concluded by Belgium on behalf of the Customs Union.” In practice, however, the treaties made under this article appear to be concluded by Belgium on behalf of Luxembourg. A commercial agreement of 1950, for example, between the Union and Mexico speaks of the Belgian Government “agissant tant en son nom qu’au nom du Gouvernement luxembourgeois en vertu des accords existants”. Similarly, in recent international commodity agreements, if the Belgo-Luxembourg practice in concluding these agreements may not be completely uniform, Luxembourg seems generally to have been accepted as becoming a party to the agreements in virtue of Belgium’s ratification, accession, etc. Thus, in the case of the International Coffee Agreement of 1962, both Belgium and Luxembourg separately signed the agreement when it was drawn up but, later on, Belgium alone acceded to the agreement, while Luxembourg informed the depositary that it considered itself bound by the Belgian accession. Another case that might conceivably arise would be the conclusion of a treaty by an international organization with a third State as agent for its members, with the object that they should severally become parties to the treaty. The organization might, in short, be used simply as a convenient “representative” of the member States for the purpose of concluding a treaty in which their interests were all the same.

3. A further special problem may be mentioned, if only to be dismissed. This is the case where an international organization enters into an agreement with one of its own members containing provisions for the benefit of the other members. Examples are mandate and trusteeship agreements, the legal nature and effects of which came under consideration in the South West Africa cases and in the Northern Cameroons case. The decisions of the International Court in these cases left open the question of the true juridical relation of Members of the Organization to the agreements in question; and the problems which they raise appear to be quite special and to belong to the law governing international organizations rather than to the general law of treaties. Accordingly, in the view of the Special Rapporteur, they can be left out of account in connexion with the present question.

4. On the more general question here under consideration, some members of the Commission at the sixteenth session noted that, although instances occurred of one State’s being authorized by another to conclude a treaty on its behalf, they are infrequent; and they expressed hesitation about including specific provisions to cover this practice from the point of view of the principle of the equality and independence of States. Other members considered that the practice, if not extensive, has a certain importance with regard to economic unions. These members also felt that the expanding diplomatic and commercial activity of States and the variety of their associations with one another may lead to an increase in cases of this

See Yearbook of the International Law Commission, 1964, vol. II, p. 16; also the commentary to the article numbered 59 in that report.


Subsequently, Belgium also informed the depositary that its accession was binding upon Luxembourg.


5. The Special Rapporteur believes that, if on a limited scale and in particular connexions, the phenomenon of agency does exist in international law and does, in principle, belong to the general law of treaties. On the other hand, he feels that it may be difficult for the Commission to formulate wholly satisfactory rules covering the cases which arise under this head without becoming involved to a certain extent in controversial problems of international capacity and personality and without encroaching to a certain extent on the law governing international organizations. Accordingly, similar considerations to those which lead him to propose the deletion of article 3 regarding "capacity to conclude treaties" also lead him to propose the omission from the draft articles of the topic which is the subject-matter of the present question. The omission of the topic would not mean the taking of any position by the Commission on the substance of the matter. It would simply mean that the topic would be left aside for special treatment as and when that might be considered necessary or desirable. However desirable in principle it might be to prepare a complete and exhaustive statement of the principles governing every possible aspect of the law of treaties, the Special Rapporteur is of the opinion that, on practical grounds, the Commission should now confine its draft to the main principles governing treaties concluded between States. The Special Rapporteur accordingly proposes the omission of this question.

**Article 5. — Negotiation and drawing up of a treaty**

**Comments of Governments**

**Japan and Luxembourg.** The Governments of these States, having regard to the purely procedural character of the article, do not think that it serves any useful purpose.

**Sweden.** Though it does not refer specifically to article 5, the Swedish Government also appears to be in favour of its deletion, since in its "preliminary general observations" the Swedish Government proposes that all provisions of a purely procedural nature should be removed from the draft articles.

**Israel.** The Government of Israel, on the other hand, urges the retention of the article on the ground that, although descriptive in character, it deals with an essential phase in the treaty-making process which is also important for other aspects of the law of treaties.

**Observations and proposals of the Special Rapporteur**

1. The Special Rapporteur's first report did not contain any article dealing specifically with the negotiation and drawing up of a treaty. At the fourteenth session some members of the Commission questioned the usefulness of the article.\(^{31}\) However, while recognizing that it is more descriptive than normative the majority felt that it serves a purpose as an introduction to the subsequent articles, and that it provides a logical connecting link between articles 4 and 6.

2. The Special Rapporteur has no strong opinion as to the desirability or otherwise of retaining article 5 in the draft articles. Admittedly, its provisions are of a primarily procedural and descriptive character. On the other hand, it may be doubted whether they are much more so than, for example, articles 5 and 9 of the Vienna Convention on Consular Relations.\(^{32}\) One reason for keeping the article might be that some later articles contain such expressions as "States participating in the negotiations" (article 6 (c) and article 17), "at the conclusion of the negotiations" (article 10), "in the course of the negotiations" (articles 12 and 46), "the negotiating States" (article 28), "treaty drawn up" (articles 6, 8 (c), 9). In other words, they refer to the procedural stage of treaty-making which is the subject of the present article. But some of these expressions may be changed in the course of the revision of the draft articles. Moreover, the expressions largely speak for themselves as to their meaning and the provisions of the present article can hardly be said to contain anything which is absolutely essential to their correct interpretation. At most, article 5 marks that the "negotiation and drawing up of a treaty" is a distinct phase of the treaty-making process and indicates the different modes in which this phase occurs. The article has a certain logic in the scheme of the draft articles, but its omission could hardly be said materially to detract from the force and effect of the other articles.

3. If the Commission maintains its decision to include article 5 in the draft articles, the Special Rapporteur considers that its wording should be revised. The wording was taken from the equivalent article in Sir G. Fitzmaurice's expository "code" and still bears some traces of its origin. The Special Rapporteur suggests that, in the event of its being retained, the article should read as follows:

"The negotiation and drawing up of a treaty take place:"

"(a) through the diplomatic or other agreed channel, at meetings of representatives or at an international conference;"

"(b) in the case of a treaty concluded under the auspices of an international organization, at an international conference convened either by the organization or by the States concerned, or in an organ of the organization in question."

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Article 6. — Adoption of the text of a treaty

Comments of Governments

Israel. The Government of Israel suggests that in paragraph (b) it is necessary to insert the word "international" before "organization".

Japan. In the opinion of the Japanese Government this article is relevant to the procedure of conferences rather than to that of treaty-making. It suggests that the matters in question had better be left to the decision of the conference or of the States concerned, and proposes the deletion of the article.

Luxembourg. The Luxembourg Government thinks it inconceivable that a multilateral treaty — even one between a small group of States — could be concluded otherwise than at an "international conference"; that is, at some form of meeting of representatives of a number of Governments. In its opinion, therefore, paragraph (c) can apply only to bilateral treaties. Stressing that many multilateral treaties are concluded between the States of a particular region, it states that the rule proposed in paragraph (a) is ill-suited to the conditions obtaining in regional conferences in which, in its view, unanimity is the only acceptable voting rule. It considers that the only principle truly compatible with the consensual character of treaties, whether bilateral or multilateral, is that of mutual agreement; and that departures from this principle are admissible only in the case of multilateral treaties drawn up either within or under the aegis of an international organization. It also considers that account must be taken of the existence of some international organizations where decisions are taken by majority vote but the constituent instrument expressly makes certain questions subject to further agreement for the very purpose of safeguarding the principle of unanimity; and it cites as examples articles 220, 236 and 237 of the treaty establishing the European Economic Community. In the light of the above considerations it proposes the following redraft of the article:

"1. The adoption of the text of a treaty takes place by the unanimous agreement of the States taking part in the negotiations.

2. In the case of a treaty drawn up in an international conference, the adoption of the text takes place in accordance with the voting rules laid down in the rules of the conference in question.

3. In the case of a treaty drawn up within an international organization, the adoption of the text takes place in accordance with the voting rule applicable to the decisions of the competent organ of the organization in question, unless otherwise provided in its constituent instrument."

Sweden. The Swedish Government considers that paragraph (a), although in itself perhaps not undesirable, may have complicated effects in cases where some of the States present at a conference are parties to the convention on the law of treaties but others are not. Paragraphs (b) and (c), in its view, merely provide that the manner in which the text is to be adopted shall be governed by the agreement of the parties; and it thinks that they are redundant and should be omitted.

United States. The United States Government considers that the article serves a useful purpose by stating general rules for application in the absence of agreement upon any other procedure.

Brazilian delegation. While concurring with the choice of the two-thirds rule as the general rule for the adoption of the text, the delegation doubts whether the same rule ought to govern the preliminary vote on the voting procedure. If that rule were made compulsory for procedural decisions on the choice of the voting rule, it might appear as an undue constraint on States in international negotiations which, being primarily political, should not be subjected to any rigid rule. Nor, in its view, has the absence of such a rule caused any great difficulty in practice.

Mexican delegation. The delegation stresses the difficulty that may arise in the event that some of the States at a conference are not parties to the proposed convention on the law of treaties. It suggests that it may be better to leave it to each conference to settle for itself both the necessary majority and the procedure for the adoption of the text.

Observations and proposals of the Special Rapporteur

1. The suggestion that the whole article should be deleted appears to the Special Rapporteur to be too radical. The adoption of the text is an important part of the treaty-making procedure, being the stage at which the content of the treaty, the mode of its entry into force, the power to make reservations, etc., are determined and defined. In consequence, the voting rules governing the adoption of the text are very much a matter of substance, even though the commitment to be bound by the treaty may not be given until later. Nor does it seem to the Special Rapporteur that paragraph (b), which prescribes in certain cases the voting rule applicable in the competent organ of an international organization, is nothing but a statement that the adoption of the text is governed by the agreement of the parties and therefore redundant. No doubt, the agreement of the parties may be said to be expressed in the decision to draw up the treaty within the organization. But, the decision once made, the adoption of the text will be governed by a special procedure.

2. Three objections have been raised with reference to paragraph (a). The first is the possibility that some of the States at a conference may not be parties to the proposed convention on the law of treaties. This is an objection which really touches the whole question of the utility of codifying the law of treaties; and it is not in itself thought to be a valid objection to paragraph (a). In the event contemplated, paragraph (a) might not be applicable in the absence of the consent of the States not parties to it; but it might still be helpful as a point of departure for settling the voting rule.

85 Ibid., 739th meeting, para. 21.
3. The third objection is the suggested unsuitability of the two-thirds rule for "regional" conferences, where, it is said, unanimity is the only acceptable voting rule. This objection touches the delicate point of the distinction between general multilateral treaties and treaties between smaller groups of States. In his original draft of this article the Special Rapporteur sought to distinguish between "multilateral" and "plurilateral" treaties, applying the rule of unanimity for the latter. But the Commission 38 preferred not to make any such distinction in the present article, while not disputing that unanimity should be the general rule for "treaties drawn up between very few States". It considered that for other multilateral treaties the rule in paragraph (a) should be specified although it would always be open to the States concerned to apply the rule of unanimity in a particular case, should they so decide. In answer to the Luxembourg Government's objection, which has a certain force, it can be urged that, if in a "regional" conference unanimity is the only acceptable voting rule the States participating will have no difficulty in arriving at a decision, by the two-thirds majority procedural vote envisaged in paragraph (a), to apply the unanimity rule. The Commission's purpose was simply to provide a residual procedural rule on the basis of which the voting rule of the conference may be speedily resolved, should no other procedure be agreed. It felt that a rule based on a two-thirds majority ought sufficiently to take account of the interests of minority groups at a conference. At the same time it noted that the procedural vote is in practice not infrequently taken by a simple majority.

4. The third objection is the suggestion that to lay down a compulsory two-thirds majority rule for procedural decisions on the choice of the voting rule may be to place an undue restraint on the freedom of States to conduct their international negotiations as they think fit; and that this is a matter which should be left entirely to the decision of the conference. Here the question is the basic one whether the inclusion of the residual rule proposed by the Commission de lege ferenda is or is not desirable. Considerations may be advanced in favour of either view, and the Commission will certainly wish to re-examine its proposal in the light of the comments of Governments. On the other hand, the Commission had these considerations in mind in 1962, and the Special Rapporteur does not, therefore, feel called on in the present report to propose that the rule adopted by the Commission in paragraph (c) should be changed.

5. There remains the point made by the Luxembourg Government that in paragraph (c) account should be taken of the existence of organizations under whose constituent instrument decisions are taken by majority vote but certain questions are expressly made subject to unanimity. While the general point that a reservation is needed to safeguard such cases may be accepted, it is not clear to the Special Rapporteur that the example given — articles 236 and 237 of the European Economic Community Treaty 37 — is a case of a treaty drawn up in a conference convened under the auspices of an organization rather than of one drawn up within an organ of an organization. Possibly, both types of case may occur, so that it may be advisable to cover the point in both paragraphs (a) and (b).

6. Finally, the Special Rapporteur shares the view of the Luxembourg Government that it may be preferable to begin the article with paragraph (c) and to give the paragraphs separate numbers. On this basis, and subject to the Commission's decision regarding paragraph (a), he suggests that the article might be revised along the following lines:

   "1. The adoption of the text of a treaty takes place by the mutual agreement of the States participating in its drawing up, subject to paragraphs 2 and 3.

   "2. In the case of a treaty drawn up at an international conference, adoption of the text takes place by the vote of two-thirds of the States participating in the conference, unless —

   "(a) by the same majority they shall decide to adopt a different voting rule;

   "(b) in the case of a conference convened by an international organization a different rule is prescribed by the established rules of the organization.

   "3. In the case of a treaty drawn up within an international organization, the adoption of the text takes place in accordance with the voting rule applicable in the competent organ."

Article 7. — Authentication of the text

Comments of Governments

Japan. In the view of the Japanese Government a general rule on authentication of texts applicable to both bilateral and multilateral treaties is not easy to formulate. In the case of bilateral treaties it is not unusual for the negotiating parties to add minor changes of substance to the text already authenticated. The Japanese Government suggests that the present article should be omitted and the substance of paragraphs 1 and 2 incorporated in articles 10 (Signature and initialling) and 11 (Legal effects of signature).

Sweden. The Swedish Government considers the article to be directed more to giving procedural advice than to stating a rule of law; and that it could not be said to have any legal content unless it were intended to mean that in case of doubt signature ad referendum, initialling, etc., constitute an authentication of the text. It also doubts whether an act of authentication has any legal effect. In this connexion it refers to the Commission's statement in paragraph 4 of its commentary that "after authentication, any change in the wording of the text would have to be brought about by an agreed correction of the authenticated text (see articles 26 and 27)", and it asks whether even before authentication any modification can be made in a text except by agreement.

39 Article 220 is also mentioned by the Luxembourg Government, but it does not appear to be relevant.
United States. The United States Government questions whether this article is at all necessary, and expresses the view that, as at present worded, the article may be more confusing than helpful.

Observations and proposals of the Special Rapporteur

1. In effect, the three Governments question the decision made by the Commission in 1959 and in 1962 to recognize authentication of the text as a distinct element in the treaty-making process: distinct, that is, from adoption of the text, on the one hand, and from signature and initialling on the other. By “authentication” of the text is meant an act or procedure which identifies and certifies the text as the correct, definitive and authentic text of the treaty. Admittedly, in the case of bilateral and of a good many multilateral treaties authentication is implied from signature or initialling, and the act of authentication merges in the act of signature. In other cases, however, authentication is a distinct process taking the form of the incorporation of the text in the final act of a conference or in a resolution of an international organization or of a signature by an official of an international organization. Again, although the legal effects of authentication may not appear considerable, it is not thought justifiable to regard them as negligible, particularly in the case of multilateral treaties. No doubt, as the Swedish Government observes, even before authentication an adopted text cannot be modified except by “agreement”. But it does not follow that in the case of multilateral treaties an agreement to modify a text will be negotiated under the same conditions before and after authentication; for unanimity is required for any modification of a text after authentication, and that might not necessarily be the case before it. Moreover, authentication also has legal consequences in the sphere of interpretation in bilateral no less than in multilateral treaties. The text may be adopted in two or more language versions, but it is only the text or texts which have been made authentic that constitute the text as the correct, definitive and authentic text of the treaty. The text may itself state which language versions, if any, are definitive and which are not. Thus the Commission may feel, on the other hand, that there is substance in the point that, as at present worded, the article takes the form of procedural advice rather than of rules of law. In addition, the treatment of initialling and of signature and signature ad referendum as means of authentication in separate paragraphs may be unduly complex and justify the observation of the United States Government. As for the point that in the case of bilateral treaties it is not unusual for the negotiating States to add minor changes of substance to a text already authenticated, this does not appear to affect the substance of the rule, since the change in the text must itself be authenticated. On the other hand, it may perhaps be underlining the definitiveness of the text after authentication too much by dealing with it in a separate paragraph.

3. The Special Rapporteur accordingly proposes the following revised version of the article:

“1. Unless the text itself prescribes otherwise or the States participating in the adoption of the text otherwise agree, a text shall be considered to be authenticated as the definitive text by —

“(a) its incorporation in the final act of the conference in which it was adopted;

“(b) its incorporation in a resolution of an international organization in which it was adopted or any other procedure employed specifically for that purpose by such organization;

“(c) in other cases, the initialling, signature or signature ad referendum of the text by the representatives of the States concerned.”

Article 8. — Participation in a treaty

Comments of Governments

Austria. The Austrian Government endorses the rules proposed in article 8, which it regards as being in accord with present-day State practice and international law.

Canada. The Canadian Government observes that with regard to many multilateral treaties the current practice is to open them to participation by Members of the United Nations and specialized agencies, parties to the Statute of the International Court of Justice and, frequently, to such other States as may be invited by the General Assembly; and notes that the rule recommended in article 8 would only apply in cases where the parties have not expressed themselves in the treaty on the question of participation. It presumes that the recommended rule would not have retroactive effect.

Denmark. The Danish Government agrees that general multilateral treaties should be open to participation on as wide a basis as possible.

Japan. The Japanese Government holds that the question of participation in a treaty should always be left to the decision of the States participating in the conference; it proposes that the article should simply be deleted.

Luxembourg. The Luxembourg Government recalls its criticism of the term “general multilateral treaty” in its comments upon article 1 on the ground that it does not provide a satisfactory basis upon which to distinguish between different categories of treaties. As to article 8, it considers that the parties to a multilateral treaty have the sovereign right to decide on the participation of States which were not original parties. In addition, it says that it is impossible to lay down a priori what is the right solution to give to the question of participation in any given case, as this depends on the object of the particular treaty and the political and legal aims of the original parties. It maintains that the rules contained in paragraph 2 of the text are sufficient and that paragraph 1 should be deleted.

Poland. The Polish Government proposes the deletion from paragraph 1 of the words “unless it is otherwise

provided by the terms of the treaty... etc.”. It considers that general multilateral treaties should be open to the participation of all States without exception. In the Sixth Committee, its delegation further maintained that the restrictions which exist in practice, or which are advocated by some members of the Commission, are inconsistent with the principle of article 1, paragraph 1 (c). It says that *mutatis mutandis* its comment apply to paragraph 2. Any limitation on the scope of general multilateral treaties is, in its view, a disservice to the cause of peace and friendly relations among States.  

Sweden. The Swedish Government, while recognizing that arguments exist for including a residuary rule of the kind proposed in paragraph 1, thinks that its introduction would be open to objection unless at the same time corresponding provision were made for means to determine which entities purporting to be States are to be considered as possessing statehood. In any event, the Swedish Government thinks it desirable for the draft of the article to be arranged so as to make it clear that the rule in paragraph 2 also is a residuary rule which applies only in the absence of an express provision in the treaty. It suggests that the two paragraphs should be amalgamated on the following lines:

“In the absence of express provisions to the contrary in a treaty or in the established rules of an international organization:

“(a) a general multilateral treaty shall be deemed to be open for every State;

“(b) other treaties shall be deemed to be open for States which took part in the adoption of the text or which, although they did not participate in the adoption of the text, were invited to attend the conference at which the treaty was drawn up.”

**United Kingdom.** The United Kingdom Government considers the presumption formulated in paragraph 1 to be unsatisfactory. In the Sixth Committee its delegation further said that the article does not represent current practice or a well-established rule; and that, on the contrary, the almost universal practice is to define the States which may accede. In its view, there is nothing contrary to international law in such a limitation, nor in the consistent practice in the United Nations of restricting conventions concluded under its auspices to its Members and those of the specialized agencies. It observes that it is a fact of international life that there are entities purporting to be States but by no means universally recognized as such; and that if multilateral conventions are thrown open to participation by “all States”, without any definition or limitation of that term, a most unpleasant duty, calling for subjective decisions, would fall upon the depositary.  

Commenting on paragraph 2, the United Kingdom Government says that, in its opinion, it requires clarification on three points: first, as to which cases the phrase “in all other cases” relates; second, as to what constitutes taking part in the adoption of the text; and third, as to whether the final expression “unless the treaty otherwise provides” applies only to paragraph 2 (c) or also to paragraphs 2 (a) and 2 (b). And with regard to the third point, it considers that the final expression should at least be made applicable to paragraph 2 (a).

**United States.** The presumption formulated in paragraph 1 is opposed by the United States Government, which considers that it is a fundamental rule of treaty-law that, in the absence of a provision allowing additional parties to participate, it is impossible for them to do so, except by the agreement of the parties. It further observes that paragraph 1 (a) seems to permit the admission of additional States to participation in a multilateral treaty without regard to the provisions of that treaty; and that the two-thirds rule in paragraph 1 (a) appears to conflict with the provisions of Article 4 of the Charter of the United Nations (see United States comments on article 13 of the draft articles). The United States Government is equally opposed to paragraphs 2 (a) and 2 (c). It does not think that the mere fact that a State participated in formulating and adopting a treaty, or that it was invited to attend the conference, necessarily entitles it to become a party. It believes that adoption of the rules proposed in paragraphs 2 (a) and 2 (c) might result in States introducing into future multilateral treaties provisions limiting the States that may become parties or reservations designed to ensure that they have a voice in the later participation of States which did not join in the actual development of the application of the treaty.

**Cameroonian delegation.** The delegation endorses the importance of articles 8 and 9. It considers that there should be no restriction on the right to become a party to an existing treaty as the international community is moving towards universality, and more especially in connexion with multilateral treaties affecting the interests of all.

**Colombian delegation.** The delegation considers that articles 8 and 9 are based on current practice, and reflect the evolution of the law. Nevertheless, in its view, it is essential in determining the participation of States in a treaty to consider the purposes of the treaty, its subject-matter and the attitude of the State wishing to participate towards the provisions of the treaty. These elements, it thinks, can only be appreciated by the parties or the competent organ of an organization. In the same connexion, the delegation is doubtful of the usefulness of the definition of “general multilateral treaty” in article 1, paragraph 1 (c), for applying the rules governing the various categories of treaties.

**Delegation of Cyprus.** The delegation considers that general multilateral treaties should be open to universal participation. It adds, however, that this is subject to the existing rule that the problem of participation in general multilateral treaties is quite distinct from that of the recognition of States.

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41 Ibid., 745th meeting, para. 21.
42 Ibid., 741st meeting, para. 7.
43 Ibid., 741st meeting, para. 32.
Czechoslovak delegation. The delegation considers that in the case of treaties whose objectives are universal it is not proper to limit their participation to member States. In its view, the codification of the law of treaties offers a good opportunity to reconsider what it conceives to be the "unlawful practice" of the United Nations. The delegation accordingly endorses the principle of the universality of general multilateral treaties contained in paragraph 1. At the same time it expresses a fear lest the words "unless it is otherwise provided by the terms of the treaty itself or by the established rules of an international organization" should result in a denial of that principle. The delegation therefore proposes that the words should be deleted. It also considers that paragraph 2 should be amended to enable a State to become a party to a treaty in which it has a legal interest, a point which, in its view, is highly important to new States.  

Hungarian delegation. The delegation endorses the principle in paragraph 1 that general multilateral treaties, because of their special character, should be open to participation on as wide a basis as possible. It considers that any measure tending to restrict participation in such treaties is adverse to the codification and progressive development of international law.

Indonesian delegation. The delegation notes that the article, as formulated, includes the possibility of cases of limited participation in general multilateral treaties and advocates that the limiting words should be deleted.

Mongolian delegation. The delegation comments that, owing to what it describes as a policy of discrimination on the part of certain Western Powers, Mongolia was prevented until recently from acceding to any general multilateral treaties. It endorses the view that, in principle, such treaties should be open to participation on as wide a basis as possible, and hopes that no provision contrary to the spirit of universality would be inserted in the article.

Romanian delegation. The delegation urges that article 8 should be redrafted to include specific recognition of the principle of universality of access to general multilateral treaties. It says that a State which is not permitted to participate in a general multilateral treaty, in which it is interested, is in effect prevented from taking part in the development of international law. The universality of general treaties is, in its view, essential to the stability of the international legal order, the maintenance of peace and security and the development of co-operation between States.

USSR delegation. The delegation states its approval of the view expressed in paragraph 2 of the Commission's commentary that general multilateral treaties should be open to participation on as wide a basis as possible.

Venezuelan delegation. The delegation endorses the distinction drawn in the Commission's commentary between the problem of participation in general multilateral treaties and the problem of recognition of States. In its view, it is desirable to embody this distinction in an article and not relegate it to the commentaries.

Yugoslav delegation. The Yugoslav delegation considers that general multilateral treaties should be open to participation on as wide a basis as possible, because that is in the interests both of the international community as a whole and of the contracting States themselves. Moreover, in its view, the exclusion of certain States would be at variance with the principle of the sovereign equality of all nations and constitute a discrimination incompatible with the purposes and principles of the Charter. In this matter it considers that the Commission should abandon traditional concepts, which it thinks are now outdated.

Observations and proposals of the Special Rapporteur

1. Opinion was divided in the Commission at its fourteenth session on the question of participation in general multilateral treaties, and paragraphs 2-4 of the commentary to the present article summarize in broad terms the different positions adopted by members. The comments of Governments reflect similar differences of view on this question. Some Governments criticize the rule stated in paragraph 1 as going too far, either on the ground that it disregards the sovereign right of contracting States to determine the States to be admitted to participation in a treaty or on the ground that the "every State" formula may create serious difficulties for depositaries if entities whose statehood is disputed seek to accede to a treaty under the terms of paragraph 1. Some Governments endorse the rule stated in the paragraph, or endorse the principle that general multilateral treaties should be open to the widest possible participation, without calling for any change in the text of the paragraph. Other Governments criticize the rule stated in the paragraph as not going far enough, on the ground that the phrase "unless it is otherwise provided", etc. derogates from the principle of universality of participation in general multilateral treaties.

2. Three precedents which have occurred in State practice since the fourteenth session require mention. The first is the Vienna Convention on Consular Relations of 24 April 1963, a general multilateral treaty codifying the law relating to consular relations. The accession clause of this Convention was in the form usual in treaties concluded under the auspices of the United Nations, namely, "all States Members of the United Nations or of any of the specialized agencies 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". The second precedent is the

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48 Ibid., 739th meeting, para. 5.
47 Ibid., 736th meeting, para. 4.
46 Ibid., 740th meeting, para. 20.
45 Ibid., 742nd meeting, para. 1.
44 Ibid., 742nd meeting, para. 25.
43 Ibid., 738th meeting, para. 5.
42 Ibid., 743rd meeting, para. 29.
41 Ibid., 743rd meeting, para. 15.
Nuclear Test Ban Treaty of 5 August 1963, a treaty drawn up between three States but made open to signature or accession by “all States”. In the case of this Treaty, in order to minimize the problems of recognition which might arise from the use of that formula, it was provided in article III, paragraph 2, of the Treaty that each of the three Governments should act as a depositary of instruments deposited under the Treaty. The third precedent is resolution 1903 (XVIII) relating to the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations, which was adopted by the General Assembly on 18 November 1963. This question had been before the Commission at its fourteenth and fifteenth sessions and it had suggested a General Assembly resolution as a simplified procedure by which certain League of Nations treaties might be made open to wider participation. Resolution 1903 (XVIII) is the outcome of this suggestion, and provides for the transfer to the General Assembly of the “power conferred by multilateral treaties of a technical and non-political character on the Council of the League of Nations to invite States to accede to those treaties”. In paragraph 4 of the resolution the General Assembly “further requests the Secretary-General to invite each State which is a Member of the United Nations or member of a specialized agency or a party to the Statute of the International Court of Justice, or has been designated for this purpose by the General Assembly, and which otherwise is not eligible to become a party to the treaties in question, to accede thereto...”. Clearly, this paragraph adopts what is simply a variant of the formula employed in the Vienna Convention on Consular Relations and in other general multilateral treaties concluded under the auspices of the United Nations. During the debates in the Sixth Committee certain delegations put forward a proposal for the use of “any State” formula instead of the one adopted in the resolution; in other words, they preferred that the Secretary-General should be requested simply to invite “any State” to accede which is not already eligible to become a party to the treaties in question, to accede thereto...

3. Paragraph 1, as at present drafted, is designed to be a purely residuary rule applicable only in the absence of any provisions in the treaty defining the categories of States to which participation in the treaty is open. This being so, the scope for its application is evidently very narrow, since modern multilateral treaties of a general character almost invariably do in fact contain such provisions. Some Governments in effect advocate that the residuary principle formulated in paragraph 1 should be made absolute — a rule of *jus cogens* overriding the expressed will of the contracting States. Invoking the principle that general multilateral treaties should be universal in their application, they urge the deletion from the paragraph of the words “unless it is otherwise provided etc.”. The Commission, while unanimous in thinking that these treaties, because of their special character, should in principle be open to participation on as wide a basis as possible, did not feel justified in setting aside, even in the case of general multilateral treaties, so fundamental a principle of treaty law as the freedom of the contracting States to determine by the clauses of the treaty itself the States which may become a party to it. The thesis that a general multilateral treaty must be considered as open to participation by any State regardless of the provisions of its final clauses appears to be in conflict not only with the traditional law but with contemporary international law and practice. Accordingly, the Special Rapporteur does not think that the Commission should adopt it for the purpose of the draft articles, even on the footing of a measure of progressive development. He also feels that, if the concept of universality in the application of general multilateral treaties were to be considered as a rule of *jus cogens*, it might be necessary for the Commission to re-examine a number of other articles, such as those dealing with reservations and with the modification of treaties, in the light of this concept.

4. Paragraph 1 has also been objected to by some Governments from the quite opposite point of view that no presumption of universality of participation should be laid down in the draft articles, even as a residuary rule for cases when the treaty is silent on the question of participation. Arguments adduced in favour of this view are that the question should be left to be settled by agreement of the “parties” or, more exactly, the States which participate in the conference; and that the “every State” formula of paragraph 1 would impose on depositaries the unpleasant task of making subjective decisions regarding entities whose statehood is disputed. At the fourteenth session the Special Rapporteur was among those members who did not feel able to support the presumption adopted in paragraph 1, having regard to the clear evidence in recent practice, and especially in United Nations practice, of a contrary intention on the part of States with respect to general multilateral treaties. These members also thought that the rule in paragraph 1 might give the Secretary-General and other depositaries the embarrassing task of

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having to make delicate decisions as to the statehood of entities applying to accede to general multilateral treaties. They considered that the Commission should not go beyond the formula employed in general multilateral treaties drawn up under the auspices of the United Nations and of the specialized agencies as well as in a number of other modern treaties. They favoured confining article 8, dealing with the question of original participation in treaties, to paragraph 2, and leaving the question of opening general multilateral treaties to additional States to be covered by article 9, paragraph 1.

5. On the question of the embarrassing position of the depositary, the Special Rapporteur thinks it right to draw the attention of the Commission to a recent statement evidencing the practice of depositary Governments in this connexion. In an opinion submitted to the Foreign Relations Committee of the United States Senate in 1963, the Legal Adviser of the State Department recalled that, when confronted as depositary with a notice of accession from a Government which it did not recognize, the United States accepted the notification and circulated it to the other States concerned, at the same time putting on record its position with regard to the non-recognition of the Government in question; and that the United Kingdom had followed a similar course as depositary of the Load Line Convention. The Legal Adviser further stated that it is understood among the original parties to the Nuclear Test Ban Treaty that no depositary need accept a signature or communication from a régime that it does not recognize. He also underlined, with supporting evidence, the now well-established principle that a State’s participation in a multilateral treaty with an entity or Government which it does not recognize will not imply recognition of it. The evidence of practice contained in this opinion suggests that the possible embarrassment of a depositary Government in face of an unrecognized entity may not be an insuperable obstacle to the operation of the rule formulated in paragraph 1. On the other hand, it equally shows that the delicacy of the position of a depositary Government is real enough, and this is confirmed, so far as concerns secretariats acting as depositaries, by the attitude adopted by the Secretary-General in regard to the “any State” formula in 1963.

6. On balance, the Special Rapporteur remains of the view that to confine article 8 to paragraph 2 and to leave the question of opening general multilateral treaties to additional States to be covered by article 9, paragraph 1, is the solution which is most consonant with existing treaty-practice and with the consensus basis of treaty relations. However, he recognizes that the majority of the Commission arrived at a different conclusion in 1963; and that a number of Governments express their support for the rule adopted by the Commission. Accordingly, he feels that his proper course is to confine himself to placing the above observations before the Commission in order to assist it in its re-examination of paragraph 1 of the present article.

7. Paragraph 2, which deals with treaties other than general multilateral treaties, has been criticized by a number of Governments on the ground that it does not sufficiently indicate that the rules which it lays down in sub-paragraphs (a) and (c) are intended to be residuary and to apply only in the absence of specific provisions in the treaty itself. This criticism appears to the Special Rapporteur to be well founded. It also appears necessary, in this paragraph, no less than in paragraph 1, to take account of the established rules of an international organization as well as of the provisions of the treaty.

8. If paragraph 2 is formulated as a purely residuary rule, sub-paragraph (b), which concerns cases where the treaty contains express provisions on the matter, will necessarily disappear. The Special Rapporteur also shares the view of the Swedish Government that, always assuming that the Commission retains the present substance of paragraph 1, it is desirable to combine paragraphs 1 and 2 in a single paragraph, in order to avoid the rather heavy repetition of the opening phrase. On this basis the article might take the following form:

“If it does not appear from a treaty which States may become parties to it —

“(a) in the case of general multilateral treaties, any State may become a party;

“(b) in other cases, any State may become a party which took part in the drawing up of the treaty or which was invited to the conference at which it was drawn up.”

Article 9. — The opening of a treaty to the participation of additional States

Comments of Governments

Australia. The Australian Government considers paragraphs 1 and 2 to be rather obscure. In its view, the expression “a small group of States” is particularly vague, and it asks whether a regional collective defence treaty would fall under paragraph 1 or 2. It feels that paragraph 1 should be restricted to general multilateral treaties. It also thinks that the wording of paragraph 3 (a) should be improved, since it assumes that paragraph 1 and paragraph 2 are meant to be mutually exclusive. Paragraph 3, it further points out, raises the difficulty for a depositary of determining what is a State, and it suggests that this should be avoided by substituting some other wording in the second line. Paragraph 4 it considers to be inadequate on two grounds: (a) such notification might be considered to be tantamount to recognition, and notification to the depositary should be an alternative; and (b) this provision should also apply to article 8, paragraph 1.

Austria. The Austrian Government considers that paragraph 1 (a) of this article goes beyond the existing law and is unacceptable because it amounts to authorizing amendment of a multilateral treaty without the consent of some of the parties. In its view, the paragraph violates the principle of sovereignty, and it proposes that paragraph 1 (a) should be revised, if not deleted. It notes that the difficulty will not arise in cases where the treaty itself contains a clause providing for its amendment by a two-thirds majority.
Canada. Referring to paragraph 3 (b), the Canadian Government notes that "the arguments against such a presumption of consent are well known, as is the very real difficulty that occasionally exists at present of eliciting any expression of opinion from States".

Denmark. The Danish Government thinks that the article goes too far in opening multilateral (as distinct from general multilateral) treaties to States other than the original parties. Paragraph 3 should not, in its view, apply to treaties concluded between a small group of States or between States belonging to a particular region. In the case of such treaties other States should not be allowed to become parties, except by invitation of the original parties. An outside State should not, in its view, be able to intrude and possibly bring pressure to bear on the original parties to refrain from objecting. The initiative, it considers, should in these cases belong to the original parties. In general, it observes that the article should not apply to constituent instruments of international organizations, since otherwise it would be possible to circumvent the provisions regarding the admission of new members.

Israel. In paragraphs 1 (a) and 2 the Government of Israel feels that a period of five years might be sufficient as the period during which it would still be necessary to consult the States which drew up the treaty as distinct from the parties. In paragraph 2 it notes the use of the phrase "concluded between a small group of States"; and it observes that in article 1 a different phrase, "limited number of States" is used to express a distinction which the Commission seeks to draw between a general multilateral treaty and a treaty between a "small group of States". It suggests that the smooth application of the law would be facilitated if the commentary were to give greater precision to this concept. In paragraph 3 (b) it feels that a period of twelve months might prove too brief for raising a presumption of tacit consent to a request to be admitted to participation in a treaty. Noting that article 19, paragraph 4, refers to a period of two years, it suggests that a more extended period should be considered in the present paragraph. In general, it suggests that further consideration should be given to uniformity in the periods of time laid down in the different articles.

Japan. As in the case of article 8, the Japanese Government considers that it would be better to leave the whole matter to the decision of the States participating in the conference; and that the present article should be deleted in its entirety.

Luxembourg. The Luxembourg Government draws attention to the debatable nature of the concept of a "small group of States" on which the distinction between paragraphs 1 and 2 is founded. It observes that, wherever a multilateral treaty is not opened to any State whatsoever, it could be claimed that one was dealing with a "small group of States". In any event, for reasons similar to those given in its comments on article 6, it considers the procedure suggested in paragraph 1 of the present article to be inadmissible. What is involved in paragraph 1 is really the amendment of the accession clauses of treaties and, in its view, the opening of a multilateral treaty to additional States should in principle be subject to the same requirements as the amendment of the treaty. It proposes that article 9 should be replaced by a clause, which could be combined with paragraph 2 of article 8 to form a new article, simply providing that:

"A multilateral treaty may be opened to the participation of States other than those to which it was originally open, subject to the provisions regarding revision of the treaty."

In that event, the provisions of paragraph 3 of the present article might, mutatis mutandis, it thinks, provide a model for a simplified procedure for giving effect to the amendment provisions of the treaty without convening another international conference. The Luxembourg Government considers that such a solution, while respecting the consensual nature of treaties, would provide a sufficient element of flexibility in the opening of multilateral treaties to additional States.

Sweden. The Swedish Government observes that, should the proposed convention on the law of treaties not meet with universal adherence, it might complicate very much the application of the present article.

United Kingdom. The United Kingdom, like the Swedish Government, thinks that the article may be difficult to operate in practice, because it may be many years before a convention on the law of treaties comes into force for all States. A proposal to open a multilateral treaty to new States in accordance with the present article might, it points out, be opposed by States which were not parties to the convention on the law of treaties and were not therefore bound by the present article. The United Kingdom Government also thinks it to be unclear as to what would be the effect of the article in the case of a treaty which is the constituent instrument of an international organization and which contains express provisions on membership of the organization. In addition, it finds the expression "a small group of States" to be imprecise and to require clarification both here and elsewhere in the draft articles.

United States. The United States Government observes that its comments on paragraphs 1 and 2 (a) of article 8 apply equally to paragraph 1 of the present article. In addition, it considers the terms "multilateral treaty" and "small group of States" to be altogether too indefinite for the purposes of the article. It asks whether the members of the Organization of American States, or the parties to the Antarctic or North Atlantic Treaties constitute a "small group of States". If not, it says that article 9 would render meaningless the provisions of those treaties regarding the States which may participate in them. Paragraph 1 (b) would in effect, it observes, permit the amendment of treaties by international organizations. Such a provision, in its view, rather than giving flexibility to the negotiation and application of treaties, might have the reverse effect of eliciting reservations by any States in approving both the proposed convention on the law of treaties and new treaties afterwards concluded. Paragraph 4 it considers to be open to the objection that it assumes that all treaties are divisible as to their parties and can be applied between certain of them while some are at the same time not in treaty relations with each other. This, it
maintains, is not the case in many instances, such as treaties establishing international organizations and treaties for defence. The Charter, it points out, is a prime example of a treaty where all members must be in treaty relations with each other.

Cameroonian delegation. The delegation stresses the importance of the article. 61

Colombian delegation. For the delegation's views see its comments on article 8. 62

Delegation of Cyprus. The delegation considers that the application of paragraph 1 has the advantage of relieving the Secretary-General or any other depositary of having to take delicate, and perhaps controversial, political decisions. 63

Hungarian delegation. For the delegation's views, see its comments under article 8. 64

Irish delegation. While appreciating the need for precision, the delegation does not think it desirable that time-limits such as those stipulated in article 9 should be imposed in such important matters, since they place an additional burden on Foreign Offices which are lightly staffed. 65

Mexican delegation. The delegation has some doubts regarding paragraph 1 (a). By what authority, it inquires, would the provision for the subsequent consent of two-thirds of the States which drew up the treaty to the participation of additional States be applicable where States not parties to the convention on the law of treaties are at the conference? In its view, it would be more prudent to recommend that all treaties drawn up at an international conference should lay down the conditions for the participation of additional States. 66

Polish delegation. The delegation states that its observations on the restrictions in article 8, paragraph 1, on the principle of universal participation in general multilateral treaties apply mutatis mutandis to paragraph 1 of the present article. 67

USSR delegation. For the delegation's views see its comments on article 8. 68

Observations and proposals of the Special Rapporteur

1. Clearly, the point made by some Governments that, whatever may be the rules ultimately adopted in the present article, a reservation ought to be made in regard to treaties which are constituent instruments of an international organization is well founded. If, however, the Commission adopts the Special Rapporteur's suggestion for the inclusion of a new article amongst the "General Provisions", making the application of the draft articles to constituent instruments and to treaties drawn up within an organization generally subject to the established rules of the organization concerned, the point need not be further taken into account in drafting the present article.

2. Paragraph 1 was drafted by the Commission primarily with general multilateral treaties in mind, though it felt that the paragraph might also serve a useful purpose in connexion with other large multilateral treaties. A number of Governments have expressed objections to the application of paragraph 1 to such a wide range of treaties, and have suggested that it should be confined to general multilateral treaties. The Special Rapporteur considers that the Commission should adopt this course, which has the added advantage of making it unnecessary to attempt to give precision in this article to the distinction between "multilateral treaties" and "treaties concluded between a small group of States". A few States have suggested that paragraph 1 (a) should be deleted altogether on the ground that it amounts to authorizing the amendment of multilateral treaties without the consent of some of the parties. This ground does not appear to the Special Rapporteur to be one which necessarily should lead the Commission to drop paragraph 1 (a), if this paragraph is otherwise considered to be desirable. Multilateral treaties frequently contain no provision regarding their amendment. Moreover, as pointed out in paragraph 4 of the Commission's commentary to article 66, which deals with the amendment of multilateral treaties, there is now a well-established practice of bringing amendments of certain types of multilateral treaties into force for States accepting the amendments without obtaining the consent of all parties — let alone the consent of all the States which took part in drawing up the treaty. General multilateral treaties, above all others, are treaties where this practice is found.

3. The question remains, however, whether the special provisions in paragraphs 1 and 3 should be retained, or whether the whole question of participation by additional States should be left to be covered by the provisions of articles 65 and 66 concerning the modification of treaties. When the Commission adopted articles 8 and 9, it had in the forefront of its mind the problem of facilitating the opening of certain categories of closed multilateral treaties to the new States. In paragraph 10 of its commentary to these articles it recognized that, owing to delays in ratifications, etc., and the possibility that the proposed convention on the law of treaties might not become binding on all the parties to the treaties in question, article 9 might be of limited effectiveness in achieving the objective. It accordingly suggested that consideration should be given to trying to obtain the necessary consents to the accession of the new States by using the depositary of each treaty as a channel for requesting the consents of the parties to the treaties in question. At the fifteenth session, as already noted in the Special Rapporteur's observations on article 8, the Commission re-examined the question of opening multilateral treaties to the new States in the particular context of League of Nations treaties containing closed participation clauses. These clauses had special features which enabled the problem to be solved in that instance by the General Assembly's assuming by resolution the power formerly vested in the Council of the League to
invite additional States to accede to the treaties. The precedent is therefore a very special one, limited to the particular League of Nations treaties, and does not touch the more general problem of opening multilateral treaties to additional States.

4. The Special Rapporteur, without wishing to become involved in any way in the topic of State succession, observes that the problem of the participation of new States in earlier multilateral treaties appears to be finding a certain measure of solution through the fact that in a now quite considerable number of cases new States have by notifications to the depositaries couched in varying terms purported to establish or recognize that they are parties to multilateral treaties to which the predecessor sovereign of the territory is already a party or signatory; and that these notifications have been communicated to the other parties to the treaties by the depositaries without meeting with any objection. This practice, if it may suggest that the problem of the new States has not perhaps the magnitude which it appeared to possess in 1962, seems to confirm the practicability of the procedural solution outlined in paragraph 3 of the present article. Against this must be weighed the consideration, mentioned in the Commission's commentary and emphasized by certain Governments, that the legal efficacy of accessions made in accordance with the present article might be doubtful or limited in cases where parties to a multilateral treaty had not all become bound by the present article.

5. The opening of a treaty to additional States is evidently tantamount to an amendment of one of its "final clauses". Accordingly, the choice before the Commission is either to deal with the extension of participation in a treaty simply as a case of amending the treaty or to regard it as a special matter to be dealt with on its own principles. When the Commission adopted article 9, it had not yet examined the subject of modification of treaties. It therefore seems desirable to consider what would be the position if the question were treated simply as a case of amendment falling under articles 65 and 66. Under the former article amendment of a treaty takes place by agreement between "the parties" and there is no proviso either in that article or in article 66, as there is in the present text of article 9, giving a voice in the matter for a limited period to signatory States. Again under article 65 the conclusion of any amending agreement, if in writing, is to be governed by the rules laid down in part I for the conclusion, entry into force and registration of treaties, unless the treaty or the established rules of an international organization otherwise provide. In other words, if the amending agreement were to be concluded at an international conference, the two-thirds majority rule would be the rule employed for the adoption of the agreement, unless otherwise decided by the parties or otherwise provided in the original treaty; and in the case of a treaty drawn up within an organization the voting rule of the organization would apply. Thus the basic position under articles 65 and 66 is not far removed from that contemplated in article 9 so far as concerns the modification of a participation clause through the ordinary procedure of an amending protocol. Equally, there is nothing in articles 65 and 66 or in part I to preclude the modification of a participation clause by an agreement reached through the medium of communications made to and circulated by a depositary.

6. Having regard to the comments of Governments, and to the provisions of articles 65 and 66 concerning the amendment of treaties, the Special Rapporteur feels that it may be sufficient to cover the extension of participation in treaties other than general multilateral treaties by a reference to those articles. As to general multilateral treaties, the Commission has recognized that these treaties because of their special character should, in principle, be open to participation on as wide a basis as possible. This principle could, it is true, be given effect by the ordinary procedures of amendment contemplated in articles 65 and 66. But, as pointed out in chapter III of its 1963 Report dealing with participation in League of Nations treaties, the normal procedure of amending protocol has certain disadvantages and is likely both to involve delay and to give incomplete results. As also pointed out by the Commission in chapter III of its 1963 Report and earlier in paragraph 10 of its commentary to the present article, it appears to be established that in international law all that is required for the opening of a treaty to additional States is the agreement of the States entitled to a voice in the matter, and that this agreement may in principle be expressed in any form. In the case of general multilateral treaties, the difficulty of reconvening a diplomatic conference for the sole purpose of extending the right of participation and the importance of facilitating agreement to its extension seem to justify the proposal of a simplified procedure in the case of these treaties. On the other hand, it would be more in conformity with general principles to make such a simplified procedure subject to any specific provisions contained in the treaty regarding its amendment. Certain Governments, it is true, have in the present connexion advocated a complete departure from the principles governing amendment of treaties on the basis that general multilateral treaties ought to be regarded as necessarily open to participation by every State regardless of the terms of their final clauses. The Special Rapporteur, while sharing the view that general multilateral treaties should be open to participation on as wide a basis as possible, does not think it admissible to go so far in overriding the expressed will of the States which drew up the treaty. One alternative might be, as suggested by the Luxembourg Government, to cover the extension of participation in all kinds of treaties by a reference to articles 65 and 66 and then to specify the simplified procedure in paragraph 3 as applicable to general multilateral treaties. Many general multilateral treaties, however, contain no provisions regarding their own amendment, and a simple reference to articles 65 and 66 would not provide any voting rule except after the convening of a new conference. Accordingly, it may still be useful to retain the essence of paragraph 1, but to state it as a residuary rule applicable in the event of the treaty's being silent about its own amendment. Similarly, it is thought that it may also be useful to state that, except as

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41 Ibid., para. 41.
provided in the present article, the provisions of articles 65
and 66 apply. This would, *inter alia*, cover the point now
contained in paragraph 4 of the present article.

7. In the light of the above observations, the Special
Rapporteur suggests that article 9 might be reformulated
on the following lines:

“1. Subject to any provisions contained in the treaty
regarding its amendment, a general multilateral treaty
may be opened to the participation of States other than
those to which it is open under article 8 —
“(a) in the case of a treaty drawn up at a conference
convened by the States concerned or by an international
organization, by the subsequent consent of two-thirds
of the parties;

“(b) in the case of a treaty drawn up in an inter-
national organization, by a decision of the competent
organ of the organization in question adopted in accord-
ance with the applicable voting rule.

“2. In other cases, a treaty may be opened to the
participation of States other than those to which it is
open under article 8 in accordance with the provisions
of articles 65 and 66.

“3. If the depositary receives a request from a State
desiring to be admitted to participation in a treaty under
the provisions of paragraph 1, the depositary:
“(a) in a case falling under paragraph 1 (a), shall
communicate the request to the other parties to the
treaty;

“(b) in a case falling under paragraph 1 (b), shall
bring the request as soon as possible before the com-
petent organ of the organization in question.

“4. The consent of a State to which a request has
been communicated under paragraph 3 (a) above shall
be presumed after the expiry of two years from
the date of the communication.

“5. Except as provided in the foregoing paragraphs,
articles 65 and 66 shall apply to the opening of a general
multilateral treaty to additional States.”

**Article 10. — Signatory and Initialling of the Treaty**

**Comments of Governments**

**Japan.** The Japanese Government thinks it desirable that
paragraph 3 should take into account certain cases where,
in its view, initialling may be equivalent to signature, as
where the initialling is by a Head of State, Prime Minister
or Foreign Minister.

**Luxembourg.** In paragraph 1 the Luxembourg Govern-
ment finds the words “in the treaty itself or in a separate
agreement” not to be entirely clear. It states that a treaty
is often embodied in several documents, including proto-
cols annexed to the treaty and protocols of signature, and
that the term “treaty” in its legal sense denotes the whole
group of documents. Accordingly, in its view, the above-
mentioned words are unnecessary. In paragraph 2 it does
not think that the distinction between a signature *ad referen-
dendum* and a signature “subject to ratification” emerges very clearly. In order to remove any risk of mis-
understanding it suggests that the word *définitive* should be
deleted from the French text of paragraph 2 (c), as
that word might give the impression that confirmation of
a signature *ad referendum* would amount to a final com-
mitment to be bound by the treaty.

**Sweden.** The Swedish Government considers that the
article should be revised so as to confine it to residiary
rules applicable in the absence of agreement between the
parties. With this object it proposes the deletion of para-
graph 1 and paragraph 2 (a) and the rewording of the
remaining provisions of the article to make it clear that
they are to operate only in the absence of agreement
between the parties. As to paragraph 2 (b), while expressing
the view that a rule limiting the legal effect of signature
*ad referendum* to an act of authentication may be desirable,
the Swedish Government draws the Commission’s atten-
tion to a practice which it believes to exist of sometimes
attaching to this act the meaning of a signature “subject
to ratification”. Paragraph 3 (a) it considers to be drafted
in too absolute a form in stating that initialling can only
function as an act of authentication as, in its view, this is
not true in all instances.

**United States.** The United States Government considers
that paragraph 1, as at present worded, may give the
impression that it rules out the procedure of bringing
treaties into force without any signature by the parties
which is used, for example, in the conclusion of ILO Con-
ventions. In order to obviate such an interpretation of the
paragraph, it proposes the insertion of the phrase “but
with respect to which signature is contemplated” between
the words “adopted” and “the States”. It also considers
that the provision in paragraph 2 (c) by which, on confir-
mation, signature *ad referendum* operates from the date
when it was affixed to the treaty, may cause difficulty for
States having requirements of their national law to satisfy
before they can agree to be bound. It accordingly suggests
that the following phrase should be added at the end of
paragraph 2 (c) “unless the State concerned specifies a
later date when it confirms its signature”. As to para-
graph 3 (a), it feels that this provision may give rise to
some question in the case of documents, such as a memo-
randum or minutes of interpretation, which are intended
to be binding solely on the basis of initialling; and it points
out that such documents sometimes accompany a more
formal document that is brought into force by signature.
In any event, it would like to see the following general
reservation made to the article by adding a new sub-
paragraph in the following terms:

> “Nothing in this article shall prevent the initialling of
> any document, particularly a subsidiary one, from
> having a final effect when the parties intend that such...”

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71 The Special Rapporteur does not feel that the argument adduced
by one Government against the inclusion of any time-limits in the
draft articles is persuasive. Numbers of multilateral treaties already
contain time-limits for one purpose or another, and usually time-
limits shorter than those proposed by the Commission. The Special
Rapporteur himself feels that the original period of twelve months
was appropriate for the present purpose; but in the light of the com-
ments of Governments he has tentatively substituted two years.

72 It is to be noted that in the English text the word “full” is used.
Observations and proposals of the Special Rapporteur

1. Title. The Special Rapporteur considers that the title of the article should be changed to read "Signature and initialling of the text". Although the distinction between signature which merely authenticates the text and signature which establishes consent to be bound by the treaty is, it is believed, made clearly enough in articles 10-12, the double sense in which the term signature is used carries an inherent risk of misinterpretation. In order to minimize this risk the Special Rapporteur thinks that it may be better to speak in article 10 of signature of the text, rather than of the treaty. It is only the procedural act of signing the text with which article 10 is concerned, the differing legal effects of signature being dealt with in article 11. Accordingly, it is suggested that "text" should be substituted for "treaty" in the title and in the provisions of the present article.

2. The Special Rapporteur shares the view of the Swedish Government that some revision of the article is desirable because, as at present worded, paragraphs 1 and 2 (a) are too expository in character, but he doubts whether these paragraphs ought to be deleted altogether. He suggests that paragraph 1 should be shortened and confined to a provision that signature must take place regularly, that is in accordance with the procedure laid down in the text or in a related instrument or otherwise decided by the States concerned. However obvious this rule may be, it has legal content, since it implies that an irregular signature is not a signature unless the other States choose to accept it as such. Similarly, he suggests that paragraph 2 (a) should be amended to state that a signature is to be considered unconditional unless the contrary is indicated at the time of signature. Such a rule would again have legal content but would, of course, have to be made subject to the provisions of articles 12 and 14, dealing with ratification and approval.

3. Paragraph 2 (b) could, it is thought, safely be omitted. The authenticating effect of signature is already covered in article 7 and article 11, while the point that the effects of a signature ad referendum are less than those of a simple signature is implied in paragraph (c).

4. In paragraph 2 (c), it is thought that, in order to minimize the risk of confusion between the procedural act of signature and signature giving consent to be bound, the expression "unconditional signature" should be used in place of the expression "full (definitive, definitiva) signature"; and that this paragraph, like paragraph 2 (a), should be stated to be subject to articles 12 and 14. It is also thought that the phraseology should be slightly modified as shown in the revised version proposed in paragraph 6 below. The Swedish Government, while favouring the limitation of the effects of signature ad referendum to an act of authentication, draws attention to a practice which it believes to exist of sometimes attaching to this act the meaning of "subject to ratification". The United States Government at the same time observes that paragraph 2 (c), under which a confirmed signature ad referendum operates from the original date of signature, may cause difficulty for States having requirements of their national law to satisfy before they can agree to be bound; and it suggests that the rule in paragraph 2 (c) should be qualified by the words "unless the State concerned specifies a later date when it confirms its signature". The proposed addition goes close to converting signature ad referendum into a disguised form of signature "subject to ratification" and confuses still further the ambiguities already surrounding the act of signature. Accordingly, the Commission may feel reluctant to endorse the proposed addition, unless it is felt to fill a real gap in treaty procedures. Normally, a State would protect its position under its internal law by making its signature subject to ratification or approval; nor does there appear to be anything to prevent a State, when confirming a signature ad referendum, from making it subject to ratification or approval. In the case of a treaty which is expressed to come into force on signature, there does not appear to be any time-limit within which a signature ad referendum may be confirmed. Consequently, signature ad referendum may, as it is, be used to serve one purpose of ratification — delay to allow the completion of constitutional procedures. On the other hand, in these cases signature ad referendum, as formulated in paragraph 2 (b), would not suffice to protect a State against being held to have violated the treaty if changes in its internal law were necessary before its practice could be said to conform to the treaty; for confirmation of the signature would make the State a party to the treaty ab initio. This being so, the Special Rapporteur feels that it may be justifiable to leave open the possibility of a State's specifying the date when its signature is to be effective. The addition proposed by the United States is therefore included in the revised draft set out below.

5. As to paragraph 3 (a), the Special Rapporteur feels that there is substance in the point that an exception should be made in the case of initialling by a Head of State, Head of Government or Foreign Minister. Such an exception was provided for in the Special Rapporteur's original draft of the article. Although some opposition was expressed in the Commission to considering initialling by a Head of State, etc., as necessarily committing the State to be bound by the treaty, it is not thought that the Commission intended to go so far as to put initialling by those State organs on the same level as initialling by a mere representative. The appropriate rule, it is suggested, would be to treat initialling by them as the equivalent of signature. The Special Rapporteur also feels that there is substance in the point made by two Governments that cases sometimes occur where other representatives indicate that their initialling of the text is intended to be equivalent to signature and that allowance should be made for these cases.

6. In the light of the above observations, the Special Rapporteur proposes the following revised text of the article:

"1. Signature of the text takes place in accordance with the procedure prescribed in the text or in a related instrument or otherwise decided by the States participating in the adoption of the text."
"2. Subject to articles 12 and 14 —

"(a) signature of the text shall be considered unconditional unless the contrary is indicated at the time of signature;

"(b) signature ad referendum, if and when confirmed, shall be considered as an unconditional signature of the text dating from the moment when signature ad referendum was affixed to the treaty, unless the State concerned specifies a later date when confirming its signature.

"3. (a) If the text is initialled, instead of being signed, the initialling shall —

"(i) in the case of a Head of State, Head of Government or Foreign Minister, be considered as the equivalent of signature of the text;

"(ii) in other cases shall operate only as an authentication of the text, unless it appears that the representatives concerned intended the initialling to be equivalent to signature of the text.

"(b) When initialling is followed by the subsequent signature of the text, the date of the signature, not of the initialling, is the date on which the State concerned shall be considered as becoming a signatory of the treaty."

Article 11. — Legal effects of a signature

Comments of Governments

Denmark. The Danish Government considers that the legal effects attributed in paragraph 2 to a signature which is subject to ratification have no significance per se; for where a treaty is subject to ratification the signature of the treaty is, in its view, a mere formality having little rational justification in modern international relations. On the other hand, it recognizes that formal signature is a procedure so deeply embedded in practice that proposals for reform would have little chance of acceptance.

Luxembourg. The Luxembourg Government recalls its observations on the term “approval” in its comments upon article 1 (d). It there stated that the term properly denotes the internal procedure of parliamentary approval of treaties and urged the elimination of the term from the phraseology of the draft articles, using only the terms “ratification” and “accession” for the international procedures of the conclusion of treaties. Accordingly, it would like to see the term omitted from paragraph 2 of the present article.

United States. The United States Government supports the provisions of this article, which it considers to be in conformity with long and widely accepted practices and procedures of treaty-making.

Argentine delegation. The delegation feels that, despite the hesitations expressed by the Commission on the point in paragraph 4 of the commentary, a clause should be included in the article, by way of a progressive development of international law, placing a signatory State under an obligation to examine in good faith whether it should become a party to the treaty. The inclusion of such a clause would, in its view, provide an element of security in the relations between States.78

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur, for the reasons given in his observations on article 1, paragraph 1 (d), does not favour the deletion of the references to approval in paragraphs 2 and 3 of the present article.

2. In paragraph 1, the reference to article 7, paragraph 2, will require to be altered if that article is revised in the manner proposed by the Special Rapporteur.

3. In paragraph 2 (b) the Special Rapporteur proposes the deletion of the words “confirm or as the case may be”. These words were inserted in the light of the fact that under article 17, paragraph 1, as adopted by the Commission, the obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty was to attach to a State participating in the negotiations or in the drawing up or adoption of the text. Under that provision, the obligation would already be in existence before signature and would thus only be “confirmed” by the latter. That provision has, however, met with what the Special Rapporteur conceives to be well-founded criticism in the comments of Governments, and he is accordingly proposing an appropriate modification of article 17, paragraph 1. If that proposal is accepted by the Commission, the deletion of the above-mentioned words from the present article will follow automatically.

4. The reasons leading the Argentine delegation to propose the inclusion of a provision placing a signatory State under an obligation to consider in good faith whether is should proceed to become a party are fully appreciated. The Special Rapporteur included a provision of this kind in his first report,74 and the question was closely discussed in the Commission at the fourteenth session.76 However, for the reasons explained in paragraph 4 of the commentary to the present article, the Commission decided not to include the provision. Accordingly, while drawing the Commission’s attention to the view of the Argentine delegation, the Special Rapporteur does not feel that he should formulate any proposal on the point which it raises.

Article 12. — Ratification

Comments of Governments

Austria. The Austrian Government is in full agreement with the basic rule stated in the article that treaties in principle require ratification. In addition, it reiterates the regret expressed in its comments on article 1, paragraph 1 (d), that the draft articles do not define ratification (see the observation of the Special Rapporteur on article 1, paragraph 1 (d)).

78 Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 744th meeting, para. 4.
76 Ibid., vol. I, 643rd —645th, 660th and 668th meetings, pp. 88-100, 204-205 and 255.
Denmark. The Danish Government considers that the basic rule stated in the article is not in conformity with international practice, and that the article is unduly complicated. The article should, in its view, be simplified by reversing the presumption on which it is based. Ratification should be required only if the necessity appears from the text, from the full powers issued to the representatives, from statements made in the course of negotiations, or from other circumstances evidencing an intention to that effect. These circumstances, it adds, may include the constitutional necessity of ratification. Furthermore, it is of the opinion that the question whether or not ratification is required should not necessarily be answered in the same way with respect to both parties. In this connexion it comments that in Danish practice cases have occurred where the signature of one party has been considered to be immediately binding, while that of the other has been subject to ratification (acceptance or approval); and it maintains that this procedure should not be precluded by the wording of the article.

Finland. The substance of the article does not, in the view of the Finnish Government, call for comment. On the other hand, it finds the form of the article defective in that the two types of treaties — formal and informal — are not always dealt with separately and that the drafting of paragraphs 2 and 3 contains elements of contradiction. It proposes that the article should be revised as follows:

“This article which are not concluded in simplified form require ratification, unless the treaty otherwise provides or a contrary intention of the signatory States clearly appears from statements made in the course of negotiations or the signing of the treaty, from the credentials, full powers or other instrument issued to the representatives of the negotiating States, or from other circumstances evidencing such an intention.”

Israel. The Government of Israel does not consider it necessary, for the purpose of drawing up practical rules, to adopt in principle on the controversial question of the necessity or otherwise in general international law for ratification of treaties which are themselves silent on the question. In its view, it is essentially for the negotiators to establish whether ratification is necessary or not. The question of ratification, it observes, may itself be part of the negotiation, or conclusively determined by the terms of the full powers of one or both of the negotiators. Such a pragmatic approach would, it suggests, enable the article to be simplified.

Japan. The Japanese Government considers that the basic presumption should be reversed, so as to make ratification unnecessary unless expressly provided for; and that the only exception for which it would then be necessary to cater would be the one mentioned in paragraph 3 (c). Moreover, it thinks that “approval” should be transferred from article 14 to this article and dealt with on the same principles.

Luxembourg. Recalling its comments on the definition of “treaties in simplified form” in article 1, paragraph 1 (b), the Luxembourg Government proposes the deletion of paragraph 2 (d) of the present article. It considers that the substance of paragraph 2 (d) is already implied in paragraph 2 (c), where it refers to “other circumstances evidencing such an intention”. The deletion of paragraph 2 (d) would, it thinks, enable the whole of paragraph 3 to be dispensed with. The only cases which, in its view, could conceivably then arise under paragraph 3 would be cases where the treaty was expressed to come into force upon signature, but was nevertheless made subject to ratification; such cases would, it feels, be too unrepresentative to justify a special provision in the draft articles. The question of treaties that come into force provisionally, raised in paragraph 8 of the Commission’s commentary, is, in its view, quite a different one. The application of the treaty in those cases it considers to be subject to the treaty’s subsequently coming into force and to be a matter within the normal limits of the powers of Governments.

Sweden. The Swedish Government would prefer to see the basic presumption reversed and the rule stated in the simple form that ratification is not necessary, unless expressly agreed upon by the parties, perhaps with the additional qualification that ratification would also be required in cases where there is a clear implication that the parties so intended. There would be no dangers in such a residuary rule, it suggests, as States may always by express clauses prescribe ratification.

United Kingdom. The United Kingdom Government considers that as a practical matter there is much to be said for the contrary rule that a treaty does not require ratification and comes into force on signature unless the treaty itself otherwise provides. It fears that the complicated provisions of the article, as at present worded, may give rise to difficulties which do not at present exist.

United States. As the principal effect of the article is that treaties require ratification in the absence of certain circumstances, the United States Government proposes that the cases requiring ratification should be stated before the exceptions. It also proposes that the phrase in paragraph 3 (b) “other circumstances evidencing such intention” should be clarified by including as an example the fact that similar treaties concluded by the parties with each other or by either with third States have been subject to ratification. In the light of these proposals it puts forward an alternative version of paragraphs 2 and 3 (see the United States Government’s comments on the present article).

Italian delegation. The Italian delegation expresses concern that certain passages in the Commission’s commentaries appear to look with disfavour on the proposition that a State’s consent to be bound by a treaty must be governed by its constitution. In particular, it notes that in the commentary to the present article the Commission differentiates between “parliamentary ratification of a treaty under municipal law” and “ratification on the international plane”, thus implying that it is the latter which counts. The commentary, it says, does not make it clear that constitutional law and international law both contribute to determining the conditions governing the conclusion of treaties.  

76 In document A/CN.4/175 (mimeographed).
77 Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 743rd meeting, para. 22.
Observations and proposals of the Special Rapporteur

1. The opinions of Governments are divided on the question whether the basic residuary rule should be that ratification must be presumed to be necessary unless the contrary appears or vice versa. Four Governments would prefer to see the presumption in paragraph 1 reversed; one Government would like to state the law pragmatically without taking any position as to the residuary rule; the remaining five Governments appear either to endorse or not to dissent from the rule as it appears in paragraph 1. In addition, certain of the Governments urge that the article should be simplified. At the fourteenth session certain members of the Commission would have preferred that the rule should be stated in the reverse way, or that the requirement of ratification should be formulated simply as a question of intention. Another group considered that the existing residuary rule is the presumption stated in paragraph 1; a third group felt that, although that presumption survives as the basic rule for "formal" treaties, the reverse presumption applies in the case of treaties in simplified form. The article adopted by the Commission contains elements of compromise which reflect this division of opinion. Paragraph 1 states the classical rule that treaties in principle require ratification; paragraph 2 reverses it for treaties in simplified form; paragraph 3 makes allowance for cases where, despite the use of a simplified form, the parties intend the treaty to be subject to ratification.

2. The article, as at present constructed, thus hinges upon the drawing of a distinction in law between formal and informal treaties; and this in turn hinges upon the establishment of adequate legal definitions of formal and informal treaties. In article 1, paragraph 1 (b), the Commission has sought to define a "treaty in simplified form" by naming examples, "exchange of notes, exchange of letters, etc.", and adding the words "or other instrument concluded by any similar procedure". In paragraph 11 of its commentary on that article, the Commission explained that these treaties in general "identify themselves by the absence of one or more of the characteristics of the formal treaty"; but it went on to say that "it would be difficult to base the distinction infallibly upon the absence or presence of any one of these characteristics". In particular, it said that ratification, "though not usually required for treaties in simplified form, is by no means unknown". Governments, as already noted in the Special Rapporteur's observations on article 1, paragraph 1 (d), do not regard the Commission's definition of "treaties in simplified form" as adequate. At the same time, for the reasons there given, the Special Rapporteur does not think that the definitions suggested by certain Governments provide viable alternatives. In addition, those Governments all include the fact that the treaty is not intended to be subject to ratification as one of the elements of the definition of an "informal" treaty. In consequence, their definitions would be of no assistance in the drafting of the present article.

3. The Special Rapporteur considers that the article should be recast and the law governing ratification restated without specifically basing the rules on a distinction between "formal" and "informal" treaties. The question then arises whether a residuary rule should be laid down for cases where the intention of the parties is not clear and, if so, whether it should require or dispense with ratification. The suggestion of the Government of Israel that the Commission should refrain from taking any position on the question of principle and should adopt a purely pragmatic approach is superficially attractive. But the Special Rapporteur is not convinced that this is the course which the Commission should follow. No doubt, it is essentially for the negotiators to establish whether ratification is necessary or not; no doubt also, the question of ratification may be part of the negotiation or conclusively determined by the terms of the full powers of one or both of the negotiators. The fact remains, however, that there is quite a large residue of cases where the intention of the parties is a matter of inference rather than of direct evidence. If States always gave clear indications of their intentions on this point, there would be no problems; but that is not so. A pragmatic approach would only solve the problem if the rules which it furnished sufficed to cover exhaustively the inferences to be drawn in this residue of cases. It is certainly possible to set down pragmatically — as in effect the Commission sought to do in paragraphs 2 and 3 — cases in which ratification is and cases in which it is not required. The risk is, however, that either the resulting rules may in some degree overlap and contradict each other or leave a certain number of cases outside any rule. If, on the other hand, the Commission sets down pragmatically only the cases where ratification is required or, alternatively, only the cases where it is not required, it will by implication leave the remaining cases outside the application of the article and, by implication will take a position on the residuary basic rule.

4. If the Commission decides to maintain the presumption in paragraph 1 as the basic rule without formally laying down a contrary presumption in the case of treaties in simplified form, it will still be necessary to make a large allowance for inferences of a contrary intention from the nature, form and circumstances of the treaty. Otherwise the article would not, in the Special Rapporteur's view, be consistent with modern practice. On the assumption that the rule in paragraph 1 remains the basis of the article, the Special Rapporteur proposes that the text should be revised on the following lines:

"1. A treaty in principle requires ratification by the States concerned unless —

"(a) the treaty itself provides that it shall come into force upon signature or specifically provides for a procedure other than ratification;

"(b) a contrary intention appears from the nature of the treaty, the form of the instrument or instruments in which it is embodied, the terms of instruments of full powers, the preparatory work of the treaty or the circumstances of its conclusion."

In the above draft the expression "preparatory work of the treaty or the circumstances of its conclusion" is used in preference to the expression "statements made in the course of the negotiations or other circumstances evidenc-
ing such an intention", in order to keep the terminology in line with that used in article 70.
5. If, on the other hand, the Commission should decide that the classical rule has now been so far eaten into by the enormous growth of treaties concluded by simplified procedures that it should not be maintained as the basic rule, the Special Rapporteur suggests that the article should simply state the rules determining the cases where ratification is required. Then, by implication, ratification would not be required in any case not covered by these rules, so that the residuary rule would, in effect, be that ratification is not required unless a contrary intention appears. In this event, the Special Rapporteur proposes that the text of the article should be revised on the following lines:

"1. A treaty requires ratification where —

"(a) the treaty itself expressly contemplates that it shall be subject to ratification;

"(b) the intention that it shall be subject to ratification appears from the nature of the treaty and the form of the instrument in which it is embodied, the terms of the representatives' instruments of full powers, the preparatory work of the treaty or the circumstances of its conclusion."

6. Either of the solutions outlined in the two preceding paragraphs can, in the Special Rapporteur's opinion, be plausibly argued to reflect the existing legal position, even although they may contain opposite residuary rules. Practice has gone so far in the use of simplified treaty-making procedures that different opinions may reasonably be held as to what should now be regarded as the underlying presumption as to the intention of contracting States. In other words, the problem is one of choice, and in 1962 the majority of the Commission appeared to incline towards a solution on the lines of the one in paragraph 4.

7. Two questions remain. The first is raised by both the Danish and United States Governments, and concerns the relevance of the constitutional practice of individual States. The Danish Government considers that amongst the circumstances evidencing an intention to require ratification should be included "the constitutional necessity of ratification". The United States Government proposes that the expression "other circumstances evidencing such an intention" should be clarified by mentioning as examples the fact that similar treaties concluded by the parties with each other, or by either party with third States, have been subject to ratification. The Special Rapporteur recognizes that there may be cases where the joint and regular practice of two States in concluding bilateral treaties, or the well-established practice of one State known to the other, may provide evidence of their common understanding regarding the requirement of ratification in the case of certain types of treaties. It seems necessary for the Commission to be cautious, however, in admitting the general relevance of the constitutional practice of individual States in the present connexion, having regard to the rules which it has laid down in article 4 concerning the authority of representatives and in article 31 concerning the irrelevance of a violation of internal law except in cases where the violation is manifest. The point in the present article is a distinct one relating to the intention of the parties at the time of the conclusion of the treaty. But too broad a reference to the constitutional practice of individual States as evidence of intention might be interpreted as, in effect, bringing the requirements of internal law regarding the validity of treaties into international law by the back-door. For this reason the Special Rapporteur doubts whether it would be advisable to refer specifically to the practice of a single signatory State in concluding treaties with third States as evidence of the common intention of all the signatories with respect to the requirement of ratification. The question of the practice of individual States should, it is thought, be dealt with separately in the manner suggested in the next paragraph of these observations. The Special Rapporteur suggests that the Commission should not go beyond inserting, immediately after paragraph 1 of the alternative texts proposed above, a second paragraph on the following lines:

"2. Among the circumstances which may be taken into account under paragraph 1 (b) is any established practice of the States concerned in concluding prior treaties of the same character between themselves."

8. The second question which remains is the point made by the Danish Government that the article should not rule out the possibility that a treaty may be subject to ratification by one party while coming into force for the other party immediately on signature. Instances where this happens are certainly found in practice, particularly where the constitution of one of the parties, as in the case of the United Kingdom, does not contain specific provisions respecting the ratification of treaties, while that of the other party does contain such provisions. The existing text of the article already recognizes in paragraphs 2 (b) and 3 (c) the possibility that a treaty may be subject to ratification by some parties but not necessarily by all. The obvious cases are where the full powers issued by a particular State or statements made by its representative indicate clearly that its signature is intended to be binding or, alternatively, to be subject to ratification. In these cases, it is thought, the intention of the individual State must prevail, unless the treaty contains an express provision in the opposite sense. Accordingly, it is suggested that the point made by the Danish Government should be met by adding a third paragraph to the revised draft, which might be on the following lines:

"Notwithstanding anything in the foregoing paragraphs:

"(a) Unless a treaty expressly provides that it shall be subject to ratification, a particular State may consider itself bound by its signature alone where it appears from the terms of the instrument of full powers issued to its representative or from the preparatory work of the treaty that the other States concerned were informed that its signature was intended to be binding without ratification.

"(b) Unless a treaty expressly provides that it shall come into force upon signature, a particular State may consider the treaty as subject to ratification by that State, where it appears from the terms of the instrument of full powers issued to its representative, or from the preparatory work of the treaty, that the other States
concerned were informed that its signature of the treaty was intended to be conditional upon a subsequent ratification.

Article 13. — Accession

Comments of Governments

Japan. The Japanese Government observes that, if articles 8 (Participation in a treaty) and 9 (The opening of a treaty to the participation of additional States) are deleted as it proposes, it will be necessary to incorporate in the present article the provisions of paragraph 2 of article 9.

Sweden. Given the provisions in articles 8 and 9, and the freedom of States to prescribe in a treaty the applicable procedures for participation in it, the Swedish Government doubts the need to retain the present article.

United States. The United States Government stresses that the acceptability of this article is dependent on the acceptability of articles 8 and 9 to which it is linked. It further observes that the article, as at present worded, may raise a question whether article 11 would permit the admission of new States to membership in the United Nations in disregard of the provisions of the Charter, more especially in the light of the rules formulated in article 9 of the draft articles. In this connexion it advances certain criticisms of paragraph 1 (a) of article 9, which are set out in the Special Rapporteur's comments on that article.

Argentine delegation. The delegation concurs in the Commission's decision not to deal specifically in the draft articles with the anomalous case which has occasionally occurred in practice of an "accession" expressed to be "subject to ratification". 79

Colombian delegation. While recognizing that articles 8, 9 and 13 are based on current practice, the delegation makes certain observations with respect to articles 8 and 9 (see its comments under article 8). 80

Romanian delegation. The delegation concurs in the Commission's decision not to endorse the doctrine that accession is impossible before the treaty has come into force; and also in its treatment of the problem of "accession subject to ratification". 81

Syrian delegation. The delegation proposes that in the terminology of the article a distinction should be drawn between "accession" and "adherence" to a multilateral treaty. In its view, the former should be restricted to cases of admission to a closed multilateral treaty, where specific formalities would have to be fulfilled, and the latter to cases of admission to an "open" multilateral treaty, where there would be no such formalities. 82

Observations and proposals of the Special Rapporteur

1. While appreciating the distinctions made by the Syrian delegation, the Special Rapporteur doubts whether there is any such general usage in the employment of the terms "accession" and "adherence" as would justify the Commission in introducing into the article the refinement suggested by that delegation.

2. Clearly, the general acceptability of the present article is linked to the acceptability of articles 8 and 9. But the intention in the present article is to state when the procedure of accession is the procedure used for exercising a right to become a party to a treaty rather than when a substantive right to become a party attaches to a State. Thus the article is designed to fit into the scheme of the draft articles whatever may be the rules ultimately adopted for articles 8 and 9.

3. No doubt, as the Swedish Government indicates, the substantive right to become a party will be covered, in one form or another, in articles 8 and 9, while the negotiating States are completely free to prescribe the procedures by which a State is to exercise that right. Accession, however, is one of the three basic procedures of treaty-making, and in a codifying convention it seems necessary to refer to it even if in a primarily descriptive article. Nor will the article lack legal content, since it touches the regularity of the act by which a State seeks to become a party to a treaty. A depositary, for example, will feel bound to insist upon an instrument of accession rather than of ratification if accession is the procedure prescribed for the State in question (see article 29, paragraph 4).

4. On the other hand, the article, as at present drafted, tends perhaps to suggest too much that the article is concerned with the substantive right to become a party to a treaty, which is the subject-matter of articles 8 and 9. This is due to the use of the expression "become a party" in the opening phrase of the article and in paragraph (a). This expression is also unsatisfactory for another reason, in that "accession" may not in modern practice at once constitute the acceding State a "party", if the treaty is not yet in force. "Accession", as is indeed expressly provided in article 16, establishes the consent of the State to be bound by the treaty, and may or may not also make it at once a party to the treaty.

5. The Special Rapporteur accordingly proposes that the text of the article should be revised to read as follows:

"Subject to articles 8 and 9, a treaty may be acceded to when a State has not signed the treaty and

"(a) the treaty specifies accession as a procedure which is open to that State; or

"(b) the treaty has subsequently become open to accession by that State."

Article 14. — Acceptance or approval

Comments of Governments

Japan. The Japanese Government advocates that the article should be confined to "acceptance". In its view, "approval" is employed in practice in most cases as a simplified procedure of ratification, and should be included in article 12, not the present article. (See the Japanese Government's comments on article 12.)
**Luxembourg.** The Luxembourg Government reiterates its view that the use of the notion of “approval” in international law as a substitute for either ratification or accession merely creates confusion, and that the term “approval” should be eliminated altogether from the draft articles. It also considers that “acceptance” should not be dealt with in the present article or in the three following articles as a distinct treaty-making procedure. Regarding “acceptance” simply as another name given to what is really either “ratification” or “accession”, it proposes that the notion of “acceptance” should be dealt with in a new article to be inserted later — after the present article 17 — and to be worded as follows:

“The provisions of the foregoing articles concerning ratification shall be applicable to treaties signed subject to acceptance; the provisions concerning accession shall be applicable to treaties containing the provision that they shall be open to participation by simple acceptance, without prior signature.”

It is equally to be inferred from these proposals that the Luxembourg Government desires to see the present article disappear completely.

**Sweden.** Given the provisions of articles 8 (Participation in a treaty) and 9 (The opening of a treaty to the participation of additional States) and the freedom of States to prescribe in a treaty applicable procedures for participation in it, the Swedish Government doubts the need for prescription in a treaty applicable procedures for participation of additional States) and the freedom of States to prescribing the exercise of the treaty-making power (see article 4), the delegation expresses its concern at the sharp distinction made by the Commission between constitutional and international procedures as they actually appear in treaties. “Approval” should be eliminated altogether from the draft articles or of simply providing that it is to be governed either by the rules concerning ratification or by those governing accession, is not without its attractions. The subsidiary and derivative character of acceptance would be emphasized and the wording of one or two other articles might be slightly lightened by deleting the word “acceptance”. Moreover, the suggested later article might deal with “approval” in the same way. The Special Rapporteur considered this possibility when preparing his first report. But it seems more correct to refer to “acceptance” and “approval” as distinct procedures because they are used as such in treaties and may even appear alongside ratification and accession in one and the same treaty. Indeed, it also seems somewhat safer to do so because acceptance, at least, is sometimes used rather as a substitute for simple signature than for either of the other two procedures. Accordingly, it is felt that “acceptance” and “approval” should be retained, where they are in the scheme of the draft articles.

3. The opening phrase of the article, on the other hand, appears to the Special Rapporteur to require modification in the same manner as the corresponding phrase of article 13. He accordingly proposes that it should be revised so as to read:

“Subject to articles 8 and 9, a treaty may be accepted or approved when...”

**Article 15. — The procedure of ratification, accession, acceptance and approval**

**Comments of Governments**

**Japan.** The Japanese Government considers that paragraphs 1 (b) and 1 (c) are too technical and trivial to merit inclusion; and that paragraph 2 merely states what is obvious and should be omitted. It further considers that paragraph 3 should be transferred to Section V (Correction of errors and the functions of depositaries). In result it proposes that the whole article should be deleted, the substance of paragraph 1 (a) being incorporated in article 16 (see its revised draft, article 16).

**Luxembourg.** The Luxembourg Government, as explained in its comments on article 1 (d) and article 14, considers that all references to “acceptance” and “approval” should be deleted from this article. It also proposes that in paragraph 1 (c) the expression “two alternative texts” should be used instead of “two differing texts”. In paragraph 2 (a) it points out that in the French text the word certifié (similarly in the Spanish text the word certificados) refers to the exchange of instruments and ought to be in the

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83 *Ibid.,* 743rd meeting, paras. 21 and 22.
singular. In addition, the Luxembourg Government draws attention to the relation between paragraph 2 of the present article and article 23 (Entry into force of treaties). In its view, a distinction must be drawn between the procedure used to achieve ratification, accession or acceptance (with which article 15 is concerned) and the moment at which the treaty produces its effects (with which article 23 is concerned). On the latter point it thinks that a further distinction must be drawn between the time of the engagement of the parties (which occurs on the meeting of wills recorded in the exchange or deposit of formal documents) and the time of the entry into force of the treaty (which may occur at a later date). It considers that articles 15 and 23 should be revised so as to take account of these distinctions.

Sweden. The Swedish Government observes that, while some provisions of this article contain important legal rules, others are exclusively procedural. In paragraph 1 (c), for example, it is provided that, where a treaty offers two alternative texts, the instrument of ratification must indicate to which text it refers, but nothing is said as to the legal position in case of a failure to do so.

United States. In general, the United States Government favours the inclusion of this article, subject to certain drafting suggestions. In paragraph 1 (a) it proposes that the phrase "a written instrument" should be expanded so as to read "a signed written instrument" or "a written instrument signed by an appropriate authority". Otherwise, paragraph 1 (a) might be understood as authorizing the practice which is occasionally encountered of submitting an instrument that bears merely a stamped seal; such an instrument the United States Government considers to be insufficient evidence of a State's intention to ratify, accept or approve an international agreement. Paragraph 3, it thinks, should specifically require the depositary to notify signatory States not merely of the fact but also of the date of the deposit of an instrument of ratification, accession, etc., as depositaries sometimes fail to include this important point in the notification. On the other hand, it considers that the requirement that the depositary should notify signatory States of "the terms of the instrument" of ratification, accession, etc., goes beyond existing practice and might both be burdensome to depositaries and delay transmission of the notification. The general practice of depositaries, it believes, is to notify the deposit of the instrument on a certain date together with the text of any reservation or understanding included in or accompanying the instrument when it is deposited. It suggests that the final clause of paragraph 3 should be revised so as to read "and the other signatory States shall be notified promptly both of the fact and of the date of such deposit".

Mexican delegation. The delegation\(^44\) suggests that it may be advisable to insert a provision that ratification must be unconditional, such as appears in article 6 of the Convention on Treaties prepared by the Sixth International Conference of American States.\(^45\)

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\(^{44}\) Ibid., 739th meeting, para. 23.

**Observations and proposals of the Special Rapporteur**

1. The Special Rapporteur shares the view of the Japanese Government that paragraph 3 should be transferred to section V, dealing with the functions of depositaries; or, more exactly, he thinks that paragraph 3 is otiose, having regard to the provisions of article 29, paragraph 3 (d), which covers the same point. Paragraphs 1 and 2, however, he considers, should be maintained, subject to the modifications mentioned below.

2. In paragraph 1 (a) the Special Rapporteur suggests that the proposal of the United States Government should be adopted, but in the form of the addition at the end of the paragraph of the words:

   "signed by a representative possessing or furnished with the necessary authority under the provisions of article 4".

While not dissenting from the point made by the Mexican delegation, the Special Rapporteur doubts whether it would be appropriate to include a specific reference to it in the present article. The term "unconditional" is susceptible of more than one interpretation, and might be thought to embrace "reservations", the making of which is governed by article 18. Moreover, the point which the delegation seeks to include in the articles seems to be covered by implication in article 16, which provides that the communication of an instrument of ratification etc. establishes the consent of the State to be bound by the treaty.

3. In paragraph 1 (b), the Special Rapporteur feels that in order to avoid any appearance of inconsistency with the provisions of article 18 regarding reservations, it may be desirable to insert at the beginning of the paragraph the words: "Subject to article 18 and".

4. In paragraph 1 (c), the Special Rapporteur shares the view of the Luxembourg Government that the expression "two alternative texts" is preferable to "two differing texts"; and he considers that an appropriate addition should also be made to the paragraph in order to meet the objection of the Swedish Government that it does not state the legal position in the event of the instrument's failing to indicate the text to which it relates. He suggests that the paragraph should be revised as follows:

   "If a treaty offers to the participating States a choice between two alternative texts, the instrument of ratification must indicate the text to which it relates. In the event of a failure to do so, the ratification shall not be considered as effective unless and until such indication has been given by the State concerned."

5. In paragraph 2, as the Luxembourg Government points out, the word "certificados" ought to be in the singular; and the same applies to "certificados" in the Spanish text. There remains the point made by the Luxembourg Government as to the distinction between the procedure to achieve ratification, accession, etc., the moment at which the treaty produces its effects, and the moment at which the engagement of the parties occurs. The Special Rapporteur doubts whether anything more is needed to establish these distinctions in the draft articles. The Luxembourg Government refers only to articles 15 and 23. But the distinction...
between the time of the engagement of each individual contracting State and the entry into force of the treaty is also made in article 11, paragraph 3, article 16, paragraph (b), article 17, paragraph 2, and article 20, paragraph 2 (a); and paragraph 4 of article 23 makes it clear that, although the entry into force of the treaty will normally make the rights and obligations of the treaty immediately applicable, this will not be so if the treaty otherwise provides. In the present paragraph the neutral expression “the instrument becomes operative” (et instrument produit effet; el instrumento surtido efecto) is used deliberately in order to underline that it is the instrument, and not its legal effects, with which the article deals. Moreover, the distinction is further underlined by the fact that the very next article is specifically devoted to the legal effects of ratification, accession, etc. If all the articles are read together, as they must be, it is thought that they sufficiently cover the point made by the Luxembourg Government.

6. As stated above, paragraph 3 is really covered by article 29, paragraph 3 (d), and it is proposed that the paragraph should be omitted. If this is done, the point made by the United States Government that paragraph 3 goes too far in requiring a depositary to notify the terms of the instruments will automatically be met, since this requirement does not appear in article 29, paragraph 3 (d). The other point made by that Government, that notification of the date of deposit should be required, is not, however, covered in article 29, paragraph 3 (d). The point is thought to be a valid one, and the Special Rapporteur proposes that it should be met by an appropriate modification of article 29, paragraph 3 (d).

Article 16. — Legal effects of ratification, accession, acceptance and approval

Comments of Governments

Finland. The Finnish Government raises the question whether or not a provision should be included regarding the possibility of revoking a ratification, accession, etc. It observes that a revocation may have a harmful effect on the position of other signatories, but that equally it may be unjust not to allow revocation under any conditions; for example, it would seem anomalous if the treaty itself provided for a right of denunciation but a ratifying State during the period before the treaty came into force could not withdraw its ratification.

Luxembourg. The Luxembourg Government, as it explains in its comments on article 1 (d) and article 14, considers that the references to “acceptance” and “approval” should be deleted from the present article.

United States. While expressing its general agreement with the article, the United States Government points out that in the opening phrase the reference to article 13 is incorrect and should be to article 15. (This remark applies to the English and Spanish texts; the reference in the French text is correct.)

Argentine delegation. The delegation agrees with the Commission’s decision to exclude, in connexion with this article, the doctrine of the retroactive operation of ratification. 86

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur, for reasons already given in his observations on article 1, paragraph 1 (d), and article 14, does not favour the deletion of the references to “acceptance” and “approval” from the present article.

2. The force of the point made by the Finnish Government regarding the revocation of ratification, accession, etc., is recognized; but this point appears to arise under article 17 rather than under the present article.

3. As pointed out by the United States Government, the article mentioned in the opening phrase has to be corrected to article 15 in the English and Spanish texts. In addition, the opening phrase of the article is thought to require a small modification. Article 15, paragraph 2 (b), provides that, where there is a depositary, the instrument is to become operative not upon “communication” but upon “deposit” with the depositary. Accordingly it is suggested that the opening phrase of the present article should be revised to read:

“The communication or, as the case may be, deposit of an instrument of ratification, accession, acceptance or approval in conformity with the provisions of article 15, paragraph 2.”

Article 17. — The rights and obligations of States prior to the entry into force of the treaty

Comments of Governments

Australia. The Australian Government considers that the article goes too far, as it feels that, if a State leaves a conference or votes against adoption, it can have no obligation with respect to the outcome of the conference or vote. It proposes that the words “negotiation, drawing up or adoption of a treaty or which” should be deleted from paragraph 1.

Finland. The Finnish Government considers it doubtful whether the rule in paragraph 1 should apply to States which have only taken part in the negotiation or a treaty or in the drawing up or adoption of the text. In addition, as noted by the Special Rapporteur in his observations on article 16, the point made by the Finnish Government with respect to that article, that it may be unjust not to allow revocation of a ratification, accession, etc., under any conditions, really concerns the present article. The Finnish Government there emphasizes how anomalous it would be if a treaty provided for a right of denunciation but a ratifying State were unable to withdraw its ratification during the period prior to the treaty’s coming into force.

Japan. In the view of the Japanese Government paragraph 1 places too great an obligation on States which have not yet decided to become parties to a treaty; and it proposes the deletion of the paragraph. It also doubts the wisdom of including any article of this character. It con-

86 Official Records of the General Assembly, Seventeenth Session Sixth Committee, 744th meeting, para. 5.
siders that in paragraph 2 the criterion for refraining from acts calculated to frustrate the objects of the treaty is too subjective and difficult of application. It would prefer to leave the matter entirely to the good faith of the parties and to omit the whole article.

**Poland.** The Polish Government is of the opinion that paragraph 1 goes too far in extending the obligation of good faith to States which only took part in the elaboration of the draft treaty or in the negotiations. Such a rule, it suggests, might lead some States to refrain from taking part in the negotiations for the conclusion of international treaties.

**Sweden.** The Swedish Government raises the query whether the rule which requires a State taking part in the negotiation of a treaty to refrain from acts calculated to frustrate its objects should be so widely framed as to cover States which have taken part in the negotiation reluctantly and expressing the strongest reservations about it. In general, it considers that the article goes too far in imposing obligations on States; for example, where a State only takes part in the drawing up of a treaty text within an international organization and perhaps even votes against the adoption of the text.

**United Kingdom.** Whilst considering the principle of the article to be sound, the United Kingdom Government thinks that it may give rise to difficulties in practice unless the drafting is made more precise. Phrases which it finds unclear are: in paragraph 1, “takes part in the negotiation” and “signified that it does not intend”; and in paragraph 2 “unduly delayed”.

**United States.** The article appears to the United States Government to be highly desirable. So far as concerns action after signature or deposit of an instrument of ratification, accession, etc., it regards the provisions of the article as reflecting generally accepted norms of international law. Broadening the article to cover the period of negotiation and drawing up until the time of adoption, in its view, goes beyond what is generally considered to be the existing position, though it thinks this to be a desirable improvement in the law.

**New Zealand delegation.** The delegation has misgivings about extending the obligation to all States associated with the treaty-making process. In its view, it is *prima facie* inequitable to apply it to a State which participates in the whole treaty-making process with the strongest reservations.

**Observations and proposals of the Special Rapporteur**

1. The view that paragraph 1 may go too far in extending the legal obligation of good faith to States which only took part in the negotiation or drawing up of the treaty appears to have some substance. In truth, the objects of a treaty cannot be said to be finally defined or legally established until its text has been “adopted” by the negotiating States. Consequently, it may not be justifiable to fix a negotiating State with an obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty unless it positively associates itself with those objects by signing the text or otherwise giving its vote to the adoption of the text. Politically and morally it is certainly desirable that negotiating States should be able to have a feeling of mutual confidence that they will not so act during the period of the negotiations as to frustrate the performance of the obligations which they may ultimately undertake towards each other. The question is, however, whether any legal obligation attaches to them unless and until they have in some degree associated themselves with the actual provisions of the treaty. In the *Polish Upper Silesia* case the treaty had entered into force and the State concerned had ratified the treaty; moreover, the Court itself appears to have approached the matter from the point of view of whether the acts done prior to ratification constituted a breach of the treaty. One point of view might therefore be that the “good faith” obligation of a negotiating State not to frustrate in advance the objects of the proposed treaty is merely inchoate until the treaty enters into force with respect to that State; but that then it becomes complete on the State’s entering into the obligations of the treaty. In drafting article 17, however, the Commission took the position that an independent obligation not to frustrate the objects of a proposed treaty attaches to a State when it takes part in the negotiations or in the drawing up or adoption of the text; and *a fortiori* when it ratifies, accedes to, accepts or approves the treaty.

2. No doubt paragraph 1, as drafted by the Commission, places the obligation of good faith on a State only “unless and until it shall have signified that it does not intend to become a party to the treaty”. But it is arguable that this proviso may not suffice to exempt from the obligation a State which withdraws from the negotiations or votes against the adoption of the text, but to which under the terms of the treaty it nevertheless remains open to become a party. Thus under the existing draft, the obligation of good faith may appear to attach to such a State unless and until it afterwards signifies that it does not intend to avail itself of its right to become a party. The Special Rapporteur shares the view of those Governments which feel that paragraph 1 should be revised so as not to appear to place the obligation of good faith on a State which dissociates itself from the text of the treaty.

3. The Special Rapporteur also considers that in paragraph 2 effect should be given to the suggestion of the Finnish Government that, where a treaty is subject to denunciation, a State which has bound itself by signature, ratification, etc., should equally be able to withdraw from the treaty during the period before it comes into force.

4. In order to meet the United Kingdom Government’s criticism of the expression “signified that it does not intend” in paragraph 1, the Special Rapporteur suggests that it be replaced by the expression “notified the other signatory States that it renounces its right to ratify... the treaty”. As to the expression “unduly delayed”, which that Government also criticizes as wanting in precision, its object was simply to put a reasonable limit on the duration of the obligation, should the treaty continue more or less indefinitely to lack the number of signatures, ratifications, etc., necessary to bring it into force. It is not

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87 Ibid., 742nd meeting, para. 5.

easy to give further precision to the expression except by specifying a definite period of years. The Special Rapporteur tentatively suggests ten years as a reasonable period, having regard to the fact that the rule is intended to be of general application. He also suggests that the question of a time-limit arises under paragraph 1; and that the appropriate solution may be to cover the point in a separate paragraph placing a time-limit on the application of both paragraphs 1 and 2.

5. In the light of the above observations, the Special Rapporteur suggests that article 17 should be revised to read as follows:

"1. Prior to the entry into force of a treaty —
   "(a) a State which has signed the treaty subject to ratification, acceptance or approval is under an obligation of good faith to refrain from acts calculated to frustrate its objects unless such State shall have notified the other signatory States of the renunciation of its right to ratify or, as the case may be, to accept or approve the treaty;
   "(b) a State which, by signature, ratification, accession, acceptance or approval, has established its consent to be bound by the treaty is under the same obligation, unless the treaty is subject to denunciation and that State shall have notified the other States concerned of its withdrawal from the treaty.

"2. However, the obligations referred to in the preceding paragraph shall cease to apply ten years after the date of a State's signature, ratification, acceptance, or approval of the treaty if the treaty is not then in force."

SECTION III: RESERVATIONS

Title to the Section. Assuming that "General Provisions" becomes a separate "part" and that the "Conclusion of Treaties" becomes part II, it will be necessary to rename the present title "section II". In addition, the Special Rapporteur shares the view of the United States Government that it would be more appropriate to call the subject of the section "Reservations to multilateral treaties". The articles which it contains are directed to reservations to multilateral treaties, while the notion of a reservation to a bilateral treaty is legally somewhat meaningless. In law, a reservation to a bilateral treaty appears purely and simply as a counter-offer and, if it is not accepted, there can be no treaty. However, in order to remove the slightest possible risk of misunderstanding, it is proposed that the title to the section should explicitly confine its contents to reservations to multilateral treaties.

Article 18. — Formulation of reservations

Article 19. — Acceptance of and objection to reservations

Article 20. — The effect of reservations

Comments of Governments

Australia. The Australian Government considers that article 19, paragraph 3, may in practice be unworkable. In its view, a non-party should not be obliged to formulate objections within twelve months of the making of a reservation if that occurs before the treaty is in force; indeed, it feels that no State should be obliged to object to a reservation before it becomes a party itself, and that States do not do so in practice. It believes that the Commission's proposal may lead to many "interim" objections put in to safeguard a State while it determines its final position, and that paragraph 3 should apply to existing parties only; any other State should be regarded as accepting if it does not object either on becoming a party or within some reasonable time thereafter. Paragraph 4 it thinks undesirable; for a State may have a number of reasons for delaying ratification, and its objection should still be enforceable at whatever date it does so. It concedes that delay in ratification would cause difficulties in treaties falling under article 20, paragraph 3; and it suggests that paragraph 4 of article 19 should be transferred to article 20, paragraph 3, as sub-paragraph (c). On the other hand, it thinks that much the preferable solution would be to adopt its proposed amendment of article 19, paragraph 3, which, in its view, would make it possible to dispense with paragraph 4 altogether.

In article 20, the Australian Government finds two problems. First, paragraph 2 (a) appears to it to make the reservation State a party vis-à-vis an accepting State at a stage when the reserving State, because a reservation may be made at signature, may not be a party to the treaty. It also suggests that on its face paragraph 2 (a) may appear to make a failure to object to a reservation formulated by an unrecognized State have the result of specifically creating a bilateral treaty relationship with that State. It would accordingly prefer the paragraph to read: "constitutes the reservation a part of the treaty in its application between the reserving and the accepting State." It also feels that it may be desirable in this or in some other article to deal with the effect of a reservation on the status of the reserving State as a party to the treaty both before and after acceptance of the reservation. Secondly, paragraph 2 (b) it thinks is unsatisfactory in appearing to treat as ineffective an objection on grounds other than incompatibility with the object and purpose of the treaty. Such a provision appears to it unacceptable in principle and inconsistent with article 19, paragraph 1 (d). It proposes that the words "which considers it... purpose of the treaty" should be deleted.

Austria. The Austrian Government considers that, while the opposition of one single State to a reservation should not have the effect of preventing the accession of the reserving State, equally a reservation opposed by a larger number of States — perhaps even the majority — should not be regarded as admissible. In addition, it thinks that the provisions on reservations, and particularly article 20, should make it clear that, on acceptance of a reservation by another party, the treaty will come into force for the two States concerned excluding the provisions to which the reservation relates. In its view, the articles in their present form leave it doubtful as to whether the treaty applies in full to the State which accepted the whole text and the doubt ought to be cleared up by a reference to the principle of reciprocity.

Canada. The Canadian Government observes that, as the articles are at present drafted, a question might arise as
to whether compatibility with the object and purpose of the treaty is to be the basis on which a State may make a reservation (article 18 (1) (d)) or on which it may object to a reservation (article 20 (2) (b)). If the former, the contracting States would still be entitled to object to reservations on other grounds. Interpreting the Commission’s intention to be to make compatibility with the object and purpose of the treaty both a prerequisite for the admissibility of a reservation and the only ground upon which an objection can be taken to it, the Canadian Government suggests that the latter point should be more clearly stated in order to remove any basis for an argument that States may still object to reservations on other grounds. It further suggests that consideration should be given to extending the criterion of “compatibility with the object and purpose” equally to reservations made pursuant to express treaty provisions in order not to have different criteria for cases where the treaty is silent on the making of reservations and cases where it permits them. In addition, the Canadian Government suggests that in article 19 it is desirable to consider whether the presumption of a State’s consent to a reservation should not be excluded in the case of a State which does not recognize the State making the reservation.

**Denmark.** While welcoming the Commission’s proposals as a constructive attempt to solve the intricate problem of reservations, the Danish Government suggests that the scheme followed in articles 18-20 may have complicated unduly the wording of the articles. It also makes certain observations on the texts as they stand.

In article 18, paragraph 1, it considers that the words “when signing, ratifying, acceding to, accepting or approving a treaty” are unnecessary as they are spelled out in paragraph 2. Nor does it think that paragraph 1 (d) ought to be dealt with as a case of inadmissibility of reservations. The criterion of “compatibility with the object and purpose of the treaty” is subjective, and depositaries, whose functions do not include adjudicating upon the validity of a reservation, may feel uncertain under paragraph 1 (d) as to their obligation regarding the communication of a reservation which they consider to be clearly inadmissible.

Article 19 may, the Danish Government thinks, give the impression that it applies to any reservation, including those which are inadmissible. Where, however, a reservation is such as is prohibited by the treaty, expressly or impliedly, another party cannot accept it and equally is not called upon to object to it in order to prevent it from becoming effective. It also suggests that paragraph 2, which it considers to be self-evident, could safely be omitted.

Article 20, paragraph 2, the Danish Government considers defective in that it appears to leave open the question as to the effect of an objection to a reservation which is not considered to be incompatible with the object and purpose of the treaty but which is objected to on another ground, in particular, on the ground of the importance attached by the objecting State to the provision to which the reservation relates. It advocates the inclusion in the article of the rule mentioned in paragraph 13 of the Commission’s commentary, namely, the rule that “a State which within a reasonable time signifies its objection to a reservation is entitled to regard the treaty as not in force between itself and the reserving State”. In addition, it advocates that paragraph 2 should deal explicitly with the objective question of the status of the reserving State in relation to the treaty, i.e., the conditions under which it is to be regarded as a “party” for purposes of clauses dealing with the entry into force, revision, etc., of the treaty. As to paragraph 3 concerning treaties between a small group of States, the Danish Government considers that in these cases express acceptance should always be required. In paragraph 4, having regard to the decisive weight to be attached to the integrity of constituent instruments of international organizations, the Danish Government considers that the admissibility of every reservation, whether or not another party has lodged an objection, should be submitted to the competent organ for decision. In its view, the possibility of implied or tacit acceptance should not be left open in these cases.

Finally, in the light of the above observations and with the object of simplifying the general structure of the articles, the Danish Government presents for consideration a redraft of articles 18-20 the text of which appears on pages 34-38 of the “Comments by Governments”.

**Finland.** In the view of the Finnish Government, article 18, paragraph 1, could be simplified either by combining sub-paragraphs (a), (b) and (c) into one paragraph or by regarding sub-paragraph (a) as sufficient by itself.

**Japan.** The Japanese Government does not accept the rules proposed in these articles. In its view, the basic rule should be the reverse: that a State may make a reservation only if the parties do not intend otherwise. It fears that reservations may provide a means through which the whole system of the agreement embodied in the treaty may be brought to the ground; and it considers that the proposed rule would encourage the making of reservations. It also underlines that the proposed rule must be regarded as residual in nature and applicable only when the treaty itself is silent upon the making of reservations. The Japanese Government further finds an inconsistency between article 18, paragraph 1 (d), under which a reservation incompatible with the object and purpose of the treaty appears to be regarded as null and void, and article 20, paragraph 2 (b), which appears to leave the application of the text of compatibility to the discretion of the individual parties. It holds that it would be more logical to have a system under which the general intention of the parties as a whole would be ascertained, whether by a majority decision or by unanimity. In this connexion, it observes that the opinion given by the International Court in the *Reservations to the Genocide Convention* case was limited to that particular Convention and to the intention of the parties with regard to that Convention; and that there is no need, in proposing a rule *de lege ferenda*, to follow the line adopted by the Court in that opinion. Finally, the Japanese Government notes that not infrequently a difficulty arises in practice of determining whether a statement

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98 In document A/CN.4/175 (mimeographed).
99 *I.C.J. Reports, 1951*, p. 15.
is in the nature of a reservation or of an interpretative declaration. It suggests that a new provision should be inserted in paragraph 2 of article 18 in order to overcome this difficulty (see article 18, paragraph 2, of Japan's suggested revised version of the articles). 81 Under this provision a declaration not entitled as a reservation would not be governed by the rules about tacit acceptance contained in article 19.

Poland. The Polish Government raises the question whether the formula in article 18, paragraph 1 (d), “incompatible with the object and purpose of the treaty”, which it regards as very wide, would not lead in practice to a considerable restriction of the right of States to make reservations to treaties. It suggests that such a restriction might in turn reduce the possibility of their participation in certain treaties, which would, it thinks, be particularly undesirable in the case of general multilateral treaties.

Sweden. In general, the Swedish Government thinks that articles 18-20 represent a respectable effort to cover the problem of reservations but that further analysis is necessary and perhaps even more differentiation between the various types of treaties. At the same time, it teels that articles 18 and 19 contain much that simply exemplifies what the parties may prescribe or that merely amounts to procedural rules which would fit better into a code of recommended practices.

United Kingdom. The United Kingdom Government notes that article 18 deals only with reservations and that there may be difficulty in applying the problem of reservations but that further analysis is necessary and perhaps even more differentiation between the various types of treaties. At the same time, it teels that articles 18 and 19 contain much that simply exemplifies what the parties may prescribe or that merely amounts to procedural rules which would fit better into a code of recommended practices.

United States. The United States Government considers that there may be a risk of confusion unless it is made clear that articles 18-20 are intended to apply only to multilateral treaties. It proposes that section III should therefore be given the title not simply of “Reservations” but of “Reservations to multilateral treaties”.

In article 18 the United States Government thinks that the word “formulate” is not clear and that it is really intended “to permit a State to propose a reservation and to become a party to a treaty with that reservation”. Paragraph 1 (d) it interprets as being completely subject to article 20, with the result that any State could become a party to a multilateral treaty under article 20, paragraphs 2 (a) and (b), if any one party accepts the reservation, regardless of objection by other parties and regardless of the “object and purpose of the treaty”. Under such an interpretation, it suggests, States could have become parties to the Charter with reservations which seriously weakened its structure. It also feels that paragraph 1 (d) does not take into account the nature or character of a multilateral treaty which in itself would preclude ratification with a reservation not accepted by all or at least by a large majority of the parties. It therefore proposes that paragraph 1 (d) should be revised as follows:

“In the case where the treaty is silent concerning the making of reservations, the reservation is incompatible with the object and purpose of the treaty, or the treaty is of such a character that each party to it must be in treaty relations with every other party.”

Article 19, paragraph 3, regarding tacit acceptance of reservations is considered by the United States Government to have merit so far as concerns admission to a treaty of States making reservations. It questions, however, whether a State should be presumed to be bound by a new treaty relation that it never expressly approves. In its view, a State failing to object should be excluded from preventing the reserving State’s participation in the treaty but should not be presumed to be in treaty relations with it unless the particular treaty contains indications to the contrary.

Article 20, paragraph 1 (a), suggests the United States Government, ought to allow for treaties which specifically permit reservations but require their acceptance by a given number or fraction of the parties. It therefore proposes the addition of the words “unless required by the terms of the treaty” at the end of this paragraph. With regard to paragraph 2 it reiterates its observations on the effect of this paragraph when read together with article 18, paragraph 1 (d). It suggests that consideration should be given to the relation between these provisions and the ratification of amendments to the Charter adopted under its Articles 108. Paragraph 2 (a) it considers to need clarification because the words “any State to which it is open to become a party” might seem to contemplate that a State which is entitled to become a party but never in fact does so should be able, by accepting a reservation, to bring the treaty into force between that State and the reserving State. Paragraph 2 (b) the United States Government finds unsatisfactory in that the paragraph seems to imply that a State may not object to a reservation on any ground other than that it is “incompatible with the object and purpose of the treaty”. A State may feel that, because of the type of treaty and the circumstances, a given reservation by another State would render relations between the two States inequitable. If the criteria for objecting to a reservation are limited to “incompatibility”, the treaty rights expected by a ratifying State might be changed considerably by reservations to which it did not consent. Such a result, it points out, would not be consistent with the principle found in paragraph 4 of the Commission's introduction to its commentary on articles 18-20. In paragraph 4 the United States Government considers the phrase “the effect of the reservation” to be unclear, but assumes that it is intended to relate to the question whether or not the reserving State shall or shall not be considered a party to the constituent instrument of the organization. In its view, if the paragraphs were intended to cover all the legal aspects of the reservation, including the legal relations

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81 See document A/CN.4/175.
between the several parties, it would conflict with the principle "no reservation can be effective against any State without its agreement thereto". Although the United States Government thinks that article 21 makes it clear that the objecting State's rights would be preserved, it considers that paragraph 4 ought to be drafted in more precise terms in order to avoid any difficulties on this point. It further expresses the view that, even if paragraph 4 is limited to the question of membership, it could give rise to difficulties and confusion, as an objecting State may feel that it ought not to be bound in any way nor its interests affected by the vote of the reserving State in the decisions of the organization. In this connexion it recalls the Commission's observations on the handling of the alleged reservation to the IMCO Convention and its conclusions thereon in paragraph 25 of its commentary, and the United States Government poses four questions:

(1) Was the reservation in the IMCO case an appropriate one on which to base a rule of international law?

(2) Is the IMCO precedent, in view of the essentially consultative character of the organization, applicable to other organizations whose character may be quite different, e.g., the International Atomic Energy Agency or the International Labour Organization?

(3) As the effect of a reservation is essentially a legal matter, does not paragraph 4 assign to an international organization functions that should more properly be handled by the International Court?

(4) Is it proper to assume that "integrity of the instrument" involves not only the integrity of the organizational structure but also the integrity of commitments by States that ratify without reservations and that the latter is not normally a matter for determination by a body constituted for other than juridical purposes?

Argentine delegation. The delegation endorses the view that considerable flexibility with regard to participation in general multilateral treaties should be allowed. It stresses the many points of agreement between the Commission's drafts and the work of the fourth session of the Inter-American Council of Jurists in 1959. The chief difference between the two drafts is that under the Pan-American doctrine, where a treaty is silent on the question of reservations, a reservation may be valid even if incompatible with the object of the treaty. Acceptance of the reservation would bring the treaty into force between the reserving and the accepting State. The delegation further expresses the view that it would be desirable to apply the criterion in article 20, paragraph 4, to treaties drawn up by an international organization or an international conference, and to provide that the instrument should indicate the fundamental articles which could not be subjected to reservations. 

Brazilian delegation. The delegation states that its approach to the question has been much modified by the opinion of the International Court in the Reservations to the Genocide Convention case; and it expresses the view that in an era when a 100 States may be involved in the negotiations the need to formulate reservations, in view of their political, economic and social differences, may make that opinion more widely acceptable. In general it expresses approval of the line taken by the Commission in its drafts. In regard to article 20, paragraph 3, however, it feels that the expression "a small group of States" is too vague. How many States, it inquires, would constitute such a group? May other factors come into consideration, such as the nature of the relations between the States or the region to which they belong?

Colombian delegation. The delegation expresses the view that the draft articles are almost entirely correct in their interpretation of existing requirements; it also recalls some of the background to the resolution of the Inter-American Council of Jurists on reservations.

Czechoslovak delegation. The delegation suggests that the Commission should reconsider the provision in article 20, paragraph 2 (b), concerning the legal effects of an objection to a reservation. The presumption in that paragraph is that objections will have the maximum effect, i.e., that the objecting State will consider the whole treaty ineffective in its relations with the reserving State. The delegation considers that the presumption should be in favour of the minimum effects, i.e., that the objecting State would suspend the validity only of that part of the treaty to which the reservation relates. This rule would, it thinks, be more likely to broaden treaty relations among States and to prevent the formation of an undesirable vacuum in the legal ties between States.

Hungarian delegation. The delegation endorses the view that it is legitimate to assume that the power to make reservations without the risk of being totally excluded by the objection of one or even of a few States may be a factor in promoting a more general acceptance of multilateral treaties.

Iranian delegation. This delegation also endorses the view that the rule calculated to promote the widest possible acceptance of whatever common measure of agreement can be expressed in a multilateral treaty may be the one most suited to the immediate needs of the international community.

Irish delegation. The delegation does not favour the imposition of the time-limits in article 19, since to do so would place additional burdens on Foreign Offices which are lightly staffed.

New Zealand delegation. Having regard to the possibility of reservations being made to the articles on reservations, the delegation has hitherto preferred a code rather than a convention on reservations. However, it appreciates the Commission's reasons for adopting the convention method.
Romanian delegation. While generally endorsing the Commission’s approach to the problem of reservations, the delegation takes the view that article 20 should establish a presumption not of maximum but of minimum effects — suspension of the validity of only that part of the treaty covered by the reservation.\(^{101}\)

Syrian delegation. The delegation considers that the purpose of admitting the greatest possible number of States to general multilateral treaties would best be fulfilled by limiting the effect of the objection to the article or articles affected. It proposes that article 20, paragraph 2 (b) should be revised accordingly, and suggests that it be replaced by two sub-paragraphs giving effect to its view.\(^{108}\)

United Arab Republic delegation. The delegation expresses general approval of the solution proposed by the Commission.\(^{108}\)

Yugoslav delegation. The delegation considers that the Commission should not adopt a restrictive attitude with regard to the concept of reservations, and should bear in mind that the essential aim is to secure the widest possible participation in general multilateral treaties.\(^{104}\)

Observations and proposals of the Special Rapporteur

1. Two Governments refer to the distinction between a “reservation” and an “interpretative declaration”. The Japanese Government notes that not infrequently a difficulty arises in practice of determining whether a statement has the character of the one or of the other; and it suggests the insertion of a new provision in article 18, paragraph 2, to overcome the difficulty. This suggestion appears to the Special Rapporteur to overlook the fact that the term “reservation” is already defined in article 1, paragraph 1 (f), in terms which indicate that it is something other than a mere interpretative understanding of the provision to which it relates. Having regard to that definition, it is not thought necessary to underline the point again in article 18. Indeed, the other Government — the United Kingdom Government — actually notes that article 18 does deal only with reservations and, in effect, asks whether statement of interpretation are to be taken up in a later article.

2. Statements of interpretation were not dealt with by the Commission in the present action for the simple reason that they are not reservations and appear to concern the interpretation rather than the conclusion of treaties. In short, they appear rather to fall under articles 69-71. These articles provide that the “context of the treaty, for the purposes of its interpretation” is to be understood as comprising “any agreement or instrument related to the treaty and reached or drawn up in connexion with its conclusion” (article 69, paragraph 2); that “any agreement between the parties regarding the interpretation of the treaty” and “any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation” are to be taken into account “together with the context” of the treaty for the purposes of its interpretation (article 69, paragraph 3); that as “further means of interpretation” recourse may be had, inter alia, to the “preparatory work of the treaty and the circumstances of its conclusion” (article 70); and that a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning. Any of these provisions may come into play in appreciating the legal effect of an interpretative declaration in a given case. Interpretative statements are certainly important, but it may be doubted whether they should be made the subject of specific provisions; for the legal significance of an interpretative statement must always depend on the particular circumstances in which it is made. It may have been made during the negotiations; or at the time of signature, ratification, etc., or afterwards in the “subsequent practice” of the State in applying the treaty; and it may or may not have met with the express or implied agreement of the other States concerned. The substantive question in each case is whether the statement must be considered as having been expressly or impliedly accepted in one way or another by the other parties so as, in effect, to become part of the treaty.\(^{106}\) The question is not peculiar to statements of interpretation, though they may be the most obvious case; for it also applies to other statements made in connexion with the treaty, such as statements of intention or of policy. In the view of the Special Rapporteur the Commission was entirely correct in deciding that the matter belongs under articles 69-71 rather than under the present section; and the Commission will, no doubt, give it further consideration when it re-examines those articles at its session of 1966.

3. The problem of reservations was the subject of a prolonged examination at the fourteenth session.\(^{106}\) The Commission was agreed that, where the treaty itself deals with the question of reservations, the matter is governed by the terms of the treaty. It was also agreed that, where a treaty concluded between a small group of States is silent upon the question of reservations, the rule of unanimity applies. In the case of other multilateral treaties which are silent upon the question of reservations, opinion in the Commission was to some extent divided. Certain members of the Commission considered it essential that the effectiveness of a reservation to a multilateral treaty should be dependent on at least some measure of common acceptance of it by the other States concerned. They advocated a rule under which, if more than a certain proportion of the interested States (for example, one-third) objected to a reservation, the reserving State would be barred altogether from considering itself a party to the treaty, unless it withdrew the reservation. The view which prevailed in the Commission, however, was that in the case of general multilateral treaties and of other treaties having a large number of parties, a more flexible system is appropriate, under which each State would decide individually whether or not to accept a reservation and to regard the reserving

\(^{101}\) Ibid., 742nd meeting, para. 27.

\(^{108}\) Ibid., 739th meeting, para. 19.

\(^{108}\) Ibid., 744th meeting, para. 11.

\(^{104}\) Ibid., 743rd meeting, para. 16.


State as a party to the treaty for the purpose of the relations between the two States. Although they criticize certain aspects of the Commission's proposals, the comments of Governments, taken as a whole, appear to the Special Rapporteur to endorse the Commission's decision to try to work out a solution of the problem of reservations to multilateral treaties on the basis of the flexible system followed in the existing texts of articles 18-20.

4. The Special Rapporteur considers that there is substance in the contention of the Danish Government that, as at present drafted, article 19 may give the impression that the process of tacit consent provided for in that article applies equally to reservations prohibited by the treaty, and in its view that other States ought not to be called upon to take a position with regard to such reservations. In order to take account of this point and to simplify the logical arrangement of the different parts of articles 18-20, the Special Rapporteur proposes that the cases where the treaty expressly or impliedly forbids the making of the reservation should be separated from the cases where the treaty is silent concerning the making of reservations. This would mean, so far as substance is concerned, taking paragraph 1 (a), (b) and (c) of article 18 and paragraph 1 (a) of article 20 and making them into a separate article. On this basis, the following would be substituted for the present article 18:

"Article 18

"Treaties permitting or prohibiting reservations"

1. A reservation permitted by the terms of the treaty is effective without further acceptance by the interested States, unless the treaty otherwise provides.

2. Unless expressly agreed to by all the interested States, a reservation is inadmissible when:

(a) the making of the reservation is prohibited by the treaty or by the established rules of an international organization;

(b) the treaty expressly authorizes the making of specified reservations which do not include the reservation in question."

In paragraph 1 the words "unless the treaty otherwise provides" are inserted in order to take account of the possibility mentioned by the United States Government that a treaty may specifically authorize reservations but on condition of their acceptance by a specified number or fraction of the parties. One Government, it is true, suggests that the criterion of "compatibility with the object and purpose" should be made applicable equally to reservations made pursuant to express treaty provisions. The Commission, however, felt at its fourteenth session that, where the parties have themselves predicated what is or what is not an admissible reservation, that should conclude the matter. A conceivable exception might be where a treaty expressly forbids certain specified reservations and thereby implicitly permits others; for it might not be unreasonable to regard compatibility with the object and purpose as still an implied limitation on the making of other reservations. But this may, perhaps, go too far in refining the rules regarding the intentions of the parties, and there is something to be said for keeping the rules in article 18 as simple as possible.

5. The Special Rapporteur next suggests that a new article 19 should then deal with the proposing and the admission of reservations in cases where the treaty contains no provisions dealing with the question of reservations; in other words, the new article 19 would include the substance of article 18, paragraph 1 (d), and of article 20. On this basis the following would replace the present article 19:

"Article 19

"Treaties silent concerning reservations"

1. Where a treaty is silent on the question of reservations, reservations may be proposed provided that they are compatible with the object and purpose of the treaty. In any such case the acceptance or rejection of the reservation shall be determined by the rules in the following paragraphs.

2. When it appears from the nature of a treaty, the fewness of its parties or the circumstances of its conclusion that the application of its provisions between all the parties is to be considered an essential condition of the treaty, the reservation shall be effective only on its acceptance by all the parties.

3. Subject to article 3 (b.i), when a treaty is a constituent instrument of an international organization, acceptance of a reservation shall be determined by the competent organ of the international organization.

4. In other cases, unless the State concerned otherwise specifies:

(a) acceptance of a reservation by any party constitutes the reserving State a party to the treaty in relation to such party;

(b) objection to a reservation by any party precludes the entry into force of the treaty as between the objecting and the reserving State.

5. In cases falling under paragraph 4 a reserving State is to be considered a party to the treaty if and when one other State which has established its consent to be bound by the treaty shall have accepted the reservation."

6. Paragraph 1 of the proposed new article 19 restates in positive form the rule contained in the existing article 18, paragraph 1 (d), and it retains the criterion of "compatibility with the object and purpose" as a limitation on the freedom to propose reservations. One Government criticizes the Commission's use of the expression "formulate a reservation" in the existing article 18. It may be doubted whether this criticism is justified, since that article covered cases both of a right to make and of freedom to propose reservations, and it was necessary to employ a neutral term. If, however, the articles on reservations are rearranged in the manner suggested by the Special Rapporteur, the new article 19 will concern cases only of freedom to "propose" reservations, and this term is therefore substituted in paragraph 1 of this new article. As to the criterion of "compatibility with the object and purpose", the Polish Government queries whether it might not lead in practice to a considerable restriction of the right of States to make reservations to treaties; and it says that this would be particularly undesirable in the case of general multilateral treaties. Although for quite different reasons, the Danish Government also would prefer to see the element of "compatibility with the object and purpose" omitted from this provision. It feels that
the criterion is subjective and that depositaries, when confronted with a reservation which they think to be clearly inadmissible, may feel uncertain as to their obligation to communicate it to the other interested States. The Argentine delegation noted that under the Pan-American system a reservation may be valid even if incompatible with the object of the treaty. On the other side, the Canadian and United States Governments appear to advocate the emphasizing of the "compatibility" criterion in the present context. At the fourteenth session the Commission accepted the principle of compatibility with the object and purpose of the treaty as a general criterion of the legitimacy of reservations. The Special Rapporteur does not feel that the difficulty mentioned by the Danish Government is such as should lead the Commission to alter its view. The same difficulty may arise in the case of treaties containing imprecise provisions on the subject of reservations, and it is no part of the functions of a depositary to adjudicate upon reservations. The most that it is entitled to do is to express its doubts to the reserving State but, if the latter maintains its reservation, the depositary must communicate it to the other interested States (see article 29, paragraphs 5 to 8). The point made by the Polish Government is more fundamental, since it really questions the principle which the Commission accepted and which the Court applied in its opinion in the Genocide Convention case. While recognizing that the application of the criterion may involve some element of subjective appreciation, the Special Rapporteur is not persuaded of the cogency of the considerations referred to by the Polish Government. In the first place, it may be doubted whether interpretation of a treaty in good faith admits the possibility, in case of the treaty's being silent on the question of reservations, of attributing an intention to the parties to allow reservations incompatible with its object and purpose. The objects and purposes of the treaty, as the Commission recognized in adopting article 69 at its sixteenth session, are criteria of fundamental importance for the interpretation in good faith of a treaty. Moreover, in article 17 the Commission has proposed that a State which has signed, ratified, acceded to, accepted or approved a treaty should, even before it comes into force, be required to refrain from acts calculated to frustrate its objects. It would seem somewhat strange if in the present article a freedom to make reservations incompatible with the objects and purposes of the treaty were to be recognized. In the second place, the initial appreciation of whether the reservation is compatible with the object and purpose lies with the reserving State itself, which is unlikely to take an unduly strict view of the application of the criterion. Having regard to the extremely flexible system proposed by the Commission, under which a reserving State will become a party to the treaty so long as its reservation does not object to by one other party, it seems very unlikely that paragraph 1 of the proposed new article 19 (paragraph 1 (d) of the existing article 18) would exercise a material influence in inhibiting participation in multilateral treaties.

7. Paragraph 2 of the new article 19 covers the substance of paragraph 3 of the existing article 20. The Commission, as already noted, was agreed that the "flexible" system which it proposed for reservations to multilateral treaties between a considerable number of States is inappropriate for treaties concluded between a small group of States; and that in this type of multilateral treaty the rule of unanimity should apply. The Brazilian delegation criticizes the expression "small group of States" as being too vague; and the United States Government, in commenting on paragraph 1 (d) of the existing article 18, stresses that it does not take into account cases where the very nature of the treaty would preclude its being ratified with a reservation not accepted by all or at least by a large majority of the parties. The Commission experienced some difficulty in formulating a satisfactory definition of the multilateral treaties which should be regarded as subject to the unanimity rule for acceptance of reservations. Moreover, although the comments of Governments on reservations do not, on the whole, contain much criticism of the expression "small group of States", this is not the case with their comments on article 9, paragraph 2, where the phrase also occurs. Accordingly, it seems desirable for the Commission to look for some method of further defining the category of treaties which this expression is intended to denote. In article 9, the Special Rapporteur believes that, with a somewhat different approach, the drawing of the distinction can be avoided altogether. In the present context, however, the drawing of the distinction would appear to be inescapable, unless the rule of unanimity were to be regarded as applicable to all multilateral treaties, which is not the general view today. At root the question is one of the intention of the parties and to find a completely precise definition of the category of treaties in issue is not within the bounds of possibility. The problem is to find a definition which is workable for the present purpose if applied in good faith. The Special Rapporteur in paragraph 2 of the new article 19 has sought to make the criterion depend not simply on the number of the parties but on the question whether it must be presumed that the treaty is intended to apply at all times between all the parties; for this is the very point to which the distinction between the different categories of treaties is directed. In making this presumption, it is thought, regard should be had not only to the fewness of the parties but also to the nature of the treaty and the circumstances of its conclusion.

8. Paragraph 3 of the new article 19 covers the substance of paragraph 4 of the existing article 20. The Danish Government considers that in the case of a constituent instrument of an international organization the admissibility of every reservation, whether or not an objection has been lodged against it, should be submitted to the competent organ for decision; and that there should be no question of implied or tacit acceptance in these cases. The Special Rapporteur shares the views of the Danish Government on these points and also the view of the United States Government that the phrase "the effect of the reservation" is unsatisfactory and should be rendered "acceptance of a reservation". Paragraph 3 of the new article 19 and paragraph 4 of the new article 20 take these views into account. The United States Government appears to go further and to question whether an individual member should be bound to accept the decision of the
competent organ in its relations with the reserving State under the constituent treaty; and in general it queries the relevance of the IMCO precedent. The observations of the United States Government, in so far as they may imply that in the sphere of reservations an organization is never competent to interpret and apply its constituent instrument and that this function belongs exclusively to legal tribunals, appear to go too far. The question seems rather to be whether an organization is competent to decide, on behalf of its members, concerning the acceptance of a reservation. The Commission will no doubt re-examine this question; in the meanwhile the Special Rapporteur feels that he should formulate paragraph 3 on the basis of the principle adopted by the Commission. Clearly, the application of this principle is, however, subject to the "established rules of the organization", and it seems prudent to make a cross-reference to article 3 (bis). Again, as in the case of treaties falling under paragraph 2, he feels that it should be made clear that implied or tacit acceptance of reservations does not apply, and this is done in paragraph 5 of the new article 20.

9. Paragraph 4 of the new article 19 deals with acceptance and rejection of reservations and contains the two basic principles of the "flexible" system. Paragraph 4 (a) follows paragraph 2 (a) of the existing article 20 in not specifying "compatibility with the object and purpose" as an express condition for the acceptance of a reservation. One Government, the United Kingdom Government, takes the view that a reservation which is incompatible with the object and purpose of a treaty should not be capable of being accepted under article 19. It also observes that the rules proposed by the Commission might be more readily acceptable if their interpretation and application were made subject to international adjudication. The United States Government, while pointing out that the Commission's proposals might have unsatisfactory results with regard to certain types of treaty, does not appear to query the proposed rule in other cases. The Commission recognized that the "compatibility" criterion is to some extent subjective and that views may differ as to the compatibility of a particular reservation with the object and purpose of a given treaty. In the absence of compulsory adjudication, on the other hand, it felt that the only means of applying the criterion is through the individual State's acceptance or rejection of the reservation. It felt bound to infer that a State which expressly accepts, or makes no objection to, a reservation considers it to be compatible with the object and purpose of the treaty. Such an inference would seem to follow automatically from the fact that paragraph 1 of the new article 19 (paragraph 1 (d) of the existing article 18) only contemplates the admissibility of reservations "compatible with the object and purpose". In any event, acceptance of a reservation, whether express or implied, would seem necessarily to be conclusive in the bilateral relations between the accepting and reserving State on the principle *allegans contraria non audiendus est.* Accordingly, although the Special Rapporteur would see no objection to mention of the "compatibility" criterion in connexion with acceptance of reservations, he doubts whether it would alter the situation under the "flexible" system the adoption of which forms the basis of the Commission's proposals.

The point made by the United States Government concerning possible difficulties in connexion with particular types of treaty is partly covered by paragraphs 3 and 4 of the existing article 20, and falls under paragraph 2 of the new article 19; it is further discussed in paragraph 7 of these observations.

10. Paragraph 4 (b) of the new article 19 also raises a question as to the application of the "compatibility" criterion. Paragraph 2 (b) of the existing article 20, to which it corresponds, limits the freedom to object by impliedly confining it to reservations considered incompatible with the object and purpose of the treaty. The Canadian Government thinks that this implication should be made clearer. The Australian, Danish and United States Governments, on the other hand, maintain that a State should remain free to object to a reservation which it considers to be harmful to its own interests independently of the compatibility of the reservation with the object and purpose of the treaty; and they advocate the deletion of the limiting words. At the fourteenth session there was some difference of view amongst members of the Commission on this point. Certain members attached importance to applying the compatibility criterion at all points of the flexible system — proposing, accepting and objecting to reservations. Others thought that a State should be free to object to a reservation on the sole ground of its prejudice to their own interests. It was also felt that the difference might not be very great in practice, since a State objecting on grounds of its own interests would be likely at the same time to characterize the reservation as incompatible with the objects and purposes of the treaty. The Special Rapporteur considers that either solution can be justified in principle. On the one hand, the view may be taken that the silence of the treaty should be interpreted as implying consent to the making of reservations compatible with the object and purpose of the treaty, in which case consent to any particular reservation of that character must be held to have been given in advance. On the other hand, the view may equally be taken that the silence of the treaty implies no more than consent to the proposing of "compatible" reservations, in which case the right to object to a particular reservation would be retained. The latter view is believed by the Special Rapporteur to reflect the existing practice, and in the light of the comments of Governments he has tentatively formulated paragraph 3 (b) of the new article 19 on that basis.

11. Another point which arises under paragraph 2 is the moment at which account is to be taken of the acceptance or rejection of a reservation. The Australian and United States Governments represent that, by using the phrase "any State to which it is open to become a party" in paragraph 2 (a) of the existing article 20, the Commission appears to contemplate the possibility of a reserving State's being a "party" *vis-à-vis* a State which has not yet itself become definitively bound by the treaty. Although the Commission qualified the rule in paragraph 2 (a) by the phrase "as soon as the treaty is in force", this is not enough to exclude the interpretation which is queried by the Australian Government. The point is not purely one of drafting, since it touches the question of the conditions...
under which a reserving State is to be considered a “party” to a multilateral treaty under the “flexible” system. Indeed, not only the Australian but also the Danish Government urges the Commission to deal explicitly with that question, since it may affect the determination of the date on which the treaty comes into force and may otherwise be of concern to a depositary. The Special Rapporteur understands the position under the “flexible” system to be that a reserving State is to be considered as a “party” if and at the moment when another State which has established its consent to be bound by the treaty accepts the reservation either expressly or tacitly under paragraph 3 of the existing article 19 (paragraph 4 of the new article 20 as given below). If this understanding is correct, the point made by the Australian and United States Governments is clearly well-founded. Paragraphs 4 (a) and 4 (b) of the new article 19 therefore speak of “any party” instead of “any State to which it is open to become a party”.

12. Paragraph 5, specifying when a State is to be considered a party in cases falling under the flexible system, has been added to the new article 19 for the reasons given in the preceding paragraph of these observations.

13. Finally, the Special Rapporteur proposes a new article 20 to cover the more procedural aspects of reservations which are at present dealt with in paragraphs 2 and 3 of the existing article 18 and in article 19. Two Governments suggest that some simplification of the procedural provisions is desirable, and the Special Rapporteur feels that, although they are not without value, the sub-paragraphs in paragraph 2 of the existing article 18 may be dispensed with. He also feels that it is possible to shorten the drafting in some places. These considerations lead him to submit the following as the text of the new article 20:

“Article 20

Procedure regarding reservations

1. A reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the other interested States.

2. A reservation put forward upon the occasion of the adoption of the text or upon signing a treaty subject to ratification, acceptance or approval, shall be effective only if the reserving State formally confirms the reservation when ratifying, accepting or approving the treaty.

3. Acceptance of a reservation, if express, takes place:

(a) In any appropriate formal manner on the occasion of the adoption of the text or signature of the treaty or of the exchange or deposit of an instrument of ratification, accession, acceptance or approval;

(b) By notification to the depositary or, if there is no depositary, to the reserving State and to the other interested States.

4. In cases falling under article 19, paragraph 4, a reservation shall be considered to have been accepted by any State:

(a) which, having had notice of it for not less than twelve months, proceeds to establish its consent to be bound by the treaty without objecting to the reservation; or

“(b) which raises no objection to the reservation during a period of twelve months after it established its consent to be bound by the treaty.

5. An objection to a reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the reserving State and to the other interested States.

6. An objection to a reservation has effect only when the objecting State shall have established its consent to be bound by the treaty.”

14. Paragraph 1 includes the opening phrase of paragraph 2 (a) of the existing article 18 and a simplified version of paragraph 3 of that article.

15. Paragraph 2 contains a slightly simplified version of paragraph 2 (b) of the existing article 18.

16. Paragraph 3 contains a slightly simplified version of paragraph 2 of the existing article 19. If this paragraph is to a large extent expository, its retention seems advisable as a prelude to the important provisions regarding tacit consent in the next paragraph.

17. Paragraph 4 concerns the implied acceptance of a reservation through failure to object, which is the subject of paragraph 3 of the existing article 19. The rule proposed by the Commission was that any State should be considered to have accepted a reservation which failed to object within twelve months of having received notice of it. The Australian Government maintains that this rule may not in practice be workable; that no State should be obliged to object to a reservation before it becomes a party itself, and that it is not the practice to do so. It considers that the Commission’s rule should apply only to actual parties; and that other States should be regarded as accepting a reservation if they do not object to it either on becoming a party or within some reasonable time thereafter. The United Kingdom refers in general terms to paragraph 3 of the existing article 19 as not being completely satisfactory. The United States, while considering the paragraph to have merit so far as concerns the admission of a reserving State to a treaty, questions whether a State should ever be presumed to be bound by a new treaty relation that it never expressly approves. It suggests that a State which fails to object should be precluded from preventing the reserving State’s participation in the treaty but should not normally itself be presumed to be in treaty relations with that State. The last suggestion is believed by the Special Rapporteur to be contrary to the existing practice in multilateral treaties; and it seems to have the disadvantage of putting a premium upon a State’s taking no position with regard to reservations and of being likely to reduce materially the range of the treaty relationships set up by multilateral treaties. On the other hand, there appears to be substance in the view that the inaction of a State which has not yet become a party should not be considered as tantamount to acceptance, unless and until it does become a party without making any objection to the reservation. The Special Rapporteur therefore submits a revised formulation of the Commission’s rule which takes account of this point.
18. A further point to note in paragraph 4 of the new article 20 is that the opening phrase limits the application of the paragraph to cases falling under article 19, paragraph 4; in other words, it excludes from the special rules there laid down regarding tacit consent treaties between a "small group of States" and treaties which are constituent instruments of international organizations. The Danish Government goes so far as to advocate that in the case of treaties between a "small group of States" express acceptance of a reservation should always be required. The Special Rapporteur doubts whether such a rule would fully accord with existing practice, or whether it would be advisable formally to exclude any possibility of tacit consent in such cases. He agrees, however, that treaties between a "small group of States" should not be subjected to the special rule under which tacit consent will be presumed after the expiry of twelve months. He also shares the view of the Danish and United States Governments that it would be inappropriate to subject constituent instruments of international organizations to that rule. Hence it seems necessary to specify that paragraph 4 applies only to multilateral treaties other than treaties between a "small group of States" and treaties which are constituent instruments of organizations.

19. Paragraph 5 is a slightly shortened and modified version of paragraph 5 of the existing article 19.

20. Paragraph 6 replaces paragraph 4 of the existing article 19. The rule proposed by the Commission provides that an objection by a State not a party to the treaty loses its force if two years after making the objection the State has still not become a party to the treaty. The Australian Government considers this provision to be undesirable, as there may be good reasons for a State to delay its ratification of a treaty and its objection to a reservation ought, in the view of the Australian Government, to hold good whenever ratification takes place. It suggests that this provision can be dispensed with altogether if the rules regarding tacit consent are formulated in the way which the Special Rapporteur now proposes in paragraph 4 of the new article 20. The Special Rapporteur considers that there is substance in the Australian Government's criticism of the rule proposed by the Commission. On the other hand, he feels that it is necessary to lay down some rule regarding the status of an objection lodged by a State which has not established its own consent to be bound by the treaty. The point is primarily of importance in the case of treaties between a "small group of States", where a reservation requires acceptance by all the parties. The rule now proposed by the Special Rapporteur in paragraph 6 of the new article 20 is thought to meet the case; it deprives an objection of any effect unless and until the objecting State shall itself have established its consent to be bound by the treaty.

21. Finally, for convenience of reference the new texts proposed by the Special Rapporteur for articles 18-20 are set out in extenso below:

"Article 18"

"Treaties permitting or prohibiting reservations"

1. A reservation permitted by the terms of the treaty is effective without further acceptance by the interested States, unless the treaty otherwise provides.

"2. Unless expressly agreed to by all the interested States, a reservation is inadmissible when:

(a) the making of the reservation is prohibited by the treaty or by the established rules of an international organization;

(b) the treaty expressly authorizes the making of specified reservations which do not include the reservation in question."

"Article 19"

"Treaties silent concerning reservations"

1. Where a treaty is silent on the question of reservations, reservations may be proposed provided that they are compatible with the object and purpose of the treaty. In any such case the acceptance or rejection of the reservation shall be determined by the rules in the following paragraphs.

2. When it appears from the nature of a treaty, the fewness of its parties or the circumstances of its conclusion that the application of its provisions between all the parties is to be considered an essential condition of the treaty, the reservation shall be effective only on its acceptance by all the parties.

3. Subject to article 3 (bis), when a treaty is a constituent instrument of an international organization, acceptance of a reservation shall be determined by the competent organ of the international organization.

4. In other cases, unless the State concerned otherwise specifies:

(a) acceptance of a reservation by any party constitutes the reserving State a party to the treaty in relation to such party;

(b) objection to a reservation by any party precludes the entry into force of the treaty as between the objecting and the reserving State.

5. In cases falling under paragraph 4 a reserving State is to be considered a party to the treaty if and when one other State which has established its consent to be bound by the treaty shall have accepted the reservation."

"Article 20"

"Procedure regarding reservations"

1. A reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the other interested States.

2. A reservation put forward upon the occasion of the adoption of the text or upon signing a treaty subject to ratification, acceptance or approval, shall be effective only if the reserving State formally confirms the reservation when ratifying, accepting or approving the treaty.

3. Acceptance of a reservation, if express, takes place:

(a) in any appropriate formal manner on the occasion of the adoption of the text or signature of the treaty or of the exchange or deposit of an instrument of ratification, accession, acceptance or approval;

(b) by notification to the depositary or, if there is no depositary, to the reserving State and to the other interested States.

4. In cases falling under article 19, paragraph 4, a reservation shall be considered to have been accepted by any State:

(a) which, having had notice of it for not less than twelve months, proceeds to establish its consent to be
bound by the treaty without objecting to the reservation; or

"(b) which raises no objection to the reservation during a period of twelve months after it established its consent to be bound by the treaty.

"5. An objection to a reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depository or, where there is no depository, to the reserving State and to the other interested States.

"6. An objection to a reservation has effect only when the objecting State shall have established its consent to be bound by the treaty."

Article 21. — The application of reservations

Comments of Governments

Japan. The Japanese Government proposes the deletion of the word "claim" in paragraph 1 (b). In its view, a non-reserving State, in its relations with the reserving State, should be definitively entitled to the same modification as that effected by the reservation and not merely entitled to "claim" it.

United States. The United States Government observes that the acceptability of this article depends on the acceptability of article 20 and on the agreement of satisfactory texts for articles 18 and 19. In addition, it observes that, if section III is not limited to multilateral treaties, the question ought to be considered as to what, if anything, should be laid down in articles 19 and 20 regarding implications arising from acts taken by the parties other than a specific statement of acceptance or rejection, e.g., the application of a bilateral treaty without the other party's having specifically accepted or rejected the reservation. (Quaere whether this observation does not really concern articles 19 and 20.) In paragraph 1 (b) the United States Government considers that the phrase "to claim" is ambiguous, as it might be understood to require the non-reserving State to notify the reserving State of an intention to invoke the reservation before it could become entitled to do so in its relations with the reserving State. It proposes that "to apply" should be substituted for "to claim". Paragraph 2, the United States Government thinks, should not exclude the situation — even if an unusual one — where a State objects to or refuses to accept a reservation but nevertheless considers itself in treaty relations with the reserving State. In order to cover such a situation it suggests the addition of a new paragraph, as follows:

"Where a State rejects or objects to a reservation but considers itself in treaty relations with the reserving State, the provisions to which the reservation applies shall not apply between the two States."

Observations and proposals of the Special Rapporteur

1. If articles 18-20 are rearranged along the lines proposed by the Special Rapporteur, it will be necessary to modify the opening phrase of the present article. In that event the following text is suggested:

"A reservation established as effective under the provisions of articles 18-20 operates:"

2. In paragraph 1 (b) both the Governments which have commented upon the article have criticized the word "claim"; and this criticism appears to be justified. One possibility might be, as suggested in the comments of Governments, simply to substitute the word "apply" for "claim". On the other hand, it may be better to go further and to revise paragraph 1 (b) to read as follows:

"Reciprocally to modify the provisions of the treaty to the same extent for each party to the treaty in its relations with the reserving State."

3. The United States Government suggests that a further paragraph should be added to cover the situation — even if an unusual one — where a State objects to, or refuses to accept, a reservation but nevertheless considers itself in treaty relations with the reserving State. The possibility of such a situation's arising is provided for in the existing article 20, paragraph 2 (b), and in the new article 19, paragraph 3, and it would therefore be logical to allow for it in the present article. On the other hand, the Special Rapporteur is a little doubtful whether it would be correct to represent the situation as arising from a unilateral expression of will on the part of the objecting State. Is a reserving State obliged to recognize the establishment of treaty relations with the State which has rejected its reservation? The Special Rapporteur feels that it may perhaps be necessary to formulate the additional paragraph on the following lines:

"Where a State objects to the reservation of another State, but the two States nevertheless consider themselves to be mutually bound by the treaty, the provision to which the reservation relates shall not apply in the relations between those States."

Article 22. — The withdrawal of reservations

Comments of Governments

Israel. In the case of treaties for which there is a depositary, the Government of Israel considers that it will be natural, and more consonant with the procedure for multilateral treaties followed in the draft articles as a whole, for a State notifying its withdrawal of a reservation to do so through the channel of the depositary. The present text, in its view, is open to the interpretation that the State concerned is obliged to inform the other interested States individually. It further considers that where the channel of the depository is employed, the withdrawal of a reservation should normally take effect in accordance with the provisions of the treaty or, failing them, in accordance with the provisions of the draft articles regarding the taking effect of communications made by or through a depository, unless the notice of withdrawal specifies otherwise.

United Kingdom. The United Kingdom Government considers that, on the withdrawal of a reservation, other States should be allowed a reasonable time (e.g., three months) before becoming bound by any new obligations resulting from the withdrawal, unless the treaty expressly
provides otherwise. Those States might need, it thinks, to adjust their laws or administrative practices to meet the new situation resulting from the withdrawal of the reservation.

United States. The United States Government supports this article, and finds particular merit in the provision that the withdrawal of the reservation "takes effect when notice of it has been received by the other States concerned".

Observations and proposals of the Special Rapporteur

1. Cases are infrequent where a treaty contains provisions regarding the withdrawal of reservations. In principle, however, where a treaty does in fact contain such provisions, they ought to prevail over those of the present article. Accordingly, the Special Rapporteur proposes that the article should be prefaced with the general reservation "Unless the treaty otherwise provides", the operative provisions becoming sub-paragraphs.

2. While doubting whether the second sentence of paragraph 1 is susceptible of the interpretation that a notice would have to be given directly and not through a depositary, the Special Rapporteur shares the view of the Government of Israel that, as in other articles, specific reference should be made to communicate through the depositary.

3. The further suggestion of the Government of Israel raises a larger question. The suggestion is that the notice of withdrawal should normally take effect in accordance with the terms of the treaty, or failing them, in accordance with the provisions of the present articles regarding the taking effect of communications made by or through a depositary, unless otherwise specified in the notice of withdrawal. Rare indeed are the cases where the treaty itself contains any provisions on the point, so that the residuary rule laid down in the present articles would normally be applicable. Article 29, which deals with the functions of a depositary, does not in its present form contain any provision regarding the time of the taking effect of a communication made by or through a depositary. On the other hand, article 15, paragraph 2, specifically lays down that, unless otherwise provided by the treaty, instruments of ratification, accession, etc., become operative upon the deposit of the instrument with the depositary. In its comments upon article 29, the Government of Israel puts forward a proposal designed to make allowance for the observance of the normal administrative processes necessary for the depositary’s preparation of the relevant communications and for their receipt by individual States through the normal channels. The Government does not there say precisely how this proposal is to relate to the "taking effect" of an instrument deposited with a depositary, though it suggests that the proposal would discourage the equation of "promptness" in making communications with the concept of "immediacy" which was applied by the International Court in the Right of Passage case,107 with reference to Article 36, paragraph 4, of the Statute. This is a large question, because it affects the coming into force generally of instruments deposited with a depositary, and it will be discussed further in connexion with article 29. But whatever may be the Commission’s conclusion on the general issue, the Special Rapporteur believes that its decision in the present article to treat a notice of withdrawal as effective only from the date of its receipt by the other States was correct for the reason given in paragraph 2 of its commentary.

4. The point raised by the United Kingdom Government, though related to the one discussed in the previous paragraph, is a distinct one. It concerns the allowance of a reasonable time, after a notice of withdrawal becomes operative, for bringing internal laws or administrative instructions into line with the new situation resulting from the withdrawal of a reservation. In some cases the withdrawal of a reservation would not necessitate any internal action on the part of other States. In other cases it might do so and, even if the internal law of some States were automatically to take account of the withdrawal of the reservation, it might still be necessary for appropriate instructions to be given to administrative authorities or appropriate publicity to be given to the new situation resulting from the deletion of the reservation. The Special Rapporteur suggests that the point should be covered by adding at the end of paragraph 2 a proviso in the sense proposed by the United Kingdom Government.

5. In the light of the above observations the Special Rapporteur proposes that the text should be revised to read as follows:

"Unless the treaty otherwise provides —

(a) a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal;

(b) such withdrawal becomes operative108 when notice of it has been received by the other States concerned from the depositary or, if there is no depositary, from the reserving State;

(c) on the date when the withdrawal becomes operative article 21 ceases to apply, provided that during a period of three months after that date a party may not be considered as having infringed the provision to which the reservation relates by reason only of its having failed to effect any necessary changes in its internal law or administrative practice.”

SECTION IV: ENTRY INTO FORCE AND REGISTRATION

Article 23. — Entry into force of treaties

Comments of Governments

Japan. In paragraph 2 the substance is found acceptable by the Japanese Government, but it considers that the matter can safely be left to the interpretation of the treaty in question. (See its revised draft of article 23 in document A/CN.4/175.)

107 Case concerning right of passage over Indian territory (Preliminary objections), I.C.J. Reports, 1957, p. 125.

108 This is the same phrase as that used in article 15, paragraph 2, with respect to instruments of ratification, accession, etc.
**Luxembourg.** The Luxembourg Government, as explained in its comments on article 1 (d) and article 14, considers that the references to “approval” should be deleted from this article. In addition, as appears from its comments on article 15, it places emphasis on the distinction between the time of the commitment of the parties and the time of the entry into force of the treaty (which may be later). It states that articles 15 and 23 should be revised in view of this distinction, though without indicating the precise revisions which it has in mind.

**Sweden.** The Swedish Government observes that article 23 appears not to cover cases where a treaty does not stipulate any date on which or mode in which it is to enter into force but is simply signed or simply provides for ratification. It presumes that the residuary rule would be that entry into force occurs on the date of signature or of ratification as the case may be.

**United Kingdom.** In the view of the United Kingdom Government, an automatic rule would be preferable to that provided in paragraph 3, which depends on the parties reaching a further agreement. The rule, it suggests, should be that a treaty which does not fall under paragraphs 1 and 2 enters into force on the date of signature or, if it is subject to ratification, acceptance or approval, when it has been ratified, accepted or approved by all the participants.

**United States.** The United States Government considers the article to be clear and to reflect accepted present-day practices that are recognized as desirable.

**Observations and proposals of the Special Rapporteur**

1. The Special Rapporteur, for the reasons given in his observations on article 1, paragraph 1 (d), does not favour the deletion of the references to “approval” in paragraph 2.

2. The Japanese Government, while not dissenting from the substance of the Commission’s proposals, would prefer to leave the matters covered in paragraph 2 to the interpretation of the treaty; and more especially in the case of multilateral treaties (see paragraph 2 of its revised draft). The Swedish and United Kingdom Governments, on the other hand, would prefer to see the Commission go even further in laying down automatic residuary rules. As the substance of the article appears to meet with general acceptance, and as it seems desirable to establish residuary rules on this extremely important question, the Special Rapporteur considers that the rules formulated in paragraph 2 should be maintained by the Commission. On the other hand, he proposes that the Japanese Government’s point should be met to the extent of adding at the end of paragraph (a) the words “without the States concerned having agreed upon another date”.

3. The Special Rapporteur also considers that, if similar qualifying words are used, the residual rule proposed by the Swedish and United Kingdom Governments for paragraph 3 can safely and usefully be adopted. He accordingly proposes that paragraph 3 should be revised to read:

“In other cases where a treaty does not specify the date of its entry into force, the date shall be the date of the signature of the treaty or, if the treaty is subject to ratification, acceptance or approval, the date upon which all the necessary ratifications, acceptances or approvals shall have been completed, unless another date shall have been agreed by the States concerned.”

4. While appreciating the significance attached by the Luxembourg Government to the distinction between the time of the commitment of the parties and the time of the entry into force of the treaty, the Special Rapporteur doubts whether anything more is needed to underline this distinction than is already done at a number of points in the draft articles (e.g. article 16; article 17, paragraph 2; article 24; and the present article).

**New Proposal. — Entry into force of treaties within the territory of the parties**

**Comments of Governments**

**Luxembourg.** The Luxembourg Government proposes the insertion of a new article to follow article 23 and to be framed in these terms:

“By the entry into force of the treaty, the parties thereto shall be bound to take all measures, both general and particular, and above all measures to ensure publication, that are necessary to secure the application in full of the treaty in their territories.”

Such a provision, it suggests, would remind States that the first obligation they incur in becoming bound by an international treaty is to take the measures necessary to ensure the effectiveness of the treaty in their national territories. It points out that clauses on these lines are found in some treaties as, for example, in article 86 of the Treaty instituting the European Coal and Steel Community and in article 5 of the European Economic Community Treaty.

**Observations of the Special Rapporteur**

1. This proposal does not appear to the Special Rapporteur to be relevant in the context in which it is put forward — entry into force of treaties as between States. The Commission has given consideration to the question of including in the draft articles a provision covering the duty of States to take the necessary measures on the internal plan to ensure compliance with their treaty obligations. It did so, if somewhat briefly, in the context of the application of treaties, and more especially of the application of treaties to individuals. The Special Rapporteur then pointed out that this duty is only one aspect of the general duty of a State to perform its international obligations; that it applies to a State’s customary no less than to its treaty obligations; and that the principle involved is a general principle of State responsibility which would presumably come under the Commission’s consideration in its work on State responsibility. He also pointed out that the principle is implicit in and covered by the rule

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110 Ibid., vol. 298, p. 17.
111 See the present Special Rapporteur’s third report in Yearbook of the International Law Commission, 1964, vol. II, p. 46, para. 3 of the commentary to article 66.
**pacta sunt servanda** proclaimed in article 55. In the light of these considerations it was provisionally concluded by the Commission that it was not necessary to include an article on this point.

2. The Special Rapporteur thinks it to be clear that the principle in question is simply a facet of the rule **pacta sunt servanda**. Accordingly, if it were to be thought desirable to make special mention of the principle in the law of treaties, as well as in the law of State responsibility, he considers that it should be placed either in close conjunction with the **pacta sunt servanda** article or in the section dealing with the application and effects of treaties. He suggests that the matter should be reviewed at the 1966 session in the light of the comments of Governments upon part III of the draft articles.

**Article 24. — Provisional entry into force**

**Comments of Governments**

**Japan.** In the view of the Japanese Government, the precise legal nature of provisional entry into force, even if this technique is sometimes resorted to in practice, is not very clear. Unless its legal effect can be precisely defined, the Japanese Government considers that the best course would be to leave the question of provisional entry into force to the intention of the parties; and it feels that article 23, paragraph 1, may perhaps sufficiently cover this problem.

**Sweden.** The Swedish Government points out that, while the text of the article appears to require an agreement between the parties in order to bring about the termination of provisional application of a treaty, the commentary contemplates that provisional application may terminate on its becoming clear that the treaty is not going to be ratified or approved by one of the parties. It suggests that the commentary comes closest to the legal position underlying the present practice; for provisional application is often resorted to for the very reason that there is no absolute assurance that internal constitutional procedures will result in the confirmation of the provisional acceptance of the treaty.

**United States.** While recognizing that the article accords with present-day requirements and practices, the United States Government questions whether there is any need to include it in a convention on the law of treaties.

**Observations and proposals of the Special Rapporteur**

1. The Commission considered that “provisional entry into force” occurs in modern treaty practice with sufficient frequency to require notice in the draft articles. 118 Although the resulting situation may be anomalous and not easy to define with precision, its incidents may be important for the parties. Accordingly, it seems desirable for the legal character of that situation to be recognized in the draft articles, lest the omission be interpreted as denying it. The Japanese Government suggests that the problem might be left to be covered by article 23, paragraph 1, which states that “a treaty comes into force in such manner and on such date as the treaty itself may prescribe”. This no doubt is one possible way of looking at the problem; though it would not cover the problem altogether, as the States concerned sometimes bring about the “provisional entry into force” by a separate agreement in simplified form. 118 But it seems preferable to separate “provisional entry into force” from normal entry into force under the treaty which is the subject of article 23. There is a certain anomaly, from the point of view of constitutional law, in dealing with “provisional entry into force” as an ordinary case of “entry into force under the terms of a treaty” which for constitutional reasons has been made subject to ratification or approval.

2. The legal position in provisional entry into force is not, however, easy to formulate; and the Special Rapporteur feels that there is substance in the Swedish Government’s observation that paragraph 2 of the commentary to article 24 perhaps comes nearer to describing it as it appears in practice than the second sentence of the article itself.

3. If the article is retained by the Commission, a course which the Special Rapporteur himself is inclined to favour, he proposes that it should be slightly revised to take account of the Swedish Government’s observation and of cases where the agreement to bring the treaty into force provisionally is not expressed in the treaty itself but concluded outside it. The text might then read:

“A treaty may prescribe, or the parties may otherwise agree that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force provisionally, in whole or in part, on a given date or on the fulfilment of specified requirements. In that case the treaty or the specified part shall come into force as prescribed or agreed, and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or it shall have become clear that one of the parties will not ratify or, as the case may be, approve it.”

**Article 25. — The registration and publication of treaties**

**Comments of Governments**

**Denmark.** The Danish Government feels that the text of this article is not entirely satisfactory, as treaties between a Member of the United Nations and a non-member State are at present covered both by paragraph 1 and paragraph 2. The article should, in its view, provide that any Member is under an obligation to register treaties which it concludes, in conformity with Article 102 of the Charter, and that any non-member State party to the present articles is under a similar obligation. It further observes that under current practice parties may agree between themselves that registration shall be effected by one of them, or by the secretariat of an international organization under whose auspices the treaty is concluded.
Israel. The Government of Israel doubts whether the draft articles are the proper place for introducing any change in existing practices which distinguish between registration in implementation of Article 102 of the Charter and filing and recording in accordance with the regulations made by the General Assembly thereunder. This distinction, it notes, was deliberately maintained when the regulations were drawn up in 1946 and the Charter is not the only international constitution which calls for registration of treaties, e.g. article 81 of Constitution of the International Civil Aviation Organization. It suggests that the Commission should draw the General Assembly’s attention to the possible need for the practices regarding registration of treaties to be re-examined and consolidated after the completion of the work on the law of treaties.

Japan. While finding the article to be on the whole acceptable, the Japanese Government thinks that paragraph 1 does not make it clear whether it applies to the category of international agreements referred to in Article 102 of the Charter or whether it concerns all international agreements as defined in the draft articles.

Luxembourg. While fully approving the provisions of the article, the Luxembourg Government asks whether paragraph 2, as drafted, is not an amendment to the Charter. It suggests that the paragraph should be reworded as follows:

“States which are parties to the present article and are not Members of the United Nations shall undertake with the Secretariat of that Organization the treaties which they have concluded.”

United Kingdom. In the view of the United Kingdom Government, it is unnecessary and undesirable to duplicate the provisions of Article 102 of the Charter.

United States. The United States Government observes that a question might well be raised whether the provisions of this article are appropriate for inclusion in the draft articles or whether the matter should be left to the United Nations. Paragraph 1, it notes, merely reiterates the obligations of Members and of the United Nations under Article 102 of the Charter. As to paragraph 2, it points out that the paragraph would impose a new obligation not only on non-members but also upon the United Nations. While recognizing the desirability of having all treaties registered with the United Nations and published by it, the United States Government questions whether the draft articles should seek to impose that function upon the Secretariat as an obligation without some recognition that the consent of the United Nations is necessary. It suggests that before the texts of the draft articles are finally agreed upon arrangements might be made for a resolution by the General Assembly inviting all non-member States to register their treaties and providing for their publication. In paragraph 3, it suggests that the phrase “in force” should be replaced by the phrase “adopted by the General Assembly of the United Nations” in order to give more direct recognition of the role of the United Nations in this matter.

Bolivian delegation. The delegation considers that in paragraph 2 the registration of a treaty with the United Nations Secretariat by non-member States should not be obligatory but should be left optional as in the past. It also criticizes the omission of any provision dealing with treaties concluded between a Member of the United Nations and a non-member State.\(^\text{114}\)

Romanian delegation. The delegation considers the article to be satisfactory.\(^\text{116}\)

Observations and proposals of the Special Rapporteur

1. The Commission appreciated that there is a certain awkwardness in duplicating the provisions of Article 102 of the Charter. On the other hand, it felt that the principle that treaties should be registered and published is now so generally accepted and so important in practice that its total omission from a general convention or code on the law of treaties would appear somewhat strange. Moreover, it seemed desirable in any general convention or code to equalize so far as possible the position of Members and non-members on this point, which appears to be essentially one of principle rather than merely an incident of membership in the United Nations. There is no question in the mind of the Commission of imposing any new obligation upon non-member States without their consent. An obligation to register (or “file and record”) treaties would arise for a non-member only if it accepted that obligation by becoming a party to the general convention on the law of treaties. As non-members already make use of the depositary and registration facilities of the Secretariat of the United Nations and are not called upon to contribute to their upkeep, it does not seem unreasonable to invite a non-member, on becoming a party to the general convention on the law of treaties, to accept the registration and publication of treaties as general principles. Nor was there any question in the mind of the Commission of imposing any new obligations on the United Nations without its consent. The Commission is itself an organ of the United Nations, and the draft articles which it is preparing are to be submitted to the General Assembly, the organ of the United Nations competent to decide both in regard to the United Nations system of registration and publication of treaties and in regard to the action to be taken upon the Commission’s drafts. Inevitably, therefore, the General Assembly will be in a position to pronounce upon the acceptability or otherwise of the present article from the point of view of the United Nations before any action is taken with reference to the draft articles as a whole. Moreover, in its resolution 97 (I) of 14 December 1946 approving regulations to give effect to Article 102 of the Charter,\(^\text{116}\) the General Assembly seems to have recognized the general desirability of the registration (filing and recording) and publication of the treaties of States not members of the United Nations; for by article 10, paragraph 3, and article 12 of those regulations it specifically directed the Secretariat to file, record and publish “treaties or international agreements transmitted by a party not a member of the United Nations”.

\(^{114}\) Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 740th meeting, para. 33.

\(^{116}\) Ibid., 742nd meeting, para. 27.

\(^{116}\) The text of these regulations, as amended by General Assembly resolution 482 (V) of 12 December 1950, is set out in an annex to the Commission’s 1962 report (see Yearbook of the International Law Commission. 1962, vol. II, pp. 194-195).
2. The Special Rapporteur does not feel that the difficulty suggested by the Japanese Government with regard to the category of "international agreements" covered by article 1 really arises. "Treaties" for the purposes of the present articles are defined in article 1 and it is those treaties with which article 25 is concerned. If the treaties and international agreements covered by Article 102 of the Charter were narrower in range than those covered by the present articles, the point raised by the Japanese Government might be a material one. But a glance at article 1 of the regulations giving effect to Article 102 shows how extremely comprehensive is the range of "treaties and international agreements" covered by Article 102. Accordingly, it is not thought that the paragraph needs further clarification on this point.

3. The Danish Government, on the other hand, points out that paragraphs 1 and 2 are so worded that treaties concluded between a Member and a non-member of the United Nations may be said to be governed by both paragraphs. This will be the case however the paragraphs are worded, but the Special Rapporteur shares the view of the Danish Government that the logical objection which may at present be raised to the drafting of the two paragraphs should be removed by reformulating them in terms of the obligations of Members and non-members. The Special Rapporteur does not feel that, even as at present drafted, paragraph 2 can legitimately be viewed as an amendment to the Charter. However, if the first two paragraphs are reformulated in the way suggested, this will automatically meet the preoccupation of the Luxembourg Government in this regard. The Special Rapporteur, on the other hand, considers that the obligation of non-members should be so stated as to apply only to treaties entered into after the present articles come into force.

4. The doubt raised by the Government of Israel as to the draft articles' being the proper place for introducing any change in existing practices which distinguish between registration under Article 102 and "filing and recording" under the regulations made by the General Assembly seems to be mainly a verbal point. Paragraph 3 of the article expressly provides that the procedure of registration in the case both of Members and non-members is to be governed by the regulations in force for the application of Article 102; in other words, unless and until the regulations are changed by the General Assembly, the existing practice will remain intact under the draft articles. The Commission felt that "filing and recording" is, in substance, only another name for registration and that to safeguard the Government of Israel's point it would be enough to underline the continued application of the General Assembly's regulations. In point of fact, if the draft articles were ultimately to be adopted as a general convention on the law of treaties, there would be some advantage in modifying the General Assembly regulations so as to make the "registration" of a treaty by a non-member under paragraph 2 of the present article, subject to the "registration" rather than the "filing and recording" regulations. Under article 3, for example, registration by a Member of the United Nations relieves all other parties of the obligation to register the treaty, whereas there is no similar provision in the case of "filing and recording". The Special Rapporteur therefore shares the view of the Government of Israel that in due course it might be desirable for the General Assembly to re-examine and consolidate the existing practices regarding registration of treaties.

5. In paragraph 3 no objection is seen to the suggestion of the United States Government that the phrase "in force" should be replaced by the phrase "adopted by the General Assembly of the United Nations" in order to give more direct recognition to the role of the United Nations in the matter. On the other hand, the words "in force" were chosen to indicate that the regulations are subject to change by the Assembly; and it may be advisable to say instead "from time to time adopted by the General Assembly of the United Nations".

6. In the light of the above observations, the Special Rapporteur suggests that the article should be revised on the following lines:

"1. Members of the United Nations are under an obligation, with respect to every treaty entered into by them, to register it in conformity with Article 102 of the Charter of the United Nations.

"2. Parties to the present articles which are not members of the United Nations agree to register every treaty entered into by them after the present articles come into force.

"3. The procedure for the registration of treaties under the foregoing paragraphs and for their publication shall be governed by the regulations from time to time adopted by the General Assembly of the United Nations for giving effect to Article 102 of the Charter."

SECTION V: CORRECTION OF ERRORS AND THE FUNCTIONS OF DEPOSITARIES

Article 26. — The correction of errors in the texts of treaties for which there is no depositary

Comments of Governments

Japan. While thinking that articles 26 and 27 will serve a useful purpose in establishing procedures for correction of errors, the Japanese Government considers that their provisions are too detailed. It suggests that the two articles should be amalgamated. (See its revised draft, articles 26 and 27, in document A/CN.4/175.)

Sweden. In the view of the Swedish Government, the rules contained in articles 26 and 27 are more appropriate for inclusion in a code of recommended practices than in a convention.

United States. The United States Government thinks that the article serves a useful purpose as a guide on procedures for correcting errors, but proposes certain drafting changes. In paragraph 1 it suggests that the word "shall" should be changed to "may", as States may wish in a particular case to follow some other procedure or to take no action at all because of the insignificance of the error. It points out that in paragraph 1 (b) the words...
4. In the light of the above observations the Special Rapporteur proposes that article 26 should be amended as follows:

"Notice of any correction made under the provisions of this article to the text of a treaty that has entered into force shall be communicated to the Secretariat of the United Nations."

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur agrees with the Japanese Government that some curtailment of the provisions of articles 26 and 27 is possible and desirable. However, he doubts whether it is advisable to curtail the articles to the extent advocated by that Government in its revised draft. The chief object of including these articles is to provide for the use of regular procedures for correcting errors in the main forms in which they occur in practice. Accordingly, it is thought that the Commission was right to distinguish between these main forms. On the other hand, some streamlining of the drafts is clearly possible, and especially with regard to the two final paragraphs, which correspond with each other in the two articles. The Special Rapporteur thinks it preferable, from a drafting point of view, to detach these two paragraphs and transfer them to a new article, article 27 (bis), rather than to amalgamate the two articles into a single, somewhat heavy, article.

2. The Special Rapporteur doubts whether all the rules in articles 26 and 27 ought properly to be regarded as nothing more than recommended practices, as the Swedish Government implies. The Special Rapporteur understands the Commission to have regarded the procedures which the articles lay down as procedures which are enjoined upon the States concerned and upon depositaries for the protection of parties and signatories in the absence of agreement upon another procedure for the correction of the error. On the other hand, the Special Rapporteur shares the general view of the Swedish Government that the provisions of the draft articles in part I ought for the most part to be stated in the form of residuary rules, and this is not the case in articles 26 and 27 as at present drafted. If this is done, it will also serve to cover the suggestion of the United States Government that the word "shall" in paragraph 1 should be changed to "may".

3. The further point made by the United States Government that the provisions of the draft articles in part I ought to be required until the treaty has entered into force and thus qualified for registration under the applicable regulations regarding registration of treaties is thought to be well-founded.

4. In the light of the above observations the Special Rapporteur proposes that article 26 should be amended to read as follows:

"1. Unless otherwise agreed between the interested States, where an error is discovered in the text of a treaty for which there is no depositary after the text has been authenticated, the error shall be corrected:

(a) by having the appropriate correction made in the text of the treaty and causing the correction to be initialled in the margin by representatives duly authorized for that purpose;

(b) by executing a separate protocol, a procès-verbal, an exchange of notes or similar instrument, setting out the error in the text of the treaty and the corrections which the parties have agreed to make; or

(c) by executing a corrected text of the whole treaty by the same procedure as was employed for the erroneous text."

Article 27. — The correction of errors in the texts of treaties for which there is a depositary

Comments of Governments

Finland. The Finnish Government suggests that, although paragraph 2 conforms to the practice of the Secretariat of the United Nations, it would be sufficient for the depositary to transmit the copy of the procès-verbal only to the State which has received the incorrect copy of the treaty, and merely to notify the other State of the action taken.

Japan, Sweden. The observations of the Japanese and Swedish Governments regarding this article are set out in their comments upon article 26.

United States. The United States Government considers that the provisions of this article will serve as a useful guide on procedures for the correction of errors in multilateral treaties for which there is a depositary. It suggests, however, that paragraph 6 should undergo a revision similar to that which it proposes for paragraph 4 of article 26 and for the same reasons.

Bolivian delegation. The delegation observes that the article, while providing for cases in which an error is discovered in the text, does not provide for cases where the error goes unnoticed by the depositary but is pointed out by a State.117

Panamanian delegation. While thinking that the juxtaposition of the mechanics of correcting errors with the important functions of the depositary is academically unfortunate, the delegation considers it justified by the practical consideration of the role played by a depositary in the correction of errors.118

Observations and proposals of the Special Rapporteur

1. The comments of the Japanese, Swedish and United States Governments have already been discussed under

118 Ibid., 741st meeting, para. 19.
article 26. The Bolivian delegation, in effect, queries whether the language of the article, as at present drafted, is apt to cover cases where the error is not noticed by the depositary but is pointed out independently by a State. The Special Rapporteur does not feel that any change is necessary in the text to cover this point, since the language of paragraphs 1, 2 and 3 is completely neutral as to who discovers or draws attention to the error or lack of concordance in the text.

2. The Finnish Government's suggestion that paragraph 2 should be amended so as to require the \textit{procès-verbal} to be transmitted only to the State which has received the incorrect copy of the treaty is not thought to be practicable. The certified copies here envisaged are the copies of the original instrument deposited with the depositary, and these copies are sent to all the States concerned. Normally, the copies would all be identical. The Japanese Government, in its revised draft, proposes the omission of this paragraph in order to lighten the text of the article. Although sympathizing with the objective, the Special Rapporteur doubts whether the deletion of this paragraph is advisable. The Secretariat in its memorandum on the "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements" stated that paragraph 3 is advisable. The Secretariat in its memorandum on the "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements" said of the certified copies here in question:

"One of the depositary's functions is to prepare and transmit to the States concerned certified copies of the original. This is an important function as it replaces the exchange of the original instruments, which formerly took place between the signatories. The certified copies are frequently used by Governments for submission of the text of the agreement to their competent organs for whatever action is required under their particular constitutional procedures." \cite{ST/LEG/7, para. 11; and see para. 18.}

In the light of these remarks the Special Rapporteur feels that paragraph 2 should be retained. On the other hand, paragraph 2 does appear not to be placed in its proper order in the article. The corrections dealt with in this paragraph do not relate to the original text, but merely to a copy; consequently, they do not require the assent of the States concerned, and the process of correction is different from those in paragraphs 1 and 3. Moreover, paragraph 4 is a further stage of the processes dealt with in paragraphs 1 and 3, but not of that dealt with in paragraph 2, and the latter paragraph tends to interrupt the logical exposition of the processes in the other paragraphs. Accordingly, it is thought that paragraph 2 should be placed lower down in the article, after the existing paragraph 4.

3. The Special Rapporteur believes that it may be acceptable to lighten the text of paragraph 1 by speaking of bringing the error to the attention of all the "interested States", instead of specifying the criteria by which they are to be determined. This may at the same time give a certain flexibility to the provision in the event of an error's being discovered after a considerable lapse of time, when it might be reasonable to consider that the consent only of the parties was required.

4. In paragraph 4 the Special Rapporteur further suggests that it may be advisable to confine the second sentence, beginning with "However", to the case of a treaty drawn up "within an international organization", and to leave the case of a treaty drawn up at a conference convened by an international organization to be covered by the first sentence alone.

5. The transfer of paragraphs 5 and 6, which correspond with paragraphs 3 and 4 of article 26, to a separate article has been proposed by the Special Rapporteur in paragraph 1 of his observations on that article.

6. On the basis of the above suggestions the Special Rapporteur proposes that the article should be revised to read as follows:

"1. (a) Unless otherwise agreed, where an error is discovered in the text of a treaty for which there is a depositary after the text has been authenticated, the depositary shall bring the error to the attention of all the interested States, and shall inform them that it is proposed to correct the error if within a specified time-limit no objection shall have been raised to the making of the correction.

"(b) If on the expiry of the specified time-limit no objection has been raised to the correction of the text, the depositary shall make the correction in the text of the treaty, initialling the correction in the margin, and shall draw up and execute a \textit{procès-verbal} of the rectification of the text and transmit a copy of the \textit{procès-verbal} to each of the interested States.

"2. The same rules apply where two or more authentic texts of a treaty are not concordant and a proposal is made that the wording of one of the texts should be corrected.

"3. If an objection is raised to a proposal to correct a text under paragraph 1 or 2, the depositary shall communicate the objection to all the interested States, together with any other replies received in response to the notifications mentioned in those paragraphs. However, if the treaty was drawn up within an international organization, the depositary shall also refer the proposal to correct the text and the objection to such proposal to the competent organ of the organization concerned.

"4. Where an error is discovered in a certified copy of a treaty, the depositary shall draw up and execute a \textit{procès-verbal} specifying both the error and the correct version of the text, and shall transmit a copy of the \textit{procès-verbal} to each of the interested States."

\textbf{Article 27 (bis).} — Taking effect and notification of correction to the text of a treaty (proposal by the Special Rapporteur)

The Special Rapporteur, for the reasons explained in paragraph 1 of his observations on article 26, proposes that paragraphs 3 and 4 of that article and the corresponding paragraphs of article 27 (paragraphs 5 and 6) should be made into a separate article, numbered for the time being article 27 (bis). The text proposed for this article is as follows:
“1. Whenever the text of a treaty has been corrected in accordance with article 26 or 27, the corrected text shall replace the faulty text as from the date on which the latter text was adopted, unless the interested States otherwise decide.

“2. Notice of any such correction to the text of a treaty that has entered into force shall be communicated to the Secretariat of the United Nations.”

Article 28. — The depositary of multilateral treaties

Comments of Governments

Sweden. The Swedish Government observes that the article contains dispositive rules.

United States. The United States Government considers the article to be declaratory of well-accepted practice and its inclusion to be useful.

Observations of the Special Rapporteur

No amendment has been suggested by Governments, and the Special Rapporteur has no proposal to make with respect to this article.

Article 29. — The functions of a depositary

Comments of Governments

Israel. The Government of Israel considers that in enumerating the functions of a depositary special reference should be made to the depository’s duty to register treaties and related documents. It draws attention to the discussions which preceded General Assembly resolution 364 B (IV) of 1 December 1949 and to relevant inter-agency agreements such as that of 17 February 1949 between the United Nations and the International Labour Organisation.130 It also thinks that it may be desirable de lege ferenda to make it clear that, unless the treaty itself provides otherwise, phrases like “promptly” and “as soon as possible” appearing in paragraphs 3 (d), 6 and 7 (a) (see also article 15, paragraph 3) are to be interpreted in such a way as to allow for the observance of the normal administrative processes customary in the depositary authority for the preparation of the relevant communications and for their receipt by individual States through the normal channels. This would, it suggests, discourage the equation of “promptness” with the concept of “immediacy” which was applied by the International Court in the Right of Passage case with reference to Article 36, paragraph 4, of the Statute of the Court.131 In paragraph 8 it points out that “any such matters” in the English text has a wider meaning than “autres actes similaires” in the French text (cf. “otras cuestiones análogas” in the Spanish text); and it suggests that the French text should be modified to bring it into line with the English text.

Japan. In the view of the Japanese Government, paragraph 1 overlaps to a great extent with article 1, paragraph 1 (g), and it suggests that the first sentence should be deleted. While recognizing that paragraphs 2 to 7 would provide a useful guide in a “code”, the Japanese Government considers it to be a little out of place as well as out of proportion to provide for procedural details of a depositary in a general convention on the law of international agreements. It suggests that the article could be redrafted in a more concise form (see article 29 of the Japanese Government’s revised version of the articles in document A/CN.4/175).

United States. While considering that the article as a whole should serve as a useful guide with respect to the functions of a depositary, the United States Government questions certain of its provisions. In paragraph 3 (a) it suggests that the words “at the time the depositary is designated” should be added at the end, that is after the word “organization”. The purpose of the addition is to protect a depositary in case an organization should adopt a new rule requiring the text of the treaty to be prepared in many additional languages. Paragraph 3 (b) it considers to be phrased too widely in requiring certified copies to be transmitted to every State to which it is open to become a party to the treaty, even if it has no interest in the treaty. Such a State, it thinks, might even be offended and protest against the communication of the copy. It proposes that the paragraph should be worded as follows:

“To prepare certified copies of the original text or texts and transmit such copies to all signatory, ratifying or acceding States, and any other States mentioned in paragraph 1 that request copies.”

In paragraph 3 (c) the United States Government raises a question as to the relationship of the paragraph with paragraphs 4, 5 and 6. These three paragraphs, it assumes, would operate before the signature takes place or the instrument of ratification, etc., is considered as “deposited”. But it considers that the relationship between these paragraphs and paragraph 3 (c) needs some clarification and that there may be cases where it would be desirable for other States to be consulted before an instrument is received in deposit, e.g. in the case of particular reservations. It therefore proposes that the words “subject to the provisions of paragraphs 4, 5 and 6 of this article” should be inserted at the beginning of paragraph 3 (c). In addition, the United States Government proposes that the second half of paragraph 3 (c) “and to execute a proces-verbal, etc.”, should be deleted, as this appears to it to require a formality that is unnecessary and would often serve no useful purpose. It emphasizes that the United States serves as depositary for many multilateral treaties with respect to which the formality of proces-verbaux is omitted without giving rise to any problems or complaints. Paragraph 3 (d) and the remaining provisions of the article are considered by the United States Government to reflect existing procedures and practices that are widely accepted and effective.

Observations and proposals of the Special Rapporteur

1. The Special Rapporteur does not share the view of the Japanese Government that it is out of place and out of proportion to provide for procedural details of a deposit-


131 Case concerning right of passage over Indian territory (Preliminary objections), I.C.J. Reports, 1957, p. 125.
tary's functions in a general convention on the law of treaties. The regular performance of the duties of the depositary is of critical importance to the operation of the modern system of multilateral treaties. Nor does it seem correct to regard the provisions of article 29 as purely procedural; for they establish not only the duties of depositaries but also the rights of the interested States with respect to the procedure. On the other hand, certain of the Japanese Government's suggestions for streamlining the text of the article may, it is thought, be usefully adopted without losing anything of substance.

2. In paragraph 1, as is pointed out by the Japanese Government, the opening phrase in effect repeats the definition of a depositary in article 1, paragraph 1 (g). The Special Rapporteur proposes that the two sentences of the paragraph should be telescoped so as to read as follows:

"A depositary shall exercise its functions impartially on behalf of all the parties to the treaty and of all the States to which it is open to become a party."

3. Paragraph 2 and the opening phrase of paragraph 3, as the Japanese Government suggests, can with advantage be amalgamated so as to combine the two paragraphs as follows:

"In addition to any functions expressly laid down in the treaty, and unless the treaty otherwise provides, a depositary shall have the duty:"  

4. Paragraph 3 (a) is omitted from the Japanese Government's redraft of the article, but the Special Rapporteur feels that it should be retained. The United States Government asks that the words "at the time the depositary is designated" should be added at the end of the paragraph in order to protect a depositary from having a new burden imposed upon it without its consent by a change in the rules of an international organization. No objection is seen to this addition.

5. Paragraph 3 (b) is considered by the United States to place an unnecessarily wide obligation on a depositary with regard to the transmission of certified copies. This comment appears to the Special Rapporteur to be justified, and he proposes the following revised text of the paragraph:

"To prepare certified copies of the original text or texts and transmit such copies to all parties and signatory States and to any other of the States mentioned in paragraph 1 that so requests."

6. Paragraph 3 (c) is also omitted by the Japanese Government. The United States Government suggests the deletion only of the second phrase, which relates to the execution of a proces-verbal of signatures and of the deposit of instruments. In the light of its own experience as a depositary, it believes this requirement to be an unnecessary formality. Although not proposing the deletion of the first phrase, "To receive in deposit all instruments and ratifications relating to the treaty", the United States suggests that its relation to paragraphs 4, 5 and 6 needs to be considered. It feels that there may be cases where it would be desirable for other States to be consulted before an instrument is received in deposit, and suggests that the paragraph be prefaced by the words "subject to paragraphs 4, 5 and 6". The Special Rapporteur considers that a better solution may be to rearrange the order of the various paragraphs.

7. The Japanese Government, in its proposed redraft of the whole article, includes a reference to the duties of a depositary in the correction of errors. The Special Rapporteur agrees that this would be logical, but considers that this should take the form of a simple cross-reference to article 26 rather than an abbreviated statement of the duties.

8. The Government of Israel proposes that special reference should be made to the depositary's duty to register treaties and related instruments. The Special Rapporteur, while recognizing the importance of this point, hesitates to state it as a general duty, having regard to the complexity of the General Assembly's regulations concerning registration. Would the Swiss Government, for example, as depositary of a treaty to which Members of the United Nations were parties, be bound to "register" or "file and record" the treaty? The Special Rapporteur feels that it may be better to leave this point to be covered by the opening phrase "In addition to any functions expressly laid down in the treaty".

9. Another point made by the Government of Israel is that in paragraphs 3 (d), 6 and 7 (a) the expressions "promptly" and "as soon as possible", unless further defined or interpreted, might be understood to signify "immediate", whereas time must be allowed for the normal administrative processes to operate. The Special Rapporteur is inclined to think that the right course may be simply to omit these words where they occur and to regard due diligence in carrying out the duties of a depositary as implied from the very nature of the duties and therefore automatically required by an interpretation of the article in good faith.

10. In the light of the above observations and with the object of streamlining the text as far as possible, the Special Rapporteur proposes that it should be revised as follows:

"1. A depositary shall exercise its functions impartially on behalf of all the parties to the treaty and States to which it is open to become a party.

2. In addition to any functions expressly laid down in the treaty, and unless the treaty otherwise provides, a depositary shall have the duty:

(a) To prepare any further texts in such additional languages as may be required either under the terms of the treaty or the rules in force in an international organization at the time the depositary is designated;

(b) To prepare certified copies of the original text or texts and transmit such copies to all parties and signatory States and to any other of the States mentioned in paragraph 1 that so requests;

(c) To examine whether a signature, deposit of an instrument or formulation of a reservation is in conformity with the relevant provisions of the particular treaty and of the present articles, and, if need be, to communicate on the point with the State concerned;
"(d) To accept any signatures to the treaty, and to receive in deposit any instruments relating to it;

"(e) To acknowledge in writing to the State concerned the receipt of any instrument or notification relating to the treaty and to inform the other interested States of the receipt of such instrument or notification;

"(f) To carry out the provisions of article 9, paragraph 3, on receiving a request from a State desiring to accede to the treaty in conformity with the provisions of that article;

"(g) To carry out the provisions of article 26 in the event of the discovery of an error in a text of the treaty.

3. Where the treaty is to come into force upon its signature by a specified number of States or upon the deposit of a specified number of instruments of ratification, accession, acceptance or approval, or upon some uncertain event, a depositary shall have the duty to inform the States mentioned in paragraph 1 when, in its opinion, the conditions for the entry into force of the treaty have been fulfilled.

4. In the event of any difference arising between a State and the depositary as to the performance of the above-mentioned functions or as to the application of the provisions of the treaty concerning signature, the execution or deposit of instruments, reservations, ratifications or any such matters, the depositary shall have the duty to inform the States concerned or the depositary itself deems it necessary, bring the question to the attention of the other interested States or of the competent organ of the organization concerned."

Part II. Invalidity and termination of treaties

SECTION I: GENERAL PROVISION

Article 30. — Presumption as to the validity, continuance in force and operation of a treaty

Comments of Governments

Israel. The Government of Israel suggests that in the French text the expression “est réputé être en vigueur” may introduce an element of legal fiction which is not present in the corresponding expression in the English text “shall be considered as being in force”. It also feels doubt as to the use of the word “nullity” in the present article in the absence of corresponding usage in the substantive articles which follow. In addition, it points out that the article does not take account of the operation of the rules regarding separability (see article 46).

Portugal. The Portuguese Government notes that the article contains a general provision affirming the principle of the validity of treaties, and that the exceptions which it mentions give a concise notion of the structure of part II.

United States. While observing that the article states a conclusion which is normally self-evident, the United States Government says that it has merit in that it places in the articles as a whole a formal presumption which might otherwise be deviated from for reasons beyond those permitted by other articles. At the same time, it expresses the view that, by stating what is readily assumed, the article seems to imply that every aspect of treaty law is covered by the convention, or series of conventions, which may be adopted on the law of treaties. It feels that the article could well be omitted if the convention, or conventions, could be simplified to state only those aspects of the law of treaties which require statement.

Pakistan delegation. The delegation considers that the Commission is justified in stating the general rule in the present article.129

Syrian delegation. Here and elsewhere in the draft articles the delegation would like to see the word “terminaison” in the French text replaced by “fin” or by “extinction”.130

Uruguayan delegation. The delegation observes that article 30 is a key article which forecasts the tenor of all the articles which follow; and that, by prefacing the part dealing with invalidity and termination of treaties with that general provision, the Commission wishes to safeguard the universally valid principle of pacta sunt servanda.131

Venezuelan delegation. The delegation considers that in the Spanish version the text of the article should be amended to make it clear that the “nullity, termination or suspension... or... withdrawal” referred to must be brought about as a result of the application of the articles on the law of treaties. In its view, it is necessary to determine the result of their application before the question whether a particular treaty is void can be settled.132

Observations and proposals of the Special Rapporteur

1. Part II, as provisionally adopted by the Commission in 1963,133 contained a series of articles setting out the cases where on one ground or another a treaty is to be considered vitiated by nullity or terminated or its operation suspended. Article 30 was introduced by the Commission at the beginning of these articles in order to underline that any treaty concluded and brought into force in accordance with the draft articles governing the conclusion and entry into force of treaties is to be considered as being in force and in operation unless the contrary is shown to result from the application of the articles dealing with the invalidity, termination and suspension of the operation of treaties. The purpose of the article was to ensure that the recognition in the draft articles of the several specific grounds on which a State may claim that the rule pacta sunt servanda is not applicable in a particular case should not result in any general weakening of the security and stability of treaties.

2. The inclusion of a general provision of the kind contained in article 30 appears to be endorsed in the comments of Governments and delegations, though the United States Government observes that it could be dispensed with if.
the draft articles were framed on a more selective basis. The need for article 30 was perhaps more acute under the arrangement of the articles which was provisionally adopted in the 1963 report than it is under the arrangement now proposed. The invalidity, termination and suspension of the operation of treaties, under certain conditions, were then being predicted before any mention had been made of the fundamental rule *pacta sunt servanda*. In consequence, there was a risk that "*pacta sunt servanda*" might have the appearance of being almost a residuary rule — a rule applicable only after a treaty has been found not to be invalid, terminated or suspended as to its operation. Under the arrangement of the articles now proposed, the *pacta sunt servanda* rule will be stated immediately after the rules dealing with the conclusion and entry into force of treaties, while the rules dealing with invalidity, termination and suspension of operation will appear rather as secondary rules concerned with particular cases. Accordingly, it may be desirable to re-examine the arguments for and against the inclusion of a general provision on the lines of article 30.

3. On the one hand, it may be said that — in the words of the United States Government — "this article states a conclusion that is normally self-evident"; for it is certainly true that a treaty concluded and brought into force in accordance with the rules set out in part I (new part II) is to be presumed to be valid, in force and in operation unless the contrary is established. This being so, it may suffice to lay down the rule *pacta sunt servanda* and then leave it to be inferred that the onus is on any State which claims that the rule does not apply in a particular case. On the other hand, it may be said that the express formulation *in extenso* of numerous provisions regarding invalidity and termination makes the inclusion of the article still desirable in order to discourage any idea that the draft convention on the law of treaties sanctions a facile recourse to those provisions for the purpose of repudiating treaties. In favour of this view it may also be urged that in their comments on the draft articles dealing with invalidity and termination a number of Governments express anxiety as to the effect of those articles on the security of treaties unless their application is subjected to safeguards.

4. If the Commission decides to retain article 30, the question arises as to the correct position for the article in the scheme of the draft articles. One possibility would be to insert it at the beginning of the new part dealing with "The observance and interpretation of treaties". In that event, it would follow "Conclusion" and "Entry into force" and immediately precede the article containing the *pacta sunt servanda* rule. This could be said to be its logical position because it would state that a treaty regularly concluded and brought into force is to be considered as being in force and in operation, and the *pacta sunt servanda* article (article 35) would then state that "a treaty in force is binding upon the parties to it and must be performed by them in good faith". Another possibility would be to place the article, as at present, at the beginning of the series of articles dealing with invalidity and termination in order to emphasize the relation between the presumption and those articles.

5. If the article is retained, it will also be necessary to consider certain suggestions made by Governments for the improvement of its wording. The suggestion of the Government of Israel that the expression in the French text "*est réputé être en vigueur*" should be modified to make it correspond more exactly with the English text is felt by the Special Rapporteur to be one that should be adopted. That Government's further point that the word "nullity" should be changed so as to bring the text more into line with the substantive articles which follow also seems to the Special Rapporteur to be well-founded, since the word invalidity is used in the title to this part, while in the articles are found the expressions "invalidating consequence", "without legal effect" and "void". The Special Rapporteur suggests that for the purposes of article 30 the most appropriate word would be "invalidity". As to the Syrian delegation's proposal that in the French text, here and in other articles, the word "*termination*" should be replaced by "*fin*" or "*extinction*", this raises a philosophical question which was much discussed at the fifteenth session and which, it is suggested, should be re-examined by the drafting committee at the forthcoming session.

6. Two further points made by Governments require consideration. The first is the comment of the Government of Israel that article 30 does not take account of the operation of the rules regarding separability. These rules are contained in articles 33 to 35 and 42 to 45, which specifically contemplate the possibility of the invalidity, termination or suspension of part only of the treaty, and in article 46, which lays down the conditions under which such partial invalidity, termination or suspension are allowed. Whether it is necessary to make anticipatory mention of these rules in article 30 seems to the Special Rapporteur to be doubtful. When partial invalidity, termination or suspension results from the application of the rules regarding partial invalidity, termination or suspension, the treaty as an instrument remains in force and in operation; and it might not be very logical or consistent with the purpose of article 30 to qualify the presumption which it contains by inserting some form of express reservation of those rules. Their relevance and effect appear to be sufficiently safeguarded by the words at the end of the article "unless the nullity... results from the application of the present articles", since these words automatically bring in the provisions dealing with partial invalidity, termination and suspension.

7. The second point is the comment of the United States Government that the article "seems to imply that every aspect of treaty law is covered by the convention, or series of conventions, which may be adopted on the law of treaties". The conclusion drawn by the United States Government from this comment is that article 30 could well be omitted if the convention, or conventions, could be simplified to state only those aspects of the law of treaties which require statement. The Special Rapporteur finds some difficulty in appreciating the precise train of thought which underlies the drawing of this conclusion. The comment of the United States Government does, however, prompt the question whether the draft articles cover all the possible grounds of invalidity, termination and suspension. If they do not, article 30 might be said
to go too far when it provides that every treaty is to be considered as being in force and in operation unless the contrary results from “the application of the present articles”. This being so, the Commission may wish to review its proposals regarding the invalidity, termination and suspension of treaties in order to satisfy itself as to their completeness. Is it, for example, still content to leave the problem of the “obsolescence” or “desuetude” of treaties to be covered by the rules governing “fundamental change of circumstances” and by tacit agreement to terminate a treaty?

8. The present wording of article 30 is not fully symmetrical, since the title and the “unless” clause cover the questions of validity, continuance in force and continuance in operation whereas the statement of the presumption “shall be considered as being in force and in operation” may seem to refer only to the second and third of these questions. In addition, it may be desirable to be more specific as to the articles whose application may produce invalidity etc. and to mention expressly articles 31 to 51 inclusive.

9. In the light of the above observations, the Special Rapporteur suggests the following rewording of article 30:

“Every treaty concluded and brought into force in accordance with the provisions of part II shall be considered as being valid, in force and in operation with regard to any party to the treaty, unless the invalidity, termination or suspension of the operation of the treaty or the withdrawal of the party in question from the treaty results from the application of articles 31 to 51 inclusive.”

Section II: Invalidity of treaties

Article 31. — Provisions of internal law regarding competence to enter into treaties

Comments of Governments

Burma. The Burmese Government appears to take the view that a failure to comply with the provisions of internal law regarding competence to enter into treaties does, in principle, invalidate the treaty on the international plane. For it says that the article, as at present drafted, “may give the parties a feeling of false security in entering into treaties, in the belief that the burden of showing ‘manifest’ lack of competence or defect in procedure would fall on the party which wishes to withdraw”. It suggests that the article needs further consideration.

Czechoslovakia. The Czechoslovak Government accepts the ideas underlying the article as reflecting the “appropriate and just balance between internal and international laws”.

Denmark. The Danish Government recalls the statement of its position on the present question in the Eastern Greenland case and says that the reference to this statement in paragraph 9 of the Commission’s commentary does not appear to reflect the Danish position quite accurately. Although feeling that the text proposed by the Commission may deprive constitutional provisions of their international relevance to a somewhat greater extent than is recognized in the opinion of the majority of writers, the Danish Government is ready to accept the proposal as a basis for solving this intricate problem. At the same time, it doubts whether in the last sentence of the article the phrase “may not withdraw the consent expressed by its representative” is appropriate. It maintains that the consent should rather be considered as not having been validly expressed from the point of view of international law; and that the formula used in articles 33 and 34 “may invoke... as invalidating its consent to be bound by the treaty” should also be employed in the present article. The use of this formula would, in its view, be justifiable because the question of invalidity under international law is to be considered distinct from the question of invalidity under national law; and there is consequently no reason why invalidity under international law should not be dependent upon a criterion—the manifest character of the violation of constitutional provisions—which would not necessarily be relevant under national law.

Israel. A number of drafting amendments are suggested by the Government of Israel, as follows: (a) the phrase “competence to enter into treaties” in the first sentence should be replaced by “competence to enter into the treaty”, and the phrase “unless the violation of its internal law” should be replaced by “unless the violation of that law”; (b) the consistency of the phrase “shall not invalidate the consent” used in the first sentence with the phrase “may not withdraw the consent” used in the second sentence requires consideration; (c) the general principle underlying article 47 is operative as regards the subject-matter of article 31 and the interrelation of the two articles should be taken into account in the drafting of the present article; (d) the first sentence should be so drafted as to make it clear that the word “manifest” is to be understood in an objective sense.

Luxembourg. The Luxembourg Government approves the rule formulated in article 31 so far as concerns the failure to comply with provisions of internal law regarding competence to conclude treaties. It draws attention, however, to the analogous problem of a failure to observe other applicable provisions of internal law not relating to the competence of representatives to conclude treaties, as, for example, provisions for the demilitarization of the State, for the transfer of powers to an international organization or for the guarantee of fundamental rights and freedoms. While taking the view that a failure to observe such provisions does not affect the international validity of the treaty, it suggests that these cases should be dealt with in the commentary to the article.

Netherlands. The Netherlands Government endorses the guiding principle proposed by the Commission. It fears, however, that the exception admitted by the “unless etc.” clause may seriously undermine that rule as it may be easy for States wishing to shirk their obligations under treaties to make every breach of their national regulations appear to other parties as a “manifest violation” of their national laws. It suggests that the clause should be made
more objective by rewording it on the lines of paragraph 7 of the commentary:

"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."

Portugal. The Portuguese Government approves the rule set out in the article. While noting that the phrase "unless the violation of its internal law is manifest" lacks something in precision, it doubts whether other possible formulations such as "absolutely manifest" or "sufficiently notorious" are any more precise. It also observes that an additional limitation on a State's being bound by the unauthorized acts of its representatives results from article 32 and that this is a further reason for rendering the present article acceptable.

Sweden. In general the Swedish Government endorses the principle proposed by the Commission as the basic rule, and also the exception to that rule provided for in the article. However, it feels that the formulation of the exception is not quite satisfactory, since the consent, if it is indeed "invalidated" in these cases, cannot very well be "withdrawn". It suggests that the article should be revised to read as follows:

"When the consent... shall not invalidate the consent expressed by its representative. Nevertheless, in case the violation of its internal law was manifest, a State may withdraw the consent expressed by its representative. In other cases it may not withdraw such consent unless the other parties to the treaty so agree."

Uganda. The Government of Uganda appears to take exception to the rule proposed in article 31 on the ground that, in its view, the article "leaves room for internationally concluded treaties to bypass constitutional procedures of a Member State".

United Kingdom. Although agreeing generally with this article, the United Kingdom Government feels that it may be difficult to apply in practice without some clarification of the proviso "unless the violation of its internal law was manifest". The wording, in its view, does not make it clear to which persons the violation must be manifest, nor whether those persons must, in fact, have had actual knowledge of the violation at the material time.

United States. The United States Government observes that the provisions of article 31, when considered along with the commentary upon it, should prove to be self-enforcing in the course of time; for a State which invokes a right to withdraw on the ground that the violation of its internal law is manifest is likely to find that States will thereafter require it to give assurances as to the fulfilment of the requirements of its internal law.

Bolivian delegation. The delegation is happy to note that, under the present article, consent expressed by the representative is considered to be valid. It seems, however, to give its approval to the article only on the assumption that a different rule is to apply in the case of "formal" treaties.

Bulgarian delegation. The delegation approves the solution proposed by the Commission, but stresses the need to specify what exactly should be understood by "manifest violation."

Delegation of Cyprus. The delegation endorses the general principle laid down in the article and thinks it to be a mistake to weaken it by admitting cases of "manifest violation" as an exception to it. In its view, no clear-cut distinction could be made in practice between a "manifest" and "non-manifest" violation.

Ecuatorian delegation. Article 31, in the view of the delegation, should not present any difficulty in the case of treaties in good and due form. Nevertheless, the delegation would have preferred the Commission to have adopted precise rules defining and distinguishing accession, acceptance and approval in order to prevent interpretations which might have unfortunate consequences. The competence of a representative is most likely, it thinks, to be challenged where the treaty is in simplified form and not subject to ratification, chiefly because, according to the draft code, that type of treaty is defined solely by its form. Although it is impossible to define it according to its substance, a formula may perhaps be found which will more clearly indicate the position of that class of agreements in international law.

Delegation of El Salvador. The delegation thinks that the question raised in the article merits further consideration.

Iranian delegation. The delegation finds the article acceptable but feels that the exact meaning of the word "manifest" should be made clear.

Iraqi delegation. The delegation considers that the article should have been founded on the "constitutionalist" rather than the "internationalist" principle; many authors, it says, maintain that international law leaves it to the internal law of each State to determine the making of a treaty. In its view, therefore, the "constitutionalist" principle should have been made the foundation of article 31, subject to certain exceptions in favour of the internationalist principle justified by the necessity to respect the good faith of the other party, above all in multilateral treaties where it is difficult to have a detailed knowledge of the internal law of all the contracting parties.

Italian delegation. Although appreciating the efforts of the Commission to find a satisfactory solution, the delegation cannot support the article as it stands. In its view a State cannot "withdraw" a consent which has never been given; and a statement made by a representative in disregard of internal law cannot be imputed to his State. The drafting problem arises, it thinks, from the fact that the article is not entirely logical. The delegation considers that the article belatedly states, in what seems to it to be a

contradictory manner, something which should have been stated in different form in earlier articles, e.g. articles 4, 11 and 12. None of the articles in part I required the establishment of a State’s consent to be effected in compliance with the constitutional laws of the State. Under part I the only conditions to be met before a State could be considered to have given its consent to be bound through the intermediary of a competent organ were those provided in article 4. It follows, in the opinion of the delegation, that a treaty may be regarded as valid in so far as article 4 is concerned, with respect to the consent given by the representatives of the parties, but invalid in so far as article 31 is concerned, for reasons relating to that consent. The delegation maintains that the role of constitutional law in the matter of consent should be defined in the part dealing with the authority of the organs of a State to commit that State to be bound by a treaty, and not merely incidentally in the section dealing with the invalidity of treaties. It further maintains that the rules of constitutional law are given less than their proper weight in article 31, less than in many international treaties and in particular the Charter, Article 110 of which provides that it shall be ratified by the signatory States in accordance with their respective constitutional processes.\footnote{Ibid., 793rd meeting, paras. 5-10.}

Panamanian delegation. The delegation does not share the fear of some delegations that the difficulty of distinguishing in practice between a “manifest” and a “non-manifest” violation of internal law would introduce an element of instability into international relations. It expresses the view, however, that article 31 deals only with the question of the competence of the representative of a State, and observes that other conflicts between internal and international law may arise, for example where there is a constitutional limitation upon the granting of jurisdictional concessions. The delegation does not now propose that the draft articles should be extended to cover such other aspects of internal law concerned with treaty-making, as these are numerous and varied. It merely wishes to underline that the draft articles are not to be construed as a complete body of rules providing for all problems respecting the causes of invalidity. Its position is that the fact that the draft does not deal with certain topics or develop all their possibilities does not mean that they are necessarily discarded as valid legal principles or that the possibility of their later codification is excluded.\footnote{Ibid., 790th meeting, paras. 29 and 30.}

Philippine delegation. In the view of the delegation, the article deserves sympathetic consideration. At the same time, while the exception appears to be desirable, the phrase “unless the violation of its internal law was manifest” seems to it to be far too vague and to require to be worded more precisely.\footnote{Ibid., 790th meeting, para. 8.}

Romanian delegation. The delegation observes that the article raises two considerations which are difficult to reconcile; and that the only way to resolve the difficulty is to find objective criteria for determining the cases in which a State is legally justified in contesting the action of its representative.\footnote{Ibid., 783rd meeting, para. 31.}

Spanish delegation. The delegation considers that it is impossible for third States to be aware of all the complex questions raised by the formal or extrinsic constitutionality of a treaty, let alone those raised by its substantive or intrinsic constitutionality. It observes that, if a Government is prepared to enter into an agreement with an other, the other party, by questioning its competence to conclude treaties, would violate the principle of non-intervention; and that many constitutions are silent with respect to certain acts which may nevertheless establish, maintain or terminate international obligations. It further observes that de facto Governments would be placed in a very invidious position if all international acts which under internal law are unconstitutional were to be declared void. In general, therefore, the delegation is of the opinion that the Commission should not have weakened the principle that the unconstitutionality of a treaty in internal law does not affect its international validity; and that it should not have introduced a concept so subjective as “manifest violation”. In addition, it does not think that the article makes it clear whether the violation to which it refers is simply a violation of the letter of the constitution or equally a violation of a constitutional practice, a matter which it might be very difficult for foreigners to ascertain.\footnote{Ibid., 792nd meeting, paras. 5-7.}

Thai delegation. The delegation feels that, so long as different legal systems prevail in the world, it will be idealistic to believe that all countries can have in common a legal principle as progressive as that embodied in article 31. It also believes that the scope of the word “manifest” is not defined with sufficient clearness and that the application of the article may give rise to controversies.\footnote{Ibid., 791st meeting, para. 3.}

Delegation of the United Arab Republic. While appreciating the efforts of the Commission to reconcile the principles of stability of treaties and of respect for constitutional limitations, the delegation regrets that article 31 does not endorse the principle of incorporating constitutional limitations in international law but merely recognises the validity of that principle in exceptional cases. It would have preferred a provision on the lines of article 21 of the Harvard Research Draft\footnote{Research in International Law, "III, Law of Treaties"; Supplement to the American Journal of International Law, vol. 29, 1935.} which is worded as follows: “A State is not bound by a treaty made on its behalf by an organ or authority not competent under its law to conclude the treaty; however, a State may be responsible for an injury resulting to another State from reasonable reliance by the latter upon a representation that such organ or authority was competent to conclude the treaty.”\footnote{Official Records of the General Assembly, Eighteenth Session, Sixth Committee, 791st meeting, para. 14.}

Uruguayan delegation. The provisions of article 31 appear to the delegation to be prima facie reasonable and ade-
The majority, however, considered that, if this exception was to be opposed to that rule, considering that greater importance should be given to the rôle of constitutional law as an element in the formation of a State’s consent to be bound by a treaty. Three delegations do not make their position plain on the central question of principle. In these circumstances the Special Rapporteur thinks that his proper course is to assume the maintenance of the rule adopted in 1962 but to try to improve its formulation in the light of the points made in the comments of Governments and delegations.

3. A number of Governments have suggested that the text should indicate more clearly, first, to whom the violation must be “manifest” for the purpose of bringing the exception into play and, secondly, what constitutes a “manifest” violation of internal law. On the first point, as the exception is based on the principle that good faith does not permit the other State to reply upon a consent manifestly given by a representative in violation of internal law, it follows that it is to the “other State” that the violation must be considered to have been manifest. This does not, however, mean that the manifest character of the violation is a wholly subjective question. That will be so if the other party is proved to have had actual knowledge of it. But where direct evidence of actual knowledge is lacking, the circumstances may still show that the violation was so manifest that it would be inadmissible to allow the other party to disclaim all awareness of it. On the second point, it is clearly impossible to define exhaustively in advance all the cases in which a violation may be held to be “manifest”, for the question must depend to a large extent on the circumstances of each case. The most that can be achieved is to state the broad principles as clearly as possible. The Special Rapporteur suggests that a reformulation of the “manifest violation” clause on the lines suggested by the Netherlands Government is as far as it is possible to go to meet the views of Governments on the two points just discussed; and a reformulation of the clause on those lines will be found in the new text of the article proposed in paragraph 9 below.

4. A number of Governments have questioned the consistency of the phrase “shall not invalidate the consent expressed by its representative” in the first sentence of the article with the phrase “may not withdraw the consent” in the second sentence. This criticism appears to be well-founded; for the words in the second sentence “except in the latter case” imply that in cases also of “manifest violation” the right attributed by the article to the State concerned is to withdraw its consent, and this is not consistent with the “invalidity” attached by the article to the consent in the previous sentence. The Swedish Government suggests that the difficulty might be avoided by a text which divides the article into three, rather than two, sentences. However, the Special Rapporteur is inclined to think that the best solution is simply to omit the second sentence altogether. If this sentence is looked at closely, it does no more than state a necessary consequence of
the rule laid down in the first sentence. If under the
general provision in the first sentence the representative’s
expression of consent binds the State, it necessarily may
not withdraw from the treaty except with the agreement
of the other parties.

5. The suggestion of the Danish Government that the
formula used in the present article should be brought
into line with that used in articles 33 and 34 “may invoke...
as invalidating its consent to be bound etc.” is thought to
be sound; and this formula is therefore employed in the
new text proposed in paragraph 9.

6. Two States (Luxembourg and Panama) interpret the
article as concerned only with violations of provisions of
internal law which relate to the competence of organs of
a State to exercise the treaty-making power; and these
States suggest that it should be extended to cover viola-
tions of other constitutional provisions. The Commission
was fully aware that constitutional restrictions upon the
competence of the executive to conclude treaties are not
limited to procedural provisions regarding the exercise
of the treaty-making power but may also result from
provisions of substantive law entrenched in the constitu-
tion. It is also the understanding of the Special Rapporteur
that the Commission intended the words “the fact that a
 provision of the internal law...regarding competence to
to enter into treaties has not been complied with” to cover
both forms of restrictions on competence. As, however,
these words have been read in a different sense by the two
States, the Special Rapporteur suggests that it may be
desirable to replace them with the broader phrase “the
fact that a treaty has been concluded in violation of its
internal law”.

7. The Special Rapporteur also doubts whether it is
necessary in article 31 (the case is different in article 32)
to link the article directly with the provisions of article 4
regarding full powers to represent the State in the con-
cclusion of treaties. Although there may be a certain con-
nection between the two articles, the question in the
present article is not fundamentally one of evidence of
full powers under international law but of restrictions
imposed by internal law on the exercise of the treaty-
making power. Omission of the reference to article 4 will
both lighten the drafting and minimize the possibility of
an interpretation limiting the operation of the article to
provisions of internal law regarding the distribution of
the treaty-making power amongst State organs. Accord-
ingly, the new text of the article proposed in paragraph 9
does not contain any cross-reference to the provisions
of article 4.

8. The comment of the Government of Israel, that the
general principle underlying article 47 (loss of the right
to allege the invalidity of a treaty through preclusion)
is operative as regards the present article and ought to be
taken into account in its drafting, also requires considera-
tion. Article 47, as at present drafted, does not cover the
present article, since it is expressed to apply to articles 32
to 35 with no mention of article 31. In their comments
upon article 47 the Portuguese and Swedish Governments,
as well as the Government of Israel, express the view that
the present article should be brought within the operation
of that article. This view is believed to be correct. But,
although the point requires to be borne in mind in con-
sidering the substance of the present article, it appears
rather to concern the drafting of article 47.

9. In the light of the foregoing observations, the Special
Rapporteur suggests that the article might be reformulated
on the following lines:

“Violation of internal law

“The fact that a treaty has been concluded in violation
of its internal law may be invoked by a State as invalidat-
ing its consent to be bound by the treaty only if the
violation of its internal law was known to the other
States concerned or was so evident that they must be
considered as having notice of it.”

Article 32. — Lack of authority to bind the State

Comments of Governments

Israel. In paragraph 1 the Government of Israel suggests
that the phrase “bound by a treaty” should read “bound
by the treaty”. It also suggests that the rule should be
formulated affirmatively, instead of negatively, as follows:
“the act of such representative shall have legal effect if it
is afterwards confirmed.” In paragraph 2 the Govern-
ment of Israel suggests that the word “power” should be
replaced by “authority” and that the phrase “bound by
a treaty” should again be amended to read “bound by the
treaty”. It also considers that in the final phrase of the
paragraph it should be made clear that the particular
instructions must have been brought to the attention of
the other contracting States prior to the termination of the
negotiations. It further proposes that, subject to the
conditions laid down in article 46, an appropriate clause
regarding the separability of treaty provisions for the
purposes of this article should be introduced into it.

Portugal. The Portuguese Government expressly endor-
ses the principles formulated in the article, explaining
its understanding of them.

United States. The United States Government recalls its
comments upon article 4, in which it suggests that “any
other representatives” (i.e. other than Heads of State, etc.)
should not be obliged to produce full powers in every case,
but only upon the request of the other contracting party.
It further states that in many instances the appointment
of a representative to negotiate is preceded by an agree-
ment at high levels on matters of substance, and that the
surrounding circumstances may also make it clear that a
given individual or mission is fully authorized. In addition,
it takes the position that the reference to article 4 in the
present article is somewhat ambiguous as it “seems to
ignore the fact that a representative may be furnished with
some credentials as required under the existing wording
of paragraphs 3-6 of article 4”. In the light of these com-
ments the United States Government proposes that para-
geraph 1 should be revised to read as follows:

“If the representative of a State, who cannot be
considered under the provisions of article 4 or in the
light of the surrounding circumstances as being furnished
with the necessary authority to express the consent of his State to be bound by a treaty, nevertheless executes an act purporting to express its consent, the act of such representative may be considered by any of the parties to be without any legal effect, unless it is afterwards confirmed, either expressly or impliedly, by his State.”

In paragraph 2, simply by way of underlining what already appears to be the sense of the paragraph, it suggests that at the end of the paragraph there should be added the words “prior to his expressing the consent”.

Indian delegation. The delegation is not happy with the phraseology of paragraph 2, which appears to it to refer to secret restrictions; for the instrument of full powers normally specifies, for the information of the other contracting States, any non-secret restrictions on those powers.146

Pakistan delegation. The delegation considers that in paragraph 1 the word “shall” should be replaced by “may”. The appointment of a representative to negotiate and draw up a treaty is generally preceded by a high-level decision, so that mandatory terminology should be avoided.147

Spanish delegation. The delegation points out that the term “facultad” found in the Spanish text does not correctly express the authority granted by one person to another to represent him in a legal transaction; and that the term “poder” or “apoderamiento” would be more appropriate.148

Observations and proposals of the Special Rapporteur

1. With regard to paragraph 1, the main point made in the comments of Governments and delegations is that of the United States Government, which holds that the reference to the provisions of article 4 is ambiguous in that it seems to overlook that a representative may be furnished with some credentials as contemplated by that article. This comment does not appear to the Special Rapporteur to have great force since the reference in the present paragraph to the provisions of article 4 is entirely general, and cases of restricted authority are dealt with in paragraph 2. The preoccupation of the United States Government appears rather to relate to the provisions of article 4 itself, with regard to which it has stressed that in practice full powers are often dispensed with when a prior agreement as to the object of the negotiations or other surrounding circumstances indicate that a representative is fully authorized to conclude the treaty. The Commission has taken this point into account in re-examining article 4, the drafting of which has been considerably changed at the present session. These changes in the wording of article 4 in any event require certain modifications in the present article.

2. The operative provision of paragraph 1, as at present formulated, states that the unauthorized act of the representative “shall be without any legal effect” unless it is afterwards confirmed by his State. The Special Rapporteur suggests that, as in the case of article 31, it may be desirable to use a formulation closer to those used in articles 33 and 34 regarding fraud and error; in other words, he suggests that the operative provision should be reworded in terms of a right to invoke the lack of authority as invalidating the expression of the State’s consent to be bound by the treaty.

3. In paragraph 2 the replacement of the word “power” by “authority”, which is suggested by the Government of Israel, is thought by the Special Rapporteur to be an improvement. The addition at the end of the paragraph which is suggested by both the Israel and United States Governments, of words spelling out more precisely the requirement that the restriction upon the representative’s authority must have been brought to the notice of the other States before he expresses the consent of his State is also thought to be acceptable.

4. As in the case of the previous paragraph, the Special Rapporteur suggests that the operative provision of this paragraph should be reworded in terms of a right to invoke the lack of authority as invalidating the expression of the State’s consent to be bound by the treaty.

5. The Special Rapporteur also suggests that the title of the article should be made more specific by changing it to “Unauthorized act of a representative”.

6. In the light of the above observations the Special Rapporteur proposes that the article should be reformulated as follows:

“Unauthorized act of a representative

1. Where a representative, who is not considered under article 4 as representing his State for the purpose or as furnished with the necessary authority, purports to express the consent of his State to be bound by a treaty, his lack of authority may be invoked as invalidating such consent unless this has afterwards been confirmed, expressly or impliedly, by his State.

2. Where the authority of a representative to express the consent of his State to be bound by a treaty has been made subject to a particular restriction, his omission to observe that restriction may be invoked as invalidating the consent only if the restriction was brought to the notice of the other contracting States prior to his expressing such consent.”

146 Official Records of the General Assembly, Eighteenth Session, Sixth Committee, 783rd meeting, para. 3.
147 Ibid., 791st meeting, para. 27.
148 Ibid., 792nd meeting, para. 2.