Document:-

Law of Treaties: Comments by Governments on the draft articles on the law of treaties
drawn up by the Commission at its fourteenth, fifteenth and sixteenth session

Topic:
Law of Treaties

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Comments by Governments\(^1\) on parts I, II and III of the draft articles on the law of treaties drawn up by the Commission at its fourteenth, fifteenth and sixteenth sessions

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1. **AFGHANISTAN**

[PARTS I AND II]

*Transmitted by a note verbale of 5 August 1964 from the Permanent Mission to the United Nations*

[Original: English]

The Government of Afghanistan wishes to extend its congratulations to the International Law Commission for the preparation of the first draft of parts I and II of the draft articles on the law of treaties. In the view of the Government of Afghanistan, both parts I and II are generally acceptable. The Afghan Government will prepare its detailed comments and observations when the preparation of part III of the draft articles on the law of treaties is completed by the Commission. Since the whole draft on the law of treaties and its various articles need rearrangement, the Afghan Government will reserve its observations for the final position in the light of the second reading by the International Law Commission.

The Government of Afghanistan looks forward to the completion of the codification of this important field which is the cornerstone of international law whose conclusion and acceptance will serve the cause of peace and understanding between nations...

2. **AUSTRALIA**

[PARTS I AND II]

*Transmitted by a note verbale of 12 February 1965 from the Permanent Representative to the United Nations*

[Original: English]

**Article 1**

Definition of "treaty". This is of course a problem of long standing and complexity. It is considered that the present definition may embrace a great quantity of informal understandings reached by exchange of notes, understandings between States which are not intended to give rise to legal rights and whose registration with the United Nations might cause the system of registration to break down. It may be thought that the phrase "governed by international law" restricts the scope of the definition; but the commentary gives a limiting explanation of this phrase, and it is considered that the definition should also include a reference to the intention of the parties to create legal obligations between themselves.

**Article 9**

The wording of paragraphs 1 and 2 is rather obscure, but it is understood that these two paragraphs are intended to be mutually exclusive. The expression "a small group of States" is particularly vague. It is not clear, for example, whether regional collective defence treaties would be included in paragraph 1 or paragraph 2; such treaties, by their nature, must be entitled to restrict their membership narrowly if they so wish. Accordingly, it is considered undesirable that paragraph 1 should apply to many multilateral treaties which seem to be included in its scope, and that paragraph 1 would be better restricted to general multilateral treaties only.

In paragraphs 1 and 2, the number of years is left blank. It is considered that this number should be high, perhaps 25.

Paragraph 3(a) might be better worded, since it is presumed paragraphs 1 and 2 are mutually exclusive. Paragraph 3 also raises the difficulty for the depositary of determining what is a "State". This might be avoided (at some theoretical inconvenience) by substituting some other wording in the second line.

Paragraph 4 is inadequate on two grounds: (a) such a notification might be considered to have the effect of recognition, and notification to the depositary should be an alternative; and (b) this provision should apply also to article 8, paragraph 1.

**Article 17**

The Commission states in effect that it is extending an existing principle in this matter, to include States which participate in treaty-making even if they do not sign the treaty. This seems to go too far: if a State leaves a conference or votes against adoption, for example, it can have no moral obligation for the outcome. It is considered that the words "negotiation, drawing up or adoption of a treaty or which" should be deleted from paragraph 1.

**Article 19**

Paragraph 3 may in practice be unworkable. A non-party to the treaty should not be obliged to formulate objections within twelve months of the making of a reservation if the reservation is made before the treaty is in force; indeed it is considered no State should be obliged to make a reservation before it becomes a party itself. Nor is it State practice to do so. The proposal might lead to many "interim" objections, put in to safeguard a State while its final position is determined. It is considered that paragraph 3 as it stands should apply to existing parties only; any other States should be regarded as accepting a reservation if they do not object, either on becoming parties or within some reasonable time thereafter.

Paragraph 4 seems undesirable. There are a number of reasons why a State might delay its own ratification, and its objection should still be enforceable at whatever later date it acts. It is true that delay in ratification would cause difficulty with treaties under article 20, paragraph 3 (or if the majority system were used, which the Commission does not propose); the Commission does not propose that article 19, paragraph 4 should be moved to be article 20, paragraph 3(c) with consequential amendment; alternatively, our suggested amendments to paragraph 3 would make paragraph 4 unnecessary altogether, and this seems much the preferable solution.

**Article 20**

There seem to be two problems here. Paragraph 2(a) appears to make the reserving State a party vis-à-vis an accepting State at

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\(^1\) Originally circulated as documents A/CN.4/175 and Add. 1-5; A/CN.4/182 and Add.1-3.
a stage when the reserving State may not be a party generally, because a reservation can be made at time of signature. Moreover, on its face, paragraph 2(a) means that failure to object to a reservation by an unrecognized State would specifically create a bilateral treaty relationship with that State. We wonder if the paragraph might read: “constitutes the reservation a part of the treaty in its application between the reserving State and the accepting State”, or some similar wording. Finally, it might be desirable, in this article or in some other article, to make some reference to 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.

Paragraph 2(b) appears to exclude any effect for an objection to a reservation which the objecting State does not consider “incompatible with the object and purpose of the treaty” but which is still objectionable. If the intention is that such an objection should be ineffective, this seems unacceptable in principle. Furthermore, it leads to a conflict with article 18, paragraph 1(d), because (assuming good faith) any reservation which is “incompatible with the object and purpose” is excluded from the beginning and paragraph 2(b), if limited to such reservations, should therefore have no effect. It is not understood why a State should be forced to accept any reservation which fails short of such incompatibility: such a rule appears to put the reserving State in a more advantageous position than the objecting State. Moreover, it seems undesirable to drive an objecting State into declaring a reservation to be incompatible so that its objection can be sustained. Finally, the 1951 decision of the International Court of Justice appears to refer to the status of a reserving State as a party to the treaty, and not to its treaty relationship with an individual objecting State. It is considered that the qualifying words “which considers it...purpose of the treaty” should be deleted.

[Part II]

**Article 40**

It is considered that twenty-five years would again be a suitable period: there are a number of cases of multilateral treaties which for years have languished with few parties, and have then proved more popular.

**Article 42**

Paragraph 2(b)(ii) seems to give a very large power, which might be out of proportion to the breach; the commentary mentions the case only of a treaty which provides for termination. It might be better to use a longer form of words, which would circumscribe the right more precisely; but if by “common” is meant “unanimous” this should be a sufficient safeguard. It is considered the clearer word should preferably be used.

**Article 44**

It is considered that paragraph 3(a) should at least extend also to any other determination of territorial sovereignty: all such territorial determinations need to be final, and not by boundary determinations alone. It might also be worth discussing whether in paragraph 2(b) a word such as “continuing” might be added before “obligations”, on the ground that if a treaty has been carried out completely on both sides, so that no obligations under it remain, it would be contrary both to common sense and to the need for stability and certainty if an attempt could be made to bring such a treaty within article 44.

3. AUSTRIA

[Part II]

Transmitted by a note verbale of 11 November 1963 from the Permanent Representative to the United Nations

[Original: English]

The views of Austria on the draft articles on the law of treaties, prepared by the International Law Commission at its fourteenth session, are as follows:

1. **General principles**

The Austrian Government fully appreciates the work done by the International Law Commission.

The work of the Commission in the field of the law of treaties has led to the proposal of concrete articles and provisions. This result was possible only because of the extensive preparatory work and exhaustive discussions in the Commission. In fact, the law of treaties is complex and not easy to codify, despite the uniformity of the underlying legal concepts and the relative clarity of the existing norms of customary law. A special difficulty is that these are not problems of substantive law, but problems of adjective law, since the norms to be codified will govern the establishment of a rule of international law, or in other words, will define the procedure by which a rule of international law is legally created.

The particularly detailed preparatory work of the Commission, which has been dealing with the law of treaties since 1949, is commensurate with the breadth and importance of the subject. Four Special Rapporteurs have devoted their learning and experience to a number of reports, the importance of which to international law itself and to the knowledge of international law is beyond question.

However, the very importance of the subject-matter makes it necessary to raise the question of the form of codification. On this question of external form, the Commission decided at its thirteenth session in 1961 “that its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention”; but only two years earlier, the Commission, endorsing the well-founded opinion of Sir Gerald Fitzmaurice, summed up their reply to the same question in the statement that “it seems inappropriate that a code on the law of treaties should itself take the form of a treaty”. In the view of Austria, the latter opinion should prevail.

It must be borne in mind, in connexion with the codification of the law of treaties, that the task is to codify adjective law of a universal character. The norms of the law of treaties need to be codified, clarified, elucidated and progressively developed, but not to be enshrined in a treaty. A code on the law of treaties would be a kind of constitutional norm, laying down for the future the procedure for the creation of a norm—in other words, a norm ranking above others, or at least taking precedence over norms of equal rank. A code on the law of treaties in the form of a convention would, however, be concluded in the same manner as any other multilateral treaty. There is no way of distinguishing it from the other law-making treaties, to which, nevertheless, it will always thereafter be applicable.

In addition, a problem which will be difficult to solve would arise at the time of concluding such a convention on the law of treaties. As the Commission points out in paragraph 22 of the introduction, the draft articles on the law of treaties contain some “elements of progressive development”. Wherever, therefore, the draft articles deviate in the direction of progressive development—which Austria welcomes—from the currently valid rules of customary law, the question will arise, when concluding a convention on the law of treaties, whether the rules of customary law valid at the time of concluding the convention or the new rules created by the convention itself should apply to it.

Other difficulties might arise in cases where, after the conclusion of such a convention on the law of treaties, States which have accepted the convention conclude treaties with States which have not accepted it. There is no possibility in law of giving precedence to such a convention and, as it were, forcing its provisions upon third States which have not accepted the convention by inducing them to observe the rules laid down in the convention when concluding treaties. Thus, such cases must again give rise to the question which law is to apply to specific treaties concluded in the future—the rules of customary law in that field, or the norms of the convention. In either case one of the contracting parties will be prevented from applying the norms (of the convention or of customary law) which it considers valid.
Finally—and this, in the view of Austria, appears to be a weighty argument against the conclusion of a convention on the law of treaties—such a convention, in all probability, will for a long time lack the universality which must be inherent in the "law of treaties" as the norm governing the creation of norms and which is needed in this field of law as in no other. Indeed, it is questionable, whether such a convention can ever achieve true universality. Even if all subjects of international law eventually accede to the convention, they will almost certainly do so only with a variety of overlapping reservations. The consequence would be that the conclusion of treaties on a bilateral or multilateral basis between subjects of international law would become considerably more difficult than it is now, when the norms of the existing customary law in this field have the sanction of the whole international community.

Austria wished to point out these difficulties, which are mentioned to some extent in the introduction to the report (A/5209, chap. II, para. 16). Austria considers a code on the law of treaties, perhaps in the form of a General Assembly resolution, more beneficial than the conclusion of a convention on the subject.

2. Definitions

In the view of Austria, the definition of "treaty" given in article 1, paragraph 1(a), is not complete, in that it omits an essential characteristic, namely, the intention to create between the contracting parties rights and obligations under international law, and the fact that such rights and obligations are indeed created by a treaty.

This significant point is mentioned in, for instance, article 2, paragraph 1, of the text of articles of code (Yearbook of the International Law Commission, 1956, vol. II, p. 107) prepared by Sir Gerald Fitzmaurice, where the definition states, inter alia, that a "treaty" is "intended to create rights and obligations, or to establish relationships, governed by international law". Sir Hersch Lauterpacht puts it even more precisely when he defines treaties as "agreements between States, including organizations of States, intended to create legal rights and obligations of the parties". (Article 1 of the text of articles, Yearbook of the International Law Commission, 1953, vol. II, p. 93).

Some such terminology should be added to the definition of "treaty" in article 1, paragraph 1 of the International Law Commission's latest draft.

Furthermore, there seems to be no real definition of "treaties in simplified form" ("accords en forme simplifiée"). The definition given in article 1, paragraph 1(b), does not differ in content from the definition of "treaty" in paragraph 1(a). The list of the ways of concluding a treaty ("exchange of notes...agreed minute", etc.) appears in paragraph 1(a) also. It is difficult to see what constitutes the difference between the two kinds of treaties. The commentary (paragraph (11)) begs the question by stating, in the French version: "La Commission a défini cette forme de traités (i.e., en forme simplifiée) en prenant pour critère sa forme simplifiée."

Austria would suggest that "accord en forme simplifiée" should be defined by saying that this group of agreements between States does not require ratification. The requirement of ratification is, in fact, the essential characteristic which distinguishes the "traité" from the "accord en forme simplifiée".

The definition of "general multilateral treaty" in article 1, paragraph 1(c), seems to refer to rather indefinite characteristics, such as "matters of general interest to States as a whole". Here it might be wise to consider taking as the sole criterion the establishment of general norms by the treaty (law-making treaty).

Finally, it might be useful also to define the terms "signature", "ratification", "accession", "acceptance" and "approval", listed boldly in article 1, paragraph 1(d).

3. Capacity to conclude treaties

Article 3, paragraph 1, correctly points out that capacity to conclude treaties under international law is possessed by States and by other subjects of international law. The commentary explains that the phrase "other subjects of international law" is primarily intended to cover international organizations and the Holy See but also includes other legal persons regarded by traditional doctrine as subjects of international law. In the view of Austria, this provision is fully in accord with existing international law.

Paragraph 3 of this article, however, contains a restriction with respect to international organizations, stating that "in the case of international organizations, capacity to conclude treaties depends on the constitution of the organization concerned".

In the view of Austria, this restriction does not appear absolutely necessary. Rather, the starting point might well be that capacity to conclude treaties must be an inherent right of any international organization, if it is at the same time a subject of international law. Indeed, capacity to conclude treaties even appears to be the essential criterion of the status of a subject of international law. An international organization lacking the capacity to include treaties would not be a subject of international law.

As may be seen in practice, the constitutions of many international organizations do not mention the question of the capacity of the organization in question to conclude treaties. In most of these cases, however, the organs of the organization in question have considered themselves competent to conclude treaties on behalf of the organization, either with other international organizations or with States. If, on the other hand, the constitutions do contain provisions concerning the conclusion of treaties, they either relate to the question which organs are competent for the purpose—in which case they are of a procedural nature—or limit the extent of freedom to conclude treaties, which in principle is all-embracing, by stipulating that only treaties on certain subjects are permitted. Constitutional restrictions do not, however, affect in principle the capacity to conclude treaties as such.

In the view of Austria, it would not be correct if the capacity to conclude treaties, as such, of an international organization were to be derived solely from the constitution of the organization. If the constitution does not contain any provisions concerning capacity to conclude treaties, it would have to be assumed, from the existing text of paragraph 3, that the organization would not possess the capacity to conclude treaties. Without such capacity, however, the organization would not be a subject of international law.

The judgments of the International Court of Justice dealing with the structure of international organizations, and in particular the opinions in the "reparation case" (I.C.J. Reports, 1949, pp. 174 et seq.) and the "expenses case" (I.C.J. Reports, 1962, pp. 151 et seq.), do not conflict with this interpretation if they concede to an international organization the competence which, though not provided for in the constituent treaty, is essential to the performance of its functions. According to the constitution of an international organization, such a reference to those functions of the organization which are mentioned in the constitution means primarily that the organization's freedom to conclude treaties is constitutionally limited by its prescribed field of activities. The Commission is therefore correct when it says, in the commentary to article 3, paragraph 3, that the provisions of the constituent treaty of an organization determine "the proper limits of its treaty-making activity"; whereas the statement that "it is the constitution as a whole...that determines the capacity of an international organization to conclude treaties" appears to be inadequate, in that organizations lacking the capacity to conclude treaties cannot be regarded as subjects of international law and are therefore not covered by article 3.

It is therefore suggested that article 3, paragraph 3, might be deleted altogether; at the very least, the wording "depends on the constitution" should be changed in such a way as to indicate that the constitution can only contain restrictions on the freedom to conclude treaties.
4. Organs competent to conclude treaties

In the view of Austria, article 4 raises an important problem.

For the most part, international law ascribes the question of the competence to conclude international treaties to domestic law. Thus, international treaties are created by organs authorized under domestic law and subject to constitutional provisions. "It is clear," says Charles Rousseau (Droit International Public, 1953, p. 21) "that, international law being silent on the subject the conditions for the exercise of competence to conclude treaties are determined, at discretion, by the domestic law of each State. Constitutional prescripts are decisive in this respect."

This principle—namely, that the determination of the organs competent to conclude treaties is ascribed to domestic law—is not mentioned at all in the existing text of article 4. Reference is made to it only in the commentary. In the view of Austria, a corresponding general reference should be included in the text of article 4 also.

The Commission previously took this into account in the text of articles tentatively adopted by the Commission at its third session, which included the following provision: "A treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose" (Yearbook of the International Law Commission, 1951, vol. II, p. 73, article 2; Yearbook of the International Law Commission, 1952, vol. II, p. 51, article 4).

Perhaps, therefore, it would be appropriate, in article 4, to refer to a legal presumption that the organs mentioned there are duly authorized representatives. However, this legal presumption would have to be a praesumptio juris and not a praesumptio juris ac de jure, thus allowing for the possibility of a disclaimer. Guggenheim, for example, says: "There is a refutable presumption of competence to conclude international treaties in the case of Heads of State and Foreign Ministers" (Lehrbuch des Völkerrechtes, 1948, p. 61).

5. Subsequent opening of treaties

Austria whole-heartedly welcomes the opening of multilateral treaties to as many States as possible, as their acceptance strengthens the legal community and leads to a wider application of international law. In the view of Austria, article 8 is in this respect fully in accord with the present situation in international law and the present practice of States. In particular, it seems proper that multilateral treaties, unless the treaties provide otherwise, should be open to accession by all States.

Article 9, on the other hand, contains some formulae which deviate greatly from the prevailing concept of international law. If a multilateral treaty includes precise provisions on the question which States may accede to it, a more extensive opening of this treaty—outside the group of States to which the treaty was open from the beginning—means an amendment of the treaty. If, however, the treaty does not contain an amendment clause, so that no special procedure is laid down for possible amendments, the consent of all the contracting parties is needed for any legally valid amendment of the treaty. In the case of treaties concluded between a small group of States, the present draft explicitly recognizes the principle that the consent of all the parties is required (para. 2). Where other multilateral treaties are concerned, however, paragraph 1(a) makes it possible for other States to accede against the will of some of the contracting States and contrary to the explicit wording of the treaty (which expressly restricts the right of accession).

This provision seems to go too far, because it violates the principles of sovereignty. Paragraph 1(a) should therefore be amended, if not entirely deleted.

It may be emphasized in this connexion that the problem under consideration will not arise if the treaty contains an amendment clause along the lines of Article 108 of the United Nations Charter, providing that any amendment—including an extension of the right of accession—would be subject to the consent of a two-thirds majority. In such cases, the treaty can be opened to other States simply with the consent of two-thirds of the contracting States.

6. Ratification

Austria fully agrees that, as stated in article 12, treaties in principle require ratification. It is true that Sir Gerald Fitzmaurice thought otherwise (article 32 of articles of code, Yearbook of the International Law Commission, 1956, vol. II, p. 113), but the two earlier Rapporteurs supported the principle now advocated by the Commission.

It is unfortunate that the term "ratification" (cf. article 1, paragraph 1(d) of the draft, and para. 2 of these comments) is not defined. In the view of Austria, such a definition, which should be included in article 1, could easily be based on the wording of article 6, paragraph 1, of the text of articles prepared by Sir Hersch Lauterpacht (Yearbook of the International Law Commission, 1953, vol. II, p. 112).

7. Reservations

The question of reservations raises difficult legal problems. The Austrian Government particularly appreciates the fact that the Commission, in codifying this part of the law of treaties was guided by the idea of progressive development, although admittedly the traditional concept that reservations should, in principle, be restricted still enjoys wide support. The Commission accepted, by and large, the system recognized by the International Court of Justice in its opinion concerning the Genocide Convention.

The question may arise whether it is in keeping with the basic ideas of the law of treaties that very far-reaching reservations to multilateral treaties should be permitted and made possible, since the integrity of the text of the treaty in question may thereby be impaired, which is certainly not undesirable. In addition, acceptance of and objections to reservations by individual States create relations of constantly different content and different scope between the States parties to one and the same multilateral treaty.

A flexible attitude towards reservations may perhaps result in the accession to multilateral treaties of a maximum number of States. Whether the practice of recent years justifies any encouraging conclusions in this respect is open to question.

Austria, therefore, fully shares the view of those members of the Commission who argued that, while an objection by a single State to a reservation could not prevent the accession of the reserving State, reservations objected to by a larger number of States—perhaps even the majority—were not admissible, and accession would not be possible unless the reservations were withdrawn (cf. commentary to articles 18-20, para. (11)). If the majority of the contracting States insists on the integrity of the text of the treaty, the reservation cannot be accepted.

In addition, Austria would consider it necessary to make it clear, in connexion with the provisions on reservations, in article 20 in particular, that even where a State accepts, explicitly or otherwise, a reservation by another State, the consequence is that the treaty comes into force as between the two States in question, but not in respect of those provisions to which the reservation related. The present wording leaves some room for doubt as to whether, in such a treaty relationship between two States, those provisions of the treaty to which the reservation relates would apply to the State that has accepted the text of the treaty in its entirety but not, because of the reservation, to the other party to the treaty. This should be clarified by means of a reference to the principle of reciprocity.
4. **BURMA**

**[PART I]**

*Transmitted by a letter of 29 March 1963 from the Permanent Mission to the United Nations*

*Original: English*

The Revolutionary Government of the Union of Burma consider, as a matter of principle, that the draft articles on the law of treaties drawn up by the International Law Commission should be acceptable, as codification of international law in the form of multilateral treaty is a major step towards greater understanding of international law and fulfillment of the object of assuring the coexistence of different interests which are worthy of legal protection.

The Revolutionary Government of the Union of Burma, however, reserve their position as to the actual contents of the draft articles till the time they become a signatory to the Convention of the said articles.

**[PART II]**

*Transmitted by a note verbale of 28 May 1964 from the Permanent Mission to the United Nations*

*Original: English*

The Government of the Union of Burma is in general agreement that the principles embodied in the draft articles reflect prevailing international law and practice on the subject. While reserving the right to make further remarks when the draft articles come up for fuller discussion, the Government would, at this stage, offer the following suggestions.

While the commentary following draft article 31 is illuminating and persuasive, the principle of the article may need further consideration. Treaties, as well as international law itself, draw their force and strength from free consent and the validity of a treaty must be derived from that consent given by the competent sources within a State in due and proper form. The contracting parties should perhaps use the usual gap between signature of a draft or preliminary agreement and its ratification to examine carefully and assure themselves that the conditions are satisfied. The draft article may, as it now stands, 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 may also be useful to consider whether the doctrine of *rebus sic stantibus* should not be included in an additional clause to draft article 38. This doctrine, clear enough in theory, has often given rise to difficulties of interpretation in international relations.

**[PART III]**

*Transmitted by a note verbale of 22 April 1965 from the Permanent Representative to the United Nations*

*Original: English*

The Government of the Union of Burma agree in general to the principles embodied in the draft articles as the said principles reflect the current international law and practice relating to application, effects, modification and interpretation of treaties.

The Government of the Union of Burma, however, reserve the right to make further comments when the said draft articles are deliberated on a wider scale.

5. **CAMBODIA**

**[PART III]**

*Transmitted by a letter of 12 February 1966 from the Minister of Foreign Affairs*

*Original: French*

In article 64, paragraph 1 states the principle that "the severance of diplomatic relations between parties to a treaty does not affect the legal relations between them established by the treaty"; paragraphs 2 and 3, however, provide for the temporary suspension of all or some of the clauses of the treaty when the severance of diplomatic relations results in "the disappearance of the means necessary for the application of the treaty".

The looseness and vagueness of the text are obvious. It is left to each party to determine to what extent the severance of diplomatic relations permits the continued application of a treaty. It is therefore to be feared that a State might resort to severing diplomatic relations in order to evade the obligations of a treaty and might claim impossibility of performance as a consequence of the situation resulting from the severance. The text opens the door to bad faith and represents a dangerous departure from the rule *pacta sunt servanda*.

The Royal Government accordingly considers it essential that paragraphs 2 and 3 of article 64 should be deleted.

6. **CANADA**

**[PART I]**

*Transmitted by a letter of 26 November 1963 from the Under-Secretary of State for External Affairs*

*Original: English*

1. In its commentary on article 4, paragraph 6, the Commission has expressed the desire to have information from Governments as to their practice with regard to instruments of full powers. In Canadian practice, the Prime Minister and the Secretary of State for External Affairs are considered to have general authority to bind the Government and full powers are therefore not issued for them. If full powers are requested and the representative of Canada is other than the Prime Minister or the Secretary of State for External Affairs, particular full powers are issued by the Secretary of State for External Affairs. While it has not been Canadian practice to issue general full powers, it is realized that circumstances might arise in which it would be advantageous to do so and accordingly, the Canadian Government favours a provision recognizing such powers.

2. It is noted that in paragraph (7) of the commentary on article 4, it is stated that instruments of ratification, accession, acceptance and approval "are normally signed by Heads of State, though in modern practice this is sometimes done by Heads of Government or by Foreign Ministers". The Commission might wish to be apprised that the usual Canadian practice in this regard is for such instruments to be executed by the Secretary of State for External Affairs.

3. It is noted that in article 8 the Commission has recommended that where a general multilateral treaty as defined in article 1, paragraph 1(e), is silent concerning participation, it is to be assumed that the parties intended the treaty to be open to participation by all States. It is noted that the Commission is not recommending a derogation of the fundamental principle of international law that contracting parties are free to determine for themselves the extent to which they are prepared to enter into treaty relations with one another. It is observed that the current practice with regard to treaties concluded under the auspices of the United Nations, as well as many other multilateral treaties, is to open them to participation by Members of the United Nations, the 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. In article 8 the Commission is recommending the establishment of a presumption of intention on the part of contracting States that the treaty is to be open to all States in a limited and very clearly defined case, namely where the parties to certain types of treaties have not expressed themselves on the question of participation. It is assumed that the new rule is not to have retroactive effect.

4. It is noted that in article 9, paragraph 3(b) and in article 19, paragraph 3, the Commission has proposed that silence should constitute a presumption of a State's consent after the expiry of a given period. 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. It is
observed that under the rule formulated by the Commission, were a non-recognized State to enter a reservation, the consent of a non-recognized contracting State to the reservation would be implied by the latter’s silence. If the non-recognizing State were to object to the reservation, its position on recognition would seem to be jeopardized but it would presumably be open to the State to preface its objections with a denial of intent to recognize. In the course of the Commission’s review of article 19, it might however wish to consider excluding from that article the presumption of a State’s consent to reservations entered by States it does not recognize.

5. It is noted that under the rule set out in article 17 concerning obligations prior to the entry into force of a treaty, a State which has taken any part in the drafting process is obliged to refrain from acts calculated to frustrate the treaty. The Commission might wish to consider whether it is appropriate that this rule should be so broad as to cover States which, although participating in the negotiation of a treaty, have done so reluctantly expressing the strongest reservations about it.

6. It is noted that in articles 18, 19 and 20 concerning reservations, the Commission has adopted the so-called flexible approach by which reservations to multilateral treaties are admissible providing they are compatible with the object and purpose of the treaty. A reservation is to be regarded as accepted by a contracting State if the latter has raised no objection to it within twelve months. It is noted however that as phrased at present, some 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, paragraph 1(d)) or the basis on which a State may object to a reservation (article 20, paragraph 2(h)). If the former, it would seem to be still open to contracting States to object to reservations on other grounds. However, it seems to be the Commission’s intention to make compatibility with the object and purpose of the treaty a prerequisite for the admissibility of reservations as well as the only grounds on which an objection can be taken to a reservation. The Commission might find it desirable to state this intention unequivocally in order to remove any basis for an argument that States may still object to reservations on other grounds. It is also noted that the Commission is recommending the establishment of this rule concerning the compatibility of the reservation with the object and purpose of the treaty, only where the treaty is silent on the question of reservations (article 18, paragraph 1(d)). Treaties which permit reservations to some or all of their articles do not generally indicate standards of admissibility, and the effect of the Commission’s recommendations would therefore seem to be the creation of separate criteria for the admissibility of reservations in the case of a treaty which is silent in this regard, and in the case of a treaty which permits them. The Commission might accordingly wish to consider the desirability of extending the standard of admissibility it has formulated to reservations made pursuant to express treaty provisions.

PART II

Transmitted by a letter of 7 April 1965 from the Under-Secretary of State for External Affairs

Article 40: Termination or suspension of the operation of treaties by agreement.

Comment: In clause 2 of this article the period of time set out in the second to last line has been left open to further consideration. Since it is not clear from the present text from when this period of time should run, it is suggested that as in article 9, it be from the date of adoption, (i.e. that it be from the time the treaty in question has been opened for signature).

It is to be noted that in article 9 of part I of the draft law of treaties, drawn up at the fourteenth session of the International Law Commission, in clause 1(a) and clause 2 there also exist similar as yet unspecified time periods. Consideration might be given to having the same period of time apply in all three cases. In his commentary on clause 2 of article 40 the Special Rapporteur, Sir Humphrey Waldock, envisaged a period of ten years. This would seem a reasonable choice.

Article 42: Termination or suspension of the operation of a treaty as a consequence of its breach.

Comment: Article 42, in its present version, does not provide for a right, where there is a material breach of a treaty, of another party unilaterally (and not merely by common and perhaps even unanimous agreement with the other parties) to withdraw from the treaty in question. Instead it would appear, from the Commission’s commentary on the provision in question, that the members considered that a right of suspension provided adequate protection to a State directly affected by such a breach.

The implication of the present draft rule, set out in article 42.2(a), as regards multilateral treaties of a sort under which the States parties agree to refrain from some action or other, is that in the case of a flagrant violation by one party no other party would have any recourse on its own. That is because it could not suspend its obligations vis-à-vis the violator (by doing whatever it had agreed to refrain from doing) without violating its own obligations to the other parties.

Since it would appear desirable that the provisions of the draft law of treaties be of such a nature that they not only attract the widest possible support but are also as widely observed as possible, consideration might be given to amending article 42 in such a way that, where there has been a violation of a treaty of the sort discussed above, the legitimate right of suspension of an individual party need not depend on a consensus but may be exercised erga omnes.

Both the present Rapporteur, Sir Humphrey Waldock, and the previous Rapporteur, Sir Gerald Fitzmaurice, in their draft articles on this matter, provided that in the case where one party were to commit a general breach of such a treaty, it would be open to individual States unilaterally to withdraw from it. Sir Gerald Fitzmaurice recommended that “if a party commits a general breach of the entire treaty in such a way as to be tantamount to a repudiation, the other parties may treat it as being at an end, or any one of them may withdraw from further participation".

Sir Humphrey Waldock, in his commentary on his draft article 20.4(d), mentioned that its intention was to cover "cases such as these, where the defaults of a key State or of a number of States go far to undermine the whole treaty regime and it seems desirable that individual parties should also have the right, not merely of terminating their treaty relation with the defaulting State but of withdrawing altogether from the treaty".

In the draft amendment which Mr. Erik Castrén proposed to the present Rapporteur’s draft of this article, at the fifteenth session of the Commission, he too provided for a right of unilateral withdrawal, under certain circumstances, on the following terms: “2(b) in the relations between itself and the other parties, withdrawn from the treaty, if the breach is of such a kind as to frustrate the object and purpose of the treaty".

Article 44: Rebus sic stantibus. Fundamental change of circumstances.

Comment: The exclusion established under section 3(a) of this article, whereby a fundamental change in circumstances would not affect a treaty fixing a boundary, would appear to have been formu-
lated without the Commission having taken into consideration such treaties (if any) under which a boundary has been established by reference to a thalweg. Since it is conceivable that such boundary treaty provisions do exist and that a fundamental change in circumstances could indeed radically affect the boundary in question (to an extent not contemplated when it was originally delineated), it is at least arguable that article 44 (3)(a) should be modified to cover such a case.

The modification might be along the following lines:

“To a treaty fixing a boundary, except if such a boundary is based directly on a thalweg or other natural phenomenon the physical location of which is subsequently significantly altered as the result of a natural occurrence; or”.

7. CYPRUS

[PART III]

Transmitted by a note verbale of 26 October 1965 from the Ministry of Foreign Affairs

[Original: English]

The Government of the Republic of Cyprus welcomes the completion of the draft law of treaties (part III), covering the broad topics of the application, effects, modification and interpretation of treaties and expresses the hope that, once it is finally formulated it will, together with the two earlier drafts (law of treaties (parts I and II)), be considered in its final form as the basis for a multilateral conference to be arrived at in due course at the appropriate diplomatic conference of plenipotentiaries. As the Commission has rightly concluded, this process would give the opportunity to all the new States to participate directly in the formulation of the law, if they so wished, and this would—in the words of the Commission—“be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundations”.

The Government of the Republic of Cyprus will not enter upon any detailed observations on individual draft articles, but will simply make some remarks of general nature on certain of these draft articles.

The Government of the Republic of Cyprus would add in this connexion—and hopes that many countries that do not at present have a fully staffed legal section to deal with international law questions bears it out—that there may be many reasons, apart from lack of interest or reservations, to explain the fact that a given Government does not furnish promptly and regularly the comments requested. Consequently, the Government of the Republic of Cyprus thinks that there is much substance in the statement made by Professor Bartos to the effect that, in cases where Governments had refrained from commenting, an inquiry had revealed agreement rather than disagreement with the Commission’s formulation.

As regards draft article 55, the Government of the Republic of Cyprus finds itself in agreement with the way in which the International Law Commission gave expression to the fundamental rule of the law of treaties to the effect that *pacta sunt servanda*.

Indeed, “a treaty in force is binding upon the parties to it and must be performed by them in good faith”. The Commission very wisely took the view that what appears to be a clear-cut rule in the Latin maxim, just quoted, would be erroneous and misleading if stated without qualification and therefore limited the application of this article to treaties “in force”. Consequently, the rule in draft article 55 must be read subject to the considerable number of draft articles which may militate against a given treaty being “in force”, such as those dealing with the entry into force, provisional entry into force, obligations resting upon the contracting States prior to entry into force and—more significantly—the articles dealing with the invalidity and the termination of treaties.

When compared with the wording of the Charter principle contained in Article 2, paragraph 2, of the Charter, which deals with the obligations arising under the Charter itself, it appears that the limiting qualification to the *pacta sunt servanda* rule, contained in draft article 55, is even wider than that in Article 2(2). In the case of Article 2(2), the express qualification is that the obligations assumed must be “in accordance with the present Charter”. In the case of draft article 55 the qualification is that the treaty in question must be “in force”—in which case a number of reasons and not just one, as stated earlier, may have a bearing on the treaty being “not in force”. It would seem, however, that this distinction is more apparent than real and that, by necessary implication, all the factors that would make an ordinary treaty “not in force” would also be relevant *mutatis mutandis* to the rule stated in Article 2(2) of the Charter.

Under either rule and apart from the lack of any formal requirements, there exist a number of situations where clearly a treaty is not “in force” for the purposes of draft article 55. One such situation is where a treaty was enforced upon a State without its free consent, contrary to the spirit of the Charter and of its fundamental principles. In such a case—as provided in draft article 36 read in conjunction with draft article 46 of part II of the law of treaties, the treaty as a whole is ab initio null and void. Consequently it would be for the State concerned to take its free decision in regard to the maintenance or not of the treaty in question, once it found itself in a position of complete equality with all other States. This observation could be even more pertinent if such a treaty was imposed in circumstances precluding free choice upon a people prior to, and as a condition for, such a people adhering to independence.

Another such situation arises where, to use the wording of draft article 37, a treaty conflicts “with a peremptory norm of international law from which no derogation is permitted...” as e.g. a treaty which contains provisions which contemplate the unlawful use of force by one State against another in violation of the rule expressed by Article 2(4) of the Charter, or containing provisions purporting to deprive one State of the substance of its sovereignty and independence in violation of Article 2(1) of the Charter. Such treaties bring into play Article 103 of the Charter, and as provided in draft article 46—referred to above—the nullity extends to the whole transaction and not merely the offending clauses themselves.

Likewise a treaty is not “in force” for the purpose of draft article 55 if it has been duly and properly terminated by one party on the ground that its provisions were substantially violated by the other party. No State can be in substantial breach of its obligations under a treaty and at the same time claim the benefits to itself deriving from such a treaty.

Turning now to draft article 58, which gives expression to the maxim *pacta tertii nec nocent nec prosunt*, and to draft article 59, the Government of the Republic of Cyprus finds itself in basic agreement with the wording used, on the clear understanding, to use the words of the Commission in its commentary on the latter draft article, that the “primary rule...is that the parties to a treaty cannot impose an obligation on a third State without its consent. That rule is one of the bulwarks of the independence and equality of States, and the present article does not depart from it. On the contrary it underlines that the consent of a State is always necessary if it is to be bound by a provision contained in a treaty to which it is not a party”.

The Government of the Republic of Cyprus feels that it should simply add to what the commentary of the Commission so clearly states, that the notion of duress and undue influence, and the doctrine of unequal, inequitable and unjust treaties also applies to the State concerned to take its free decision in regard to the maintenance or not of the treaty in question, once it found itself in a position of complete equality with all other States. This observation could be even more pertinent if such a treaty was imposed in circumstances precluding free choice upon a people prior to, and as a condition for, such a people adhering to independence.

As regards draft article 63, dealing with the application of treaties having incompatible provisions, the Government of the Republic of Cyprus fully shares the view of those of the members of the Commission who insisted that the overriding character of Article 103 of
the Charter should find expression in the draft article in question. At the same time recognizing that it is logical to argue that, if a treaty were void under the operation of draft articles 37 or 45, such a treaty would not be a treaty in force and therefore there can be no question of its application. Such is the importance which the Government of the Republic of Cyprus attributes to Article 103, that it agrees emphatically to the present wording of the article in question. Moreover, in the opinion of the Government of the Republic of Cyprus, whenever circumstances warrant it, the competent organs of the United Nations should be guided by and apply Article 103 unreservedly.

Likewise, the Government of the Republic of Cyprus notes carefully draft articles 65, 66, 67 and 68, as well as the commentaries attached to each and reserves the right to make detailed comments thereon through the appropriate channel. The same applies to the three articles (69, 70 and 71) dealing with the interpretation of treaties. However, the Government of the Republic of Cyprus takes the opportunity to remark in this respect that it might have been preferable if more weight were to be attached to the principle contained in the maxim ut res magis valeat quam pereat through its express mention.

8. Czechoslovakia

[PART II]

Transmitted by a note verbale of 23 September 1964 from the Permanent Representative to the United Nations

[Original: English]

...The Government of the Czechoslovak Socialist Republic has closely followed and supported the activities of the United Nations International Law Commission in the field of the codification and progressive development of international law, which significantly contribute to the promotion of peaceful coexistence among States with different social and economic systems. The Czechoslovak Government appreciates the progress achieved by the Commission in the codification of the law of treaties, and as far as part II of the draft articles on the law of treaties is concerned, it associates itself in principle with the approach of the Commission to the solution of the question of invalidity and termination of international treaties.

The Czechoslovak Government agrees with the ideas underlying article 31 concerning provisions of international law regarding competence to enter into treaties, which reflect the appropriate and just balance between internal and international laws and ensure both respect for the sovereignty of a State and the right of nations to self-determination as well as the necessary legal security in treaty relations.

The Czechoslovak Government devotes special attention to articles 35, 36 and 37 and notes with satisfaction that those draft articles—in conformity with justice and international legality—declare to be null and void, ab initio, international treaties concluded through personal coercion of representatives of States or through coercion of a State by the threat or use of force, and treaties which are contrary to peremptory norms of international law.

In connexion with draft article 37 and draft article 45, which supplements the former, the Czechoslovak Government shares fully the view of the Commission contained in the commentary to article 45 that “there are a certain number of fundamental rules of international public order from which no State may derogate even by agreement with another State”. The Czechoslovak Government believes that the codification of legal principles of peaceful coexistence which has been taken up by the United Nations General Assembly during the consideration of principles of international law pertaining to friendly relations and co-operation among States in accordance with the Charter of the United Nations will contribute to the stipulation of those rules which must be considered as peremptory norms of general international law.

The Czechoslovak Government does not doubt that the rules contained in articles 36 and 37 also declare the invalidity of unequal treaties which, as one of the instruments of modern colonialism, constitute a serious obstacle for the attainment of complete independence and sovereignty of a number of developing countries and a source of conflicts and situations endangering international peace and security.

Furthermore, the Czechoslovak Government is of the opinion that the final formulation of article 36 should also contain explicitly the principle of invalidity of international treaties imposed by such forms of coercion as, for example, economic pressure.

The Czechoslovak Government reserves the right to submit more detailed observations to the draft articles on the law of treaties during their final consideration.

[PART III]

Transmitted by a note verbale of 4 October 1965 from the Permanent Representative to the United Nations

[Original: English]

1. The Government of the Czechoslovak Socialist Republic has attentively and with great interest followed the work done for the last few years by the International Law Commission in the field of codification and progressive development of the law of treaties. It greatly appreciates the results achieved in these efforts thus far, which undoubtedly contribute to a further development of international law as a useful instrument of peaceful coexistence and co-operation among all States of the world. The last, third, part of the draft articles on the law of treaties successfully evolves from the preceding two parts and regulates the complicated questions of the application, effects, modification and interpretation of international treaties in a progressive spirit with due regard to the established practice of States and to the opinions of the doctrine of international law. Therefore, as well as in the case of the first and second parts of the draft, the Czechoslovak Government in principle agrees with the proposed formulations of the articles and commentaries attached to this part of the draft. In view of the fact that this is the first version of the draft articles and that at a later stage opportunities will present themselves for expressing views on the definitive version, the Czechoslovak Government has adopted a position with regard to only some of the main questions.

2. In principle, the Czechoslovak Government agrees with draft article 55, containing the fundamental principle of the law of treaties, that of “pacta sunt servanda”, according to which the treaties in force are binding upon the parties and must be performed by them in good faith. Consistent and faithful observance of obligations emanating from international treaties is of considerable significance for the strengthening of peaceful coexistence among States as well as for the development of fruitful and mutually advantageous international co-operation in the field of economic, technical, social and cultural co-operation. The Czechoslovak Government submits for consideration whether, in view of the tremendous practical and political purport of this principle, it would not be convenient to extend article 55 in such a way as to clarify in the text or at least in the commentary that the term “treaty in force” means an international treaty concluded freely and on the basis of equality, in accordance with international law. Czechoslovakia expounded this interpretation of the principle in 1962 in its Draft Declaration of the Principles of Peaceful Coexistence: “Every State shall fulfil, in good faith, obligations ensuing for it from international treaties concluded by it freely and on the basis of equality, as well as obligations ensuing from international customary law” (document A/C.6/L.505). It is also believed that in drafting the final text of this provision, regard should be given to the results of the discussion in the General Assembly in connexion with the codification of the legal principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter, which should take place within the framework of the
debate on the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations (see item 90 of the Agenda of the twentieth session of the General Assembly of the United Nations).

3. The Czechoslovak Government agrees with draft article 57 concerning the territorial scope of a treaty, according to which "the scope of application extends to the entire territory of each party". It considers this formulation to be more correct and more precise than the wording often used in the past, "all the territory or territories for which the parties are internationally responsible". The principle thus formulated was contrary to the requirement of a speedy liquidation of colonialism in all its forms and manifestations, and was more than once misused by the colonial powers for temporary exclusion of the territories administered by them from the benefits and rights ensuing particularly from general international treaties of a humanitarian character. In modern international treaties there is no place for either the so-called colonial clause or for any other form of discrimination aiming at a limitation of the validity of a treaty only to certain parts of the territory of a State. In the opinion of the Czechoslovak Government, the exception contained in the draft article ("unless the contrary appears from the treaty") may only be applied to bilateral or multilateral treaties governing specific interests of the contracting parties within a limited territorial scope; in no way, however, may it be applied to a legal régime of a general contractual nature which the contracting parties are bound to observe and give effect to throughout their respective territories and with regard to all persons living therein.

4. The Czechoslovak Government also agrees with the formulation in article 58 of the draft, concerning to which a treaty applies only between the parties. In this way, the draft strictly respects the key principle of contemporary international law, that of the sovereign equality of States. Any transfer of obligations or rights to a third State requires, eo ipso, its consent. Without the free consent of a State not party to a treaty, it is impossible either to oblige or to authorize it by virtue of a treaty inter alios acta.

5. Ultimately, the Czechoslovak Government shares the view of the Commission that the proposed article 69 containing a general rule of interpretation should proceed from the assumption that the text of the treaty is an authentic expression of the intention of the contracting parties and that the text itself should be the basis from which any interpretation should proceed. However, unlike the International Law Commission which mentioned this assumption only in the commentary, the Czechoslovak Government deems it correct to include it expressly in the wording of draft article 69, paragraph 1, so that it would read as follows: "A treaty, whose text is presumed to be the authentic expression of the intentions of the parties, shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term".

In conclusion, the Czechoslovak Government reserves its right to put forward detailed comments and proposals to the final text of the draft codification of the law of treaties at the international conference of plenipotentiaries which in its opinion, and in the sense of the preliminary recommendation of the International Law Commission, should be convened for the purpose of preparing a Convention on the Law of Treaties.

9. DENMARK

[PARTS I AND II]

Transmitted by a note verbale of 2 March 1964 from the Permanent Representative to the United Nations

[Original: English]

Article 4

Article 4, paragraph 3, provides that a representative of a State other than the Head of State, Head of Government, Foreign Minister and the accredited head of a diplomatic mission, shall produce written credentials of his authority to negotiate, draw up and authenticate a treaty.

In the opinion of the Danish Government, this text does not correspond to general practice, nor does it seem adequate as a new rule of international law. In cases where two Governments wish to conclude a treaty on a given subject, the normal procedure is that they agree, through diplomatic channels, to open negotiations. The time and place of such negotiations are likewise agreed upon, and the parties inform each other of the names of the officials designated to represent them in the negotiations. This is considered to be a sufficient introduction of the representatives of the respective Governments, and the question of credentials does not arise until the treaty is to be signed, and sometimes not even then.

With the possible exclusion of treaties drawn up at general international conferences, it is therefore suggested that the article should be modified so as not to require credentials for the negotiation, drawing up and authentication of a treaty.

As to the authority to sign a treaty, whether or not subject to ratification, the Danish Government agrees that Heads of State or Government and Foreign Ministers shall never be required to produce full powers (article 4, paragraph 1). It is also accepted that full powers shall not be required, even of other representatives, in cases of treaties in simplified form, unless called for by the other negotiating State (paragraph 4(b)), and that full powers shall be produced in other cases (paragraph 4(d)). The question is, however, whether the definition of "treaties in simplified form" as contained in article 1, paragraph 1(b), is adequate for the purpose. After enumerating certain examples, this definition refers to the procedure ("other instrument concluded by any similar procedure"). In current practice an essential part of the simplified procedure is the omission of full powers. This obviously leads into circular reasoning: full powers are not required for treaties in simplified form; treaties in simplified form are those for which no full powers are required.

It would appear to be in better conformity with current practice and more consistent with the requirements of logic to adopt a rule which would not provide for the production of full powers to sign a treaty, except where the other party so requires. A practical indication of such a requirement would be to insert in the text the classical clause about full powers having been produced and found to be in good and proper form.

Articles 8 and 9

The Danish Government shares the unanimous view of the International Law Commission that general multilateral treaties should be open to participation on as wide a basis as possible.

With regard to other treaties, the Danish Government is inclined to think that the proposals of the Commission go too far towards opening such treaties to the participation of other States than the original parties. In some cases where treaties are concluded by a small group of States, or between States belonging to a particular region, other States should not be allowed to become parties except by invitation of the original parties. In such cases, it should not be open to an outside State to present a request which would have the effect that the consent of the original parties would become automatic after the expiry of a certain period. A non-participating State should not be able to intrude, and possibly bring pressure to bear on the original parties to refrain from objecting. The initiative should belong to the original parties, and article 9, paragraph 3, should consequently not apply to such cases.

In general, article 9 should not apply to treaties which are the constituent instruments of international organizations. It should not be possible under the procedure laid down in article 9 to modify or circumvent the provisions concerning the admission of a new member to an international organization.

Article 11

The legal effects which under paragraph 2 are attributed to signature subject to ratification have no significance per se. In most cases the signature of a treaty subject to ratification is a formality.
which unduly complicates the treaty-making procedure and which has little rational justification in modern international relations. The necessary authentication of the text may well take place in other ways, as proposed in article 7, paragraph 1. The Danish Government recognizes, however, that the formal signature is so deeply embedded in international practice that proposals for a reform would have little chance of being accepted.

Article 12

In the opinion of the Danish Government, this article, which requires ratification of a treaty unless an exception is made, is not in conformity with international practice. Moreover, the article is drafted in unduly complicated terms. The article should be simplified by reversing the presumption on which it is based.

It should be presumed that a treaty which has been duly signed by representatives of States should need no ratification. In other words, ratification should be required only if the necessity appears from the text, from the full powers issued to representatives of the signatory States, or from other circumstances evidencing an intention to that effect. The constitutional necessity or ratification may be included in such circumstances.

This reversal of the basic principle would bring the article in line with international practice as understood and followed by the Danish Government.

Furthermore, it is submitted that the question whether or not ratification is required should not necessarily be answered in the same way with respect to both parties. In the practice followed by the Danish Government for the conclusion of bilateral treaties it has occurred that the signature of one party has been considered to be immediately binding, while the signature of the other party has been subject to ratification (acceptance or approval). This procedure may have practical advantages in certain cases, and it should not be precluded by the wording of the article.

Articles 18-20

The Danish Government welcomes the constructive proposals of the International Law Commission for the solution of this intricate problem which has caused so many difficulties and so great uncertainty in recent years. Without committing itself definitely to the solution proposed, the Danish Government is ready to examine the proposals as a possible basis for achieving that general agreement on the subject which is so urgently needed.

Experience seems to suggest that no short and simple formula can solve the problem. The Commission has therefore chosen the right approach in distinguishing between different aspects of the problem and between different situations in which the problem arises. It is only on the basis of such a differentiation that realistic proposals can be drafted. But this approach has the inevitable consequence that the proposed rules will be lacking in that simplicity and clarity which should be aimed at in the process of codifying international law.

While thus admitting that the nature of the problem justifies complicated formulas, it may be asked whether the drafting methods chosen by the Commission—proposing separate articles concerning the conditions under which reservations are permissible (article 18) and the effect of reservations (article 20)—have not unduly complicated the wording of the articles. Before going further into this question, the Danish Government wishes to make a few comments on the text as it stands.

In article 18, paragraph 1, the words "when signing, ratifying, acceding to, accepting or approving a treaty" seem to be redundant, as they are spelled out by paragraph 2 of the same article.

As stated by the Commission in the commentary to article 20, paragraph 1(d) of article 18 implies a subjective appreciation of the compatibility of a reservation with the object and purpose of the treaty. As this question may therefore be subject to divergent interpretations, it does not seem appropriate to deal with it as a case of inadmissibility of reservations. As the rule now stands, it may cause difficulties for the depositary who would not be under a strict obligation to communicate a reservation which is clearly inadmissible under the rule, although it is not the function of the depositary to adjudicate upon the validity of a reservation (commentary to article 29, paragraph 5).

Article 19 concerning acceptance of or objection to reservations may, on the face of it, give the impression that it applies to any reservation, even reservations which are inadmissible. It seems evident, however, that in cases where a reservation is prohibited, explicitly or implicitly, it cannot be accepted by any other party, and an objection is not required to prevent the reservation from becoming effective in relation to another State.

The provisions of article 19, paragraph 2, seem to be self-evident, and may be omitted if a simplification of the article is attempted.

Article 20, paragraph 2(a), deals with acceptance of reservations and paragraph 2(b) with objections to reservations on the ground of alleged incompatibility with the object and purpose of the treaty. It leaves open the question what will be 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 the importance attached by the objecting State to the provision to which the reservation relates. In its introductory commentary, paragraph (13), the Commission mentions a well-established rule to the effect "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". It would seem preferable to include this rule in the draft articles.

Furthermore, article 20, paragraph 2, deals with the question whether or not the reserving State becomes a party to the treaty in relation to other States which either accept or object to the reservation. The question whether or not the reserving State is a party to the treaty may, however, present itself in a more general and objective manner. Is its ratification to be included in the number of ratifications required for the treaty to enter into force? Is the reserving State entitled to ask for revision of the treaty, if such right is granted to any contracting party or to a specified number of contracting parties? The answer to these and other similar questions should presumably be in the affirmative, provided that the reservation has not been objected to by all other contracting parties. It would be preferable, however, to insert provisions dealing explicitly with this question.

Article 20, paragraph 3, concerning treaties between a small group of States does not distinguish between express and implied acceptance. The considerations expressed in the commentary seem to warrant the conclusion that an express acceptance should be required in these particular cases.

Article 20, paragraph 4, deals with constituent instruments of international organizations. In its commentary, the Commission rightly attaches decisive weight to the integrity of such Instruments. This would imply that the reservation should be submitted to the competent organ for decision in all cases—not only when an objection has been raised. In other words, the possibility of an implied or tacit acceptance of the reservation should not be left open in these cases.

In the light of the preceding observations and in an attempt to simplify the general structure and economy of the articles, the following redraft is offered for consideration:
Article A

1. In cases where the terms of a treaty or the established rules of an international organization prohibit the making of a reservation, no such reservation shall be admissible. No act or instrument—signature, ratification, accession, acceptance or approval—to which such a reservation is attached shall have legal effect.

2. In the case where a treaty expressly authorizes the making of a specified category of reservations, any other reservation shall be excluded.

Article B

In the case where a reservation is made to the constituent instrument of an international organization, the effect of the reservation shall be determined by decision of the competent organ of the organization in question, unless the treaty provides otherwise.

Article C

Where a reservation is expressly or impliedly permitted by the terms of the treaty, the reservation shall be admissible and the act or instrument to which it is attached shall have its usual legal effects, as limited or modified by the terms of the reservation.

Article D

1. Where the treaty is silent in regard to the making of reservations, a reservation shall not be considered inadmissible, but other States may object to the reservation, either because they consider it to be incompatible with the object and purpose of the treaty, or for any other reason. Any such objection precludes the entry into force of the treaty between the objecting and the reserving States, unless a contrary intention shall have been expressed by the objecting State.

2. Objection to a reservation may be raised by any State which is, or to which it is open to become, a party to the treaty. An objection by a State which has not yet established its own consent to be bound by the treaty shall have no effect if after the expiry of two years from the date when it gave formal notice of its objection it has still not established its consent to be bound by the treaty.

3. An objection to a reservation shall be formulated in writing and shall be notified:
   (a) In the case of a treaty for which there is no depositary, to the reserving State and to every other State party to the treaty or to which it is open to become a party; and
   (b) In other cases, to the depositary.

4. The right to object to a reservation shall be precluded by expressed or implied acceptance. A State shall be considered as having accepted a reservation implicitly if it shall have raised no objection to the reservation during a period of twelve months after it received formal notice of the reservation.

5. Acceptance of a reservation by a State which is bound by the treaty shall constitute the reserving State a party to the treaty in relation to such State as well as for general purposes not connected with the relations to any other particular State. The same applies to an acceptance by a State to which it is open to become a party to the treaty as soon as the treaty has entered into force with respect to such State.

Article E

Notwithstanding the preceding article, a reservation to a treaty, which has been concluded between a small number of States, shall be conditional upon the express acceptance by all the States concerned, unless:

Corresponding provision in the ILC draft

Article 18, paras. 1(a) and (b)

Article 18, para. 1(c)

Article 20, para. 4

Article 20, para. 1(a)

Article 18, para. 1(d)

Article 19, para. 4

Article 19, para. 5

Article 19, para. 3

Article 20, para. 3
provisions merely limits the power to enforce a treaty within the
may take various forms. One group of provisions relates to the power
Consequently, the second group of provisions should not be given
same from the point of view of international law. If its consent has
the problem is essentially the
whether a Government to enter into treaties, while another group of
In the opinion of the Danish Government, this latter group of
The wording of this article does not seem entirely satisfactory. Treaties between a Member of the United Nations and a non-
- It would seem preferable to provide that any Member of the
- It might be added that the parties may, in conformity with current

Article 25

The wording of this article does not seem entirely satisfactory. Treaties between a Member of the United Nations and a non-
It would seem preferable to provide that any Member of the United Nations shall register treaties which it concludes, in conformity with Article 102 of the Charter, and that any non-member State party to the present articles shall be under a similar obligation.

It might be added that the parties may, in conformity with current practice, 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.

[Part II]

Article 31

In paragraph (1) of the commentary to this article it is pointed out that constitutional limitations upon the treaty-making power may take various forms. One group of provisions relates to the power of a Government to enter into treaties, while another group of provisions merely limits the power to enforce a treaty within the internal law of the State.

In the opinion of the Danish Government, this latter group of provisions does not raise any special problem distinct from the general problem of giving effect to a treaty in national law. Whether the treaty requires amendment of administrative decrees, statutory acts or constitutional provisions, the problem is essentially the same from the point of view of international law. If its consent has been validity expressed, a State cannot rely on its internal law, not even its constitution, as an excuse for not giving effect to a treaty. Consequently, the second group of provisions should not be given special consideration in this context. The wording of article 31 seems to be entirely compatible with this point of view in so far as it refers to provisions of the internal law regarding “competence to enter into treaties”.

The main problem dealt with in this article is one of considerable theoretical and dogmatic interest. As pointed out in the commentary, however, experience seems to indicate that the practical importance is less significant.

Although it is felt desirable, in States having a system of government based upon principles of parliamentary democracy, to safeguard the powers of representative bodies against encroachments by the executive, there is an equally strong and legitimate interest in being able to rely on the consent given in due form by a foreign Government. The point of balance between these conflicting interests is difficult to determine exactly.

The Danish Government has previously had an occasion to state its views on one particular aspect of this problem. In the course of the oral proceedings of the Eastern Greenland case before the Permanent Court of International Justice the Danish agent stated with reference to constitutional provisions limiting the power of a Foreign Minister:

...the Danish standpoint is that such internal constitutional restrictions are of no importance in international law, in any case unless they are expressed in an absolutely clear and unequivocal manner in the Constitution of the State in question.”


It appears from the written pleadings that the point at issue was the international relevance of Norwegian constitutional provisions concerning the procedure to be followed for the adoption of a decision by the Government, in particular the question whether
such a decision should necessarily be adopted by the King in Council. The question of parliamentary approval or countersignature of a Royal Resolution by a Minister did not arise in the case (P.C.I.J., Series C, No. 63, pp. 880-884). The statement contained in paragraph (9) of the commentary of the International Law Commission does not appear to reflect quite accurately the Danish position.

Although the proposal of the Commission seems to deprive constitutional provisions of their international relevance to a somewhat greater extent than recognized by the opinion which prevails in the doctrine of international law, the Danish Government is ready to accept the proposal as a basis for solving this intricate problem. It is essential, however, to maintain the safeguarding clause of the proposal according to which a State is not bound by the declaration of its representative if the violation of its internal law was manifest.

The last sentence of article 31 calls for an additional comment. This provision seems to be based on the juridical construction that the consent is valid even in cases of manifest violation of internal law, although the State is entitled in such cases to withdraw the consent thus expressed by its representative. It would seem preferable to consider the consent as not validly expressed from the point of view of international law. Consequently, the formula in articles 33 and 34 ("many invoke...as invalidating its consent to be bound by the treaty") should be employed in the present article also. The theoretical objections mentioned in paragraph (5) of the commentary do not seem to be decisive. As the question of validity under international law is considered to be distinct from the question of invalidity under national law, there does not seem to be any reason why the invalidity in international law should not be made dependent upon a criterion which is not necessarily relevant under national law, such as the manifest character of the violation of constitutional limitations.

Article 44

The Danish Government agrees that fundamental changes of the circumstances may be invoked as a ground for terminating or withdrawing from a treaty under the conditions specified in paragraph 2.

It must be borne in mind, however, that this is a field in which contracting parties are likely to evaluate factual circumstances differently and draw different legal conclusions from the facts. If the principle of the binding force of treaties is not to be unduly weakened, it seems essential to include an additional provision to the effect that a State should not be entitled to withdraw from a treaty under this article unless it is ready to submit any controversy on this point to the decision of an arbitral or judicial tribunal. Even if no general clause concerning the judicial settlement of disputes is ultimately added to the draft articles, it seems advisable to attach such a clause to this specific article.

10. FINLAND

[PART I]

Transmitted by a letter of 17 April 1964 from the Permanent Representative to the United Nations

[Original: English]

Part I of the draft articles on the law of treaties drawn up by the International Law Commission constitutes, in the opinion of the Government of Finland, an adequate basis for the codification of this branch of the law.

With regard to some specific articles, however, the Government of Finland would wish to submit the following observations:

Article 1

Since the definitions contained in article 1 considerably affect the subsequent articles every effort should be made to formulate these definitions as clearly and unequivocally as possible. As the definition contained in paragraph 1(a) of article 1 is given for the purposes of this Convention only and since the Convention deals exclusively with treaties concluded between States, there appears to be no need in this connexion to touch upon other subjects of international law. Consequently, the words "or other subjects of international law" could be deleted from sub-paragraph (a).

Article 3

For the same reason as stated above under article 1, the whole of paragraph 3 concerning international organizations could be deleted from article 3 as well as the words "and by other subjects of international law" from the end of paragraph 1. These words could perhaps be replaced by the words "which are subjects of international law", as all States do not possess international sovereignty. Another possibility would be to delete the whole of article 3 as superfluous, as suggested by some members of the International Law Commission.

The Government of Finland wish, in this context, to point out that, although the draft treaty deals only with States, nothing would prevent the inclusion, if desired, in the commentaries on certain articles, of statements indicating that these articles should ex analogia be applied to, for example, the Holy See and certain international organizations, and that a new draft agreement regarding this question could be worked out later.

Paragraph 2 of this article does not seem quite satisfactory, as it only mentions the federal State and its member states, although there exist several other types of composite States where the member states possess the capacity to conclude treaties in certain fields. The said paragraph might, therefore, read for example as follows: "In a union of States, the capacity of its members to conclude treaties depends on its constituent treaty or its constitution".

Article 12

The contents of the proposal of the International Law Commission on this article call for no comments, but its form invites some remarks. In the draft the two types of treaties, the formal treaties and those in simplified form, are not always dealt with separately. For instance, the principle embodied in paragraph 1 regarding the necessity of ratification applies to all treaties. Paragraph 2 of the same article contains so extensive exceptions, that they in fact cancel the principal rule, especially since most treaties are treaties concluded in simplified form. Paragraph 3, again, contains counter-presumptions, i.e. exceptions, which in part are contradictory to the preceding paragraph. This unnecessarily complicated and in a technical sense unsatisfactory article could be simplified, for instance, as follows: "All treaties 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".

Article 16

In article 16 regarding the legal effects of ratification, accession, acceptance and approval, it would perhaps have been possible to deal with the question as to whether and on what conditions such acts could be revoked. Reasons can be given as well for as against the inclusion of such a possibility. Revocations may have a harmful effect on the position of other signatory States. But in some cases it may be unjust to prohibit revocation unconditionally. Such would be the case, for example, if a signatory State would be compelled to wait until the treaty enters into force and only then be able to denounce it, provided that this is allowed by the terms of the treaty.

Article 17

The view that a State, which has ratified a treaty (that has not yet entered into force) and which subsequently commits acts contrary to the objectives of the treaty, thereby violates its obligations,
is quite acceptable. One may even accept the presumption that the mere signing of a treaty puts the signatory State under obligation of good faith. It is, however, doubtful whether such an obligation should also ensue in respect of States which have only taken part in the negotiation of a treaty or in the drawing up or adoption (authentication) of its text.

**Article 18**

Paragraph 1 of article 18, which deals with the formulation of reservations, could be made simpler by combining—as has been suggested—sub-paragraphs (a), (b) and (c) into one single paragraph. Another possibility would be to regard sub-paragraph (a) alone as sufficient.

**Article 27**

Although the provisions contained in article 27, paragraph 2, are in compliance with the practice of the Secretariat of the United Nations, it would appear sufficient to transmit the copy of the *procès-verbal* only to the State which has received the incorrect copy of the treaty, while the other States would be only notified of the action taken.

[PART II]

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

In the opinion of the Government of Finland, the draft articles submitted by the International Law Commission constitute an entirely satisfactory basis for the future work on the codification of the part of the law of treaties relating to the validity and termination of treaties.

With regard to certain of the draft articles, the Government of Finland would wish to make the following specific observations, which the Commission may wish to take into account in its further work.

In the title of part II of the draft articles as well as in the title of section II, it would perhaps be more appropriate to speak not of the invalidity but of the validity of treaties, since in article 30 the emphasis is placed on the validity of treaties in general and since the articles contained in section II deal both with the validity and the invalidity of treaties.

**Article 38**

The main part of the provisions contained in article 38 seem self-evident. Hence it would appear possible to delete them altogether. The last sentence of sub-paragraph (b) of paragraph 3, on the other hand, embodies an important principle which deserves to be explicitly recognized in the draft articles.

**Article 40**

The Government of Finland concur in the conclusion that a decision on termination and suspension of the operation of multilateral treaties requires, in addition to the agreement of all parties to the treaty, also the consent of not less than two thirds of all States which participated in the drawing up of the treaty in question. As to the length of time during which this principle should apply, a period of three to five years after the entry into force of the treaty would not seem unreasonable.

**Article 51**

The acceptance of that procedure contained in article 51 would undoubtedly be of great importance. However, the draft article still fails to establish the means which could be resorted to in the event negotiations and other efforts for the settlement of a dispute prove to be unsuccessful. This should not be interpreted to imply that unilateral measures for withdrawing from treaty obligations are permissible.

A particular difficulty arises from the fact that some States do not accept compulsory settlement of disputes, for instance, through arbitral or judicial procedure. For those States which in principle accept such compulsory settlement of disputes, there remains only the possibility to agree—for example, through a separate protocol, as was done in connexion with the Geneva Conventions on the Law of the Sea, 1958, and with the two Vienna Conventions on Diplomatic and on Consular Relations, 1961 and 1963 respectively—to submit disputes arising out of the application or interpretation of a particular treaty or convention to this kind of procedure. As a compromise one may also accept the *status quo*, however, with an additional stipulation to the effect that, if the contracting party which wishes to withdraw from the treaty obligations proposes to the other parties to settle the dispute by judicial or arbitral procedure and this offer is rejected, the first party has the right of denunciation.

As to the details of this draft article, sub-paragraph (b) of paragraph 1 appears inadequate in so far as it does not fix any period of time within which an answer must be given in urgent cases. This period could suitably be two weeks or one month.

[PART III]

Transmitted by a letter of 24 September 1965 from the Permanent Representative to the United Nations

In the opinion of the Government of Finland the draft articles submitted by the International Law Commission constitute an entirely satisfactory basis for the future work on the codification of this part of the Law of Treaties.

With regard to certain of the draft articles the Government of Finland would wish to make the following specific observations, which the Commission may wish to take into account in its further work.

**Article 55**

There might be advantage also to state that the party must abstain from acts calculated to frustrate the objects and purposes of the treaty. Such an addition would complete the article in conformity with all that has already been stated concerning the same matter in other articles.

**Article 62**

Concerns the importance of custom as a source of international law; therefore this article does not really belong to the law of treaties.

Since international custom and the law of treaties are equivalent sources of law, the principle expressed in article 62 might be considered self-evident.

**Article 67**

This article does not in all respects satisfactorily solve the question of amendment of multilateral treaties between certain of the parties only.

A correction of a formal nature should be made to paragraph 1 of the article.

As it is admitted in the commentary (2), the second and third conditions overlap to some extent. The latter could be left out.

Critical observations should be made concerning paragraph 2 of the article. It would have been reasonable that States which wish to amend the treaty (inter se agreement) would notify all parties as stated in article 66 regardless of the fact that the treaty allows certain arrangements between certain of the parties only.

All parties should be notified of above-mentioned plans of amendment as soon as negotiations are under way.

The position of the parties not involved in the amendment is even worse due to the fact that no term has been set by the article for notification. It has not even been mentioned that it should take
place at earliest convenience or as soon as possible upon conclusion of the special treaty.

Articles 69-73

The Government of Finland considers the rules concerning the interpretation of treaties as both useful and appropriate.

11. HUNGARY

[PART III]

Transmitted by a note verbale of 1 September 1965 from the Permanent Representative to the United Nations

[Original: English]

1. The last sentence in paragraph 3 of the commentary to draft article 59 indicates that a treaty provision imposed upon an aggressor State does not fall under the rule of nullity set forth in article 36. It clearly follows from this right statement that the consent of an aggressor State is not needed to establish an obligation for it by the provision of a treaty to which it is not a party. It would be advisable to include this highly important exception in the text of article 59 itself.

2. According to article 59 of the draft, an obligation may arise for a State from a provision of a treaty to which it is not a party if...the State expressly or impliedly (italics added) assents thereto. However, according to article 61, the provision of a treaty establishing a right or an obligation as referred to in articles 59 and 60 respectively may be revoked or amended only with the consent of the State in question, without any distinction being made—in contrast to articles 59 and 60—between an express consent which seems to be needed for the revocation or an unfavourable amendment of a provision establishing a right, on the one hand, and implied consent which may be enough for the revocation or a favourable amendment of a provision establishing an obligation, on the other. It would seem advisable to adjust the provisions of article 61 to the provisions of articles 59 and 60.

3. In draft article 64 the International Law Commission has determined the effect of severance of diplomatic relations on the application of treaties.

The draft contains no provision dealing with the effect of severance of consular relations on the application of treaties. Although it is without doubt that, considering the interests of co-operation of States, the maintenance of consular relations is desirable even in case of severance of diplomatic relations, the severance of consular relations cannot be considered impossible at the present stage of development of international law. The Vienna Convention on Consular Relations concluded on 24 April 1963 provides for this possibility in article 27. It would therefore seem desirable for the International Law Commission to deal also with the effect of severance of consular relations on the application of treaties in article 64 or in a separate article. It would be appropriate to draft a new provision according to which the provisions of paragraphs 1 to 3 of article 64 should apply to the severance of consular relations accordingly.

4. Article 66 deals with the question of the amendment of multilateral treaties. It seems desirable that the general rule set forth in paragraph 1 of this article should be complemented with a special rule in regard of general multilateral treaties.

Such an addition to article 66 presupposes the alteration of the text of article 8 by bringing the provisions of article 8 into accord with the definition of general multilateral treaties as contained in article 1.

5. The provision contained in paragraph 3 of article 66 lays down a specific rule dealing with a case which seems to be rather hypothetical. The question arises whether there is need to create a new rule for a hypothetical case whose regulation seems hardly justified by practice. The provision seems to be questionable also on the ground that it attaches a certain effect to the signature of a treaty. This, however, seems to be out of place in the section of the draft dealing with the modification of treaties.

6. The commentary to article 69 explains the textual approach to treaty interpretation adopted by the Commission. The text of the article itself seems to be more rigid than the commentary in this respect, not even mentioning the intention of the contracting parties. It would seem desirable to draft article 69 more flexibly in this respect and to give expression of the thought contained in paragraph (10) of the commentary, i.e. that it is the intention of the parties which is sought and it is presumed that their intention is that which appears from the text.

7. Article 70 of the draft refers to recourse to the preparatory work of a treaty merely as a further means of interpretation. This seems to be inconsistent with article 69, paragraph 3, where the subsequent practice of the parties in the application of the treaty is considered a primary means of interpretation. The preparatory work done prior to the conclusion of a treaty is believed to be of the same importance as the subsequent practice in regard to determining the intention of the parties.

12. ISRAEL

[PART II]

Transmitted by a note verbale of 26 April 1963 from the Permanent Mission to the United Nations

[Original: English]

1. The Government of Israel is pleased to note the progress which has been made in connexion with the law of treaties. In general, the practical approach which has been adopted is seen to be adequate to present needs, and the Commission's general decision that its draft articles on the law of treaties shall serve as the basis for a convention on the topic is acceptable. Particular satisfaction is felt at the manner in which the problems of reservations to multilateral conventions and the functions of the depositary authority have been dealt with, thereby responding to requests which have been made by the General Assembly during recent sessions, and with the question of treaties in simplified form. It is noted that this progress is the consequence of the conscientious preparatory work which has been undertaken by the present Special Rapporteur on the law of treaties and by the previous Special Rapporteurs on the topic, and the Government is happy to express its appreciation for their work.

2. It is observed that several of the articles refer to tacit consent as a method by which various stages of the treaty-making process can be accomplished. Examples of this are found in articles 9, 19 and 27. The question of tacit consent appears to be of increasing practical significance; and it is believed that further consideration might be given to all its implications. Furthermore, it is being adopted in some domestic constitutional practices in connexion with the parliamentary ratification of treaties. The notion of tacit consent raises the question of the length of time which has to lapse before the presumption of consent may be inferred. Article 9, paragraph 3(b), and article 19, paragraph 3, refer to a period of twelve months.

Additional observations on part I are included in the comments on part II.
Article 19, paragraph 4, refers to a period of two years and article 27, paragraph 1, simply to a "specified time-limit". This Government feels that under certain circumstances a period of twelve months might prove too brief for such a presumption and therefore suggests that its extension be considered. At all events, it is believed that closer consideration might be given to the question of uniformity for the different periods of time involved.

II

The following specific observations are put forward.

3. With regard to paragraph (5) of the commentary to article 1, attention is called to the fact that in United Nations practice the designation "declaration" is used with increasing frequency for the purpose of distinguishing certain quasi-normative texts from instruments which are intended to be international treaties. This has been pointed out in the memorandum of the Office of Legal Affairs published in document E/CN.4/L.610. Without taking any position on the precise legal characterization of such declarations, it is suggested that appropriate mention of this aspect should appear in the final text of the commentary.

4. It is believed that the last member of the final sentence of paragraph (8) of the commentary to article 1 may be open to misconstruction. In a set of articles dealing with the conclusion, entry into force and registration of international treaties, it is probably unnecessary to consider whether individuals or corporations created under national law do or do not possess capacity to enter into agreements governed by public international law, or what is the proper law of such instruments. There are a number of such agreements which purport to be governed by public international law, or at least by Article 38 of the Statute of the International Court of Justice. Perusal of the summary records of the Commission's fourteenth session suggests that this particular phrase may not adequately reflect the Commission's discussions on this matter.

5. The English and French texts of the draft articles do not fully correspond to one another in their definition of "reservation" (article 1, paragraph 1(f)). While the English text speaks of "an...statement...purporting...to exclude...the legal effect of some provisions", the French text refers to "certaines dispositions". Paragraph (13) of the commentary to this article would appear to support the view that the French text, in fact, reflects more precisely the Commission's intention that a true reservation relates to a specific provision of a treaty. An appropriate modification of the English text is therefore suggested.

6. It is felt that article 1, paragraph 2 ("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") might give rise to difficulties on the internal level, especially in the countries in which duly ratified international treaties become part of the law of the land. While accepting the principle, therefore, doubts are felt whether the provision itself is fully appropriate to an international treaty, and whether the idea would not better be expressed should it appear in the commentary.

7. With regard to article 3, it is suggested that for the present purposes the question of capacity would be adequately covered if paragraph 2 of this article were eliminated.

8. (a) With regard to article 4, it is suggested as a matter of principle that full powers to conclude a treaty in simplified form should not normally be dispensed with. On the other hand, it is believed that the transaction of international business would be facilitated were the representatives referred to in paragraph 2(a) and (b) to be regarded as normally having implied authority to conclude all treaties of the type referred to in that paragraph, whether in solemn form or in simplified form. It is accordingly suggested that in paragraph 4(a) the word "shall" be substituted by "may" and that sub-paragraph (b) be eliminated.

(b) It is noted that no reference is made to the language of full powers, and other like instruments, used in connexion with the making of treaties. It is assumed that each State is free to follow its own inclinations in this regard.

(c) With regard to paragraph (8) of the commentary to this article, by Government decision the Minister for Foreign Affairs has a standing Commission which covers the complete exercise of the treaty-making power. It has not hitherto been this Government's practice to clothe its diplomatic representatives abroad or its permanent representatives at the headquarters of international organizations with comparable full powers. However, it sees no objection to adopting this practice in the future.

(d) With regard to paragraph (9) of the commentary, it is suggested that, owing to developments in contemporary treaty-making practice, two types of precautionary signature, whether or not technically designated signature ad referendum, have to be contemplated. The first type is that dealt with by the Commission, concerning which no observations are made. The second type is exemplified by the 1958 Conference on the Law of the Sea. The four Conventions adopted by that Conference specifically state that they are each subject to ratification, whereas the Optional Protocol of Signature concerning the compulsory settlement of disputes provides that it is "subject to ratification, where necessary, according to the constitutional requirements of the signatory States". The representative of Israel signed that Optional Protocol ad referendum in order to establish on the international level that ratification of any of the Conventions would not in itself imply ratification of the Optional Protocol. (Cf. doc. A/CN.4/121, sect. A, para. 1: Yearbook of the International Law Commission, 1959, vol. II, p. 82). It is suggested that the Commission consider whether its articles adequately deal with that type of precautionary signature.

(e) With regard to provisional full powers also referred to in paragraph (9), the addressee of the letter or telegram is not indicated. It is the practice of the Government to address such letters to the Minister for Foreign Affairs of the other party, or the Secretary-General of the organization concerned, and to transmit them through the diplomatic channel. On the other hand, telegrams are normally despatched to the Israel diplomatic mission concerned and handed over by it to the other party.

9. (a) With regard to article 5, despite its apparently descriptive character it relates to an essential phase of the treaty-making process. The negotiating phase may also be of importance for other aspects of the law of treaties. Its retention is accordingly urged.

(b) Attention is, however, drawn to a discrepancy between the English and French texts of this article. Whereas the English text refers to "some other agreed channel", the French text speaks of "une autre voie officielle". It is suggested that the French text be brought into line with the English.

10. Article 6 (b) of the English text speaks of "a treaty drawn up within an organization". From paragraph (6) of the commentary to this article it appears that article 6(b) is intended to refer to treaties drawn up within an international organization. It is accordingly suggested that the word "international" be added in the text of article 6(b), thus making it conform more closely to the French text.

11. With regard to article 9, it is believed that a period of five years from the date of the adoption of the treaty would be sufficient for the purposes of paragraphs 1(a) and 2.

12. With regard to the expression "concluded between a small group of States" appearing in paragraph 2 of article 9, and again in paragraph 3 of article 20, it is observed that in paragraph (12) of the commentary to article 1 a different expression is used, namely "limited number of States". The distinction which the Commission seeks to draw between general multilateral treaties as defined in article 1 and treaties concluded between a small group of States is appreciated. However, it is felt that the smooth application of the law would be facilitated were the commentary to introduce more precision with regard to the concept of "small group of States".
13. The Government wishes to express its reservations to article 12 which, if it has been correctly understood, introduces doctrinal considerations alongside its practical rules. It is not considered necessary, for the purpose of drawing up practical rules, to adopt a position in principle on the controversial question of the necessity or otherwise in general international law for ratification of treaties which themselves are silent on the question. In the view of this Government, it is essentially for the negotiators of the treaty to establish whether ratification is necessary or not. The question of the necessity for ratification may itself be part of the negotiation, or it may be conclusively determined by the terms of the full powers of one or both of the negotiators. It is suggested that a pragmatic point of departure such as this could lead to a simplification of the article which, in its present form, is unduly complex.

14. With regard to the withdrawal of reservations dealt with in article 22, it is suggested that in respect of those treaties for which there is a depositary, the State wishing to withdraw its reservation will comply with the necessary requirements if it employs the depositary as the channel for the transmission of the necessary notification. This would appear to conform more to the general character of the multilateral treaty for which there is a depositary, as it emerges from the draft articles as a whole, than the present wording which is open to the interpretation that the State concerned is obliged to inform the other interested States individually. If the depositary is employed in these circumstances, the withdrawal of the reservations should normally take effect in accordance with the general provisions of the treaty, or the residual provisions of the draft articles (in the event of the silence of the treaty), for the taking of effect of communications transmitted by or through the depositary, unless of course the notice of withdrawal specifies otherwise.

15. (a) With regard to article 25, it is correct to include in the draft articles a reference to the registration of treaties. However, this Government hesitates to agree that the 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. It is recalled that the distinction between obligatory registration and voluntary filing and recording was deliberately maintained when the regulations were first drawn up in 1946. It may also be pointed out that the Charter is not the only international constitution which calls for the registration of treaties. Reference may be made, for instance, to article 81 of the Constitution of the International Civil Aviation Organization.

(b) It may be the case that upon the completion of the work on the law of treaties it will be necessary for the General Assembly to re-examine and consolidate the practices in connexion with the registration of treaties, and to co-ordinate them with the practices of the specialized agencies. The Commission therefore might well consider whether, in due course, the General Assembly’s attention should not be drawn to this aspect.

16. With regard to article 29, it is suggested that in enumerating the functions of the depositary special reference should be made to the depositary’s duty to register international treaties and related documents. In this connexion attention is called to the discussions which preceded General Assembly resolution 364 B (IV) of 1 December 1949 and also to relevant inter-agency agreements such as that of 17 February 1949 between the United Nations and the International Labour Organization (United Nations, Treaty Series, vol. 26, p. 323).

17. It is believed desirable to clarify de lege ferenda that as a residual rule phrases such as “promptly”, “as soon as possible”, etc., appearing in paragraphs 3 (d), 6 and 7 (a) of article 29, as well as in paragraph 3 of article 15, should, unless the treaty itself provides otherwise, 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 the receipt of those notifications through the normal channels by the home authorities of the individual States. This mitigates against equating the concept of “promptness” with that of “immediacy”, which was applied by the International Court in the Right of Passage case (preliminary objections), with particular reference to the terms of Article 36, paragraph 4, of the Statute of the International Court of Justice.

18. It appears that the expression “any such matters” which occurs in article 29, paragraph 8, of the English text has a rather wider meaning than “autres actes similaires” of the same article of the French text. It is accordingly suggested that the term “acte” be replaced by another expression which more accurately accords with the English text.

19. This Government specifically welcomes the inclusion of the annex in the report of the fourteenth session of the Commission’s work and suggests that it should also be included in the final text of the draft articles, when these are adopted.

[PART I] 7

Transmitted by a note verbale of 15 May 1964 from the Permanent Representative to the United Nations

[Original: English]

I

1. The Ministry wishes again to express its appreciation to the Commission, and the Special Rapporteur on the law of treaties, for the remarkable progress which has been achieved in placing the law of treaties upon the widest and most secure foundation, as desired by the General Assembly.

2. Careful reconsideration of the consistency of the terminology is desirable. The following instances are given:

(a) The expression “conclude a treaty” appears in articles 1(1)(a), 1(1)(b) and (c), 3, 30, 36 and 49 of the draft, as well as in Articles 43 (3) and 80 of the Charter. On the other hand, the expression “enter into a treaty” is used in articles 25 (2), 31, 33, 34, 41 and 44 of the draft, and in Articles 63 and 102 of the Charter.

(b) Different expressions are used in draft articles 12(2)(c), 12(3)(b), 39 and 46(2)(b) in referring to the “travaux préparatoires” of a treaty, without it being clear whether this differentiation is intentional.

(c) The word “nullity” appears in the title of article 47, in the text of articles 30 and 46, in the title to section VI, and in the title and text of article 52. However, the terminology of the substantive articles dealing with “nullity” is more differentiated, since it distinguishes between relative voidability and absolute voidness. Thus: article 31 refers to “invalidate the consent” and “withdraw the consent”.

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(d) The word “instrument” is being used in many different senses. Cf. articles 1(1)(a), 1(1)(b), 1(1)(e), 4(4), 4(5), 4(6), 12(3)(c), 15, 16, 18, 19, 23, 24, 26, 29, 40 and 52.

(e) There is inconsistency in the terms used to express a residiary rule, without it always being clear whether this is intentional. Thus:

(i) “Unless another procedure has been prescribed in the text or otherwise agreed upon” in article 7;

(ii) “Unless it is otherwise prescribed by the terms of the treaty itself” in article 8;

7 Including certain additional observations on part I.
(iii) “When...the treaty specifies...” in article 13, and “provides” in article 14;
(iv) “Unless the treaty itself expressly contemplates” in article 15;
(v) “Unless the treaty [itself] otherwise provides [prescribes]” in articles 20(3), 29, 40, 50, 53;
(vi) “where the treaty does not specify...” in article 23;
(vii) “Except as provided in the treaty itself...” in article 46;
(viii) “Subject to the provisions of the treaty...” in article 54.
This multiplicity of terms might become a source of confusion.

II

3. The following observations are made on article 30:
(a) The French text (“est réputé être en vigueur”) may introduce an element of legal fiction which is not present in the English text (“shall be considered as being in force”).
(b) Doubt is felt over the use of the word “nullity” in the absence of corresponding usage in the substantive articles.
(c) This article does not foresee the operation of the rules for separability.

4. The following observations are made on article 31:
(a) It is suggested that it would be preferable for the second member of the first sentence to refer to “competence to enter into the treaty” rather than “competence to enter into treaties”, and that the end of the sentence should read “unless the violation of that law, etc.”, in order to take into account a situation, such as exists sometimes in Israel, where, without prejudice to the general treaty-making power, the exercise of the treaty-making power for a given treaty (e.g. a treaty of extradition) is subjected to specific conditions.
(b) The first sentence of this article uses the expression “shall not invalidate the consent” and may be inconsistent with the second sentence, which uses the expression “may not withdraw the consent”.
(c) It appears that the general principle which underlies article 47 is operative as regards the subject matter of article 31. Accordingly, it is suggested that appropriate expression should be given to this interrelation, a matter which, it is considered, would permit of a solution of the problem.
(d) It is understood that the word “manifest” is to be taken in an objective sense, and it is suggested that this should find expression in the text.

5. The following observations are made on article 32:
(a) Redraft the first part of paragraph 1 so that it should refer to the “consent...to be bound by the treaty...”.
(b) Redraft the conclusion of paragraph 1 to read: “the act of such representative shall have legal effect if it is afterwards confirmed...”
(c) Redraft paragraph 2 to read:
“In cases where the authority conferred upon a representative to express the consent of his State to be bound by the treaty has been made subject to particular instructions, his omission to observe those instructions...” (This redraft is based on paragraph (5) of the commentary, and assumes that article 4 will continue substantially in its present form.)
(d) It is assumed that the particular instructions should be brought to the notice of the contracting States prior to the termination of the negotiation, and it is suggested that this should find expression in the text.
(e) It is believed that, subject to article 46, an appropriate provision for voluntary separability should be introduced into this article.

6. The following observations are made on article 33:
(a) Place this article after article 34, in order to distinguish the reprehensible from the non-reprehensible “vices de consentement”, and place the former in ascending order of calumny.
(b) In lieu of “fraudulent conduct” it would be preferable to refer to “fraudulent act or conduct”.
(c) Paragraph 2 as at present drafted can be interpreted as excluding the option of the injured State, contrary to what is stated in paragraph (6) of the commentary. That is the effect of the word “only” which, it is suggested, would be better omitted.

7. The following observations are made on article 34:
(a) The error to which this article refers is described, in paragraph 1, as an error relating to a “fact or state of facts”. However, paragraph (7) of the commentary is not so limiting and it is suggested to bring the text of the article into line with the commentary.
(b) Redraft paragraph 4 to read: “When there is no error as to the substance of a treaty but there is a mistake in the wording of its text, the mistake shall not affect the validity of the treaty and articles 26 and 27 then apply.”
(c) Paragraph 4 is understood as intended to apply only to the case in which the parties are in agreement, or are presumed to be in agreement, as to the existence of the mistake. This appears from the commentary to article 10 of the Special Rapporteur’s second report (A/CN.4/156). The judgment of the International Court in the Frontier Land case indicates that a mistake in transcription can vitiate the treaty (as opposed to invalidating a party’s consent), subject to the necessary proof being forthcoming (I.C.J. Reports, 1959, pp. 222-6), and that in any event such a mistake can be cured by subsequent ratification of the treaty, its publication, and by acquiescence (p. 227). It is suggested, therefore, that the language of paragraph 4, and if necessary articles 26 and 27, be adjusted accordingly.
(d) The proposed redraft of paragraph 4 will require consequential amendments to the title to section V of part I, and to articles 26 and 27, by substituting the word “mistake” for the word “error” wherever appearing therein (the same adjustment to be made in the final text of the commentary to those articles).

8. The following observations are made on article 35:
(a) There is a possible inconsistency between the absolute expression “without any legal effect” found in paragraph 1 and the relative partial invalidation of the consent according to paragraph 2.
(b) It is not clear whether any difference is intended between the expression “shall be void” appearing in article 35 and the expression “shall be void” appearing in article 36. Perhaps, therefore, it would be better to draft paragraph 1 as follows: “If an individual representative of a State is coerced...the State whose representative has been coerced may invoke the coercion as invalidating its consent to be bound by the treaty.”
(c) For the reasons stated in observation (e) to article 33, the word “only” should be omitted from paragraph 2. The provisions of articles 33 and 35 regarding separability should remain substantially identical.

9. It is suggested to complete article 36 by adding a provision to the effect that the article also applies where the participation of a State in an existing treaty was procured by the threat or use of force.

10. The only comment to article 37 is that it should be made clear in the commentary that for a rule of jus cogens to exist, the two elements, as set out in this article, must subsist simultaneously. This is already implicit in paragraph (4) of the commentary.

11. In order to clarify the significance of article 38 as determinative not of the manner but of the time of termination, it is suggested that the factor of “time” be mentioned specifically in the title and in the opening part of paragraph 1. In its present form, the article is open to the misconception that it states the obvious, but it is
considered that this clarification of the time element would be useful.

12. It is suggested that article 39, while objectionable in itself, should open the possibility of suspending the operation of the treaty, as an alternative to terminating it, in the circumstances mentioned in the article. This could be achieved by an addition along the lines of article 40, paragraph 3.

13. The following observations are made on article 40:

(a) There is a possible inconsistency between paragraph 1 of the text and the reference to "new "treaty"" in paragraph (1) of the commentary, in view of the formal definition of "treaty" contained in article 1, paragraph 1(a). The text of the article is acceptable, on the assumption that it includes the possibility of a tacit agreement of all the parties to terminate an existing treaty.

(b) After the words "A treaty" in paragraph 1, add "in whole or in part".

(c) It is suggested that in paragraph 2, the period should correspond to that adopted for article 9 (see paragraph 11 of the Government's observations on part I).

(d) Consideration should also be given to the question whether articles 9 and 40 should not refer to two thirds of the States which drew up the treaty including two thirds of the parties.

(e) In order to accommodate the functions of the depository to the function sought to be conferred upon it by article 40, paragraph 1(a), appropriate modifications will be required in article 29.

14. With regard to article 41, in the light of what is stated in paragraph 15 of the Commission's report and paragraph (2) of the commentary, it is believed that the article contains an inherent contradiction. If the later treaty was intended to terminate the earlier treaty, then the termination of the later treaty would not bring about the revival of the earlier treaty. But if the later treaty was intended to suspend the operation of the earlier treaty, the termination of the later treaty will, following article 54, bring about the revival of the earlier treaty. In either event, the whole matter depends upon the interpretation of the intention of the parties to the later treaty. If the article is retained, it is suggested that the element of suspension (with the omission of the word "only" in paragraph 2) should precede the element of termination. A reconstruction of the article along these lines might facilitate the problem of the placing of this provision.

15. With regard to article 42, paragraph (8) of the commentary seems to suggest that the definition of breach in paragraph 3 is not exclusive.

16. The following observations are made on article 43:

(a) Redraft paragraph 2 to read:

"If it is not clear that the disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty will be total and permanent, the impossibility may be invoked only as a ground for suspending the operation of the treaty."

(b) It should be clarified that this provision does not apply in the case where the impossibility is the consequence of breach of the treaty by the party invoking the impossibility.

17. The following observations are made on article 44:

(a) It is suggested that the expression "fact or situation" appearing in paragraph 2 should coincide with whatever expression is used in article 34, which at present reads "fact or state of facts". Cf. observations on article 34 above.

(b) It is suggested that the article could also envisage the suspension of the operation of the treaty, in whole or in part.

18. In view of the problems of intertemporal law which arise, observations on article 43 are reserved until the Commission has completed its first draft of part III of the law of treaties.

19. Article 32 should be included among the articles mentioned in article 46.

20. It is believed that article 47 requires careful reconsideration to take account of the following aspects:

(a) The word "nullity" does not appear in any of the articles mentioned in article 47.

(b) No reference appears to the effect of the general principle on the exercise of the right to require the suspension of the operation of the treaty, despite the fact that suspension is included in one of the articles mentioned in article 47 (article 42).

(c) Since the principle itself is one of general application, article 47 should distinguish carefully between the general principle and the specific concept of tacit consent as it is employed in part I of the draft articles (cf. paragraph 2 of the Government's observations on part I).

(d) The drafting of the introductory part of the article could be simplified were it to be worded more positively. The following redraft is therefore suggested (also taking account of observation (e) to article 31):

"A State may not rely upon articles 31 to 35 and 42 and 44 if that State, after having become aware of the facts giving rise to the application of those articles, shall have elected by conduct or otherwise to consider itself bound..."

This text also makes redundant the specific reference to "waiver", which, in the context, may be a complicating factor, and avoids the awkwardness of the phrase "debarred from denying". The commentary should make it clear that the election will be presumed after the lapse of a reasonable period of time, such time depending, of course, on all the circumstances.

21. Consideration should be given to whether article 48, which is in principle correct, should not be framed in more general terms covering also sections III, IV, V and VI of part II, and placed after the present article 2. That could lead to a simplification of part I, similar to that intended for part II by article 48. In fact, similar provisions already appear in articles 5, 6, 7, 9, 18(1)(a), 20(4), 27(4), 28 and 29(6). Such generalization would correspond, it is believed, to existing practice as regards the two types of treaties to which article 48 applies. Nevertheless, it might be more satisfactory to draft two separate provisions, one relating to a treaty which is the constituent instrument of an international organization, and one relating to a treaty which has been drawn up within an international organization. It should, however, be indicated that sections I and II of Part II are fully applicable to both these classes of treaties. In the penultimate phrase of the article, the words "to that treaty" should be inserted after "the application".

22. There are no observations on article 49.

23. The following observations are made on article 50:

(a) The notice should correspond in principle, and subject only to the rules of separability, to the requirements for the instrument regarding participation contained in article 15, paragraph 1(b).

(b) It is believed that paragraph 1 should likewise be framed as a residual rule, operative in the event of the silence of the treaty.

(c) It is further suggested to substitute "to the depository" for "through the depository".

(d) A corresponding modification to article 29 will be required, in order to complete the enumeration of the functions of the depository.

24. There are no observations on article 51.

25. The following general observations are made on section VI:

(a) It is assumed that all three articles will require reconsideration in the light of the conclusions to be reached by the Commission on the question of the effects of treaties on third States (pacta in favorem and in detrimentum tertii).
(b) Each one of the three articles deals with the treaty as a whole. Some provision should be added regarding the consequences of the operation of article 46 on the matters dealt with in section VI.

(c) The use of the word “nullity” in the title of section VI raises the question of terminology referred to generally in observation 2(c) above.

(d) Article 29 will require adjustment in order to authorize the depositary to perform functions which are the consequence of section VI.

26. The following observations are made on article 52:

(a) This article attempts to deal with two distinct matters, namely: treaties which are a “nullity” ab initio, and treaties the consent to which may be invalidated subsequently at the initiative of one of the parties. It is suggested that these two aspects should be brought more sharply into focus.

(b) It is suggested that these difficulties, as well as those of a terminological character, would be reduced were the text to be reconstructed by referring not to the general concept of “nullity”, but more specifically to the legal consequences of the application of the different articles of section II of part II to which it relates.

(c) Subject to the foregoing, it is suggested that paragraph 1(a) should refer to the “legal consequences of acts performed in good faith by a party in reliance on the void treaty”. While it is true that omnia pro rite praesumuntur, the invalidation of the consent to be bound by a treaty ought not in itself to impair claims based upon the alleged illegality of acts performed in reliance on that treaty. A passage in the Judgment of the International Court of Justice in the Northern Cameroons case (I.C.J. Reports, 1963, p. 34) alludes to this, in the case of termination of a treaty.

(d) It is suggested to commence paragraph 1(b) by a connecting word such as “Nevertheless”.

(e) In paragraph 3, it would be better to substitute “invalidation of a State’s participation in a multilateral treaty” for “nullity of a State’s consent to a multilateral treaty”, thus corresponding more closely to the language of articles 8 and 9.

27. The following observations are made on article 53:

(a) It is suggested to redraft paragraph 1(b) to read:

“(b) Shall not affect the legal consequences of any act done in conformity with the provisions of the treaty while that treaty was in force or...”

(b) For reasons similar to those given in observation 26(b), it would probably clarify matters if the article were to specify the articles of part II to which it relates.

(c) For reasons given in observation 18, paragraph 2 is reserved.

(d) The commentary should make it clear that once a treaty is terminated, it can only be revived, in the future, by some formal treaty (in the sense used in the draft articles). This is necessary because of differences of approach of different legal systems on the effect of the repeal of a statute which itself repeals an earlier statute. There is a statutory provision in force in Israel to the effect that where any enactment repealing any former law is itself repealed, such last repeal shall not revive the law previously repealed unless words be added reviving such law. It is assumed that the same principle applies in international law.

28. The following observations are made on article 54:

(a) It is assumed that this article does not refer to the consequences on the operation of a treaty of the suspension of diplomatic relations between the parties (in the case of a bilateral treaty), or between some of the parties (in the case of a multilateral treaty).

(b) The suspension of the operation of a treaty is mentioned in articles 30, 40, 41, 42, 43, 46, 49 and 50. Articles 42 and 43 also raise the possibility of the suspension of the operation of a part of a treaty. It is accordingly suggested that article 54 should specify the substantive articles to which it refers.

(c) It is suggested, having regard to the peremptory effect of the termination of a treaty, to extend the option to suspend the operation of a treaty also to the matters covered by articles 39 and 44, and thus facilitate the possibility of a later resumption of the operation of the treaty.

[PART III]

Transmitted by a letter of 8 September 1965 from the First Secretary of the Permanent Mission to the United Nations

Original: English

1. The Commission’s intention, as indicated in paragraph 15 of its Report (A/5809), to consider the possible amalgamation of the three parts of the law of treaties into a single draft convention, together with its observation that rearrangement of the material may be found to be desirable, have been duly noted. Since all the different parts and sections are in substance closely interconnected, it is considered appropriate for the Commission’s final text to consist of a single draft of articles dealing as comprehensively as feasible with all the law of treaties. The necessity for rearrangement of the material is also appreciated. The only observation felt to be appropriate at this stage is that it is believed that the whole text would gain considerably in clarity were the text dealing with interpretation to appear as early in the final text as would be consistent with the logical exposition of the material.

2. With reference to paragraph 21 of the Report, the suggestion that most-favoured-nation clauses in general might at some future time appropriately form the subject of a special study by the Commission is noted with approval.

3. In the course of the examination of the draft articles, some further inconsistency in terminology and discordance between the three language versions has been noted. However, in view of the proposals advanced by the Special Rapporteur in his fourth report (A/CN.4/177) on the question of terminology and definitions, it is not considered necessary in these observations to deal particularly with this aspect, except where either inconsistency in terminology, or discordance between different versions of the draft articles, may have occasioned difficulties in understanding the intention of any draft article.

4. With regard to article 55, the following observations are made:

(a) It is believed that the title of this article may be narrower than the scope of the article itself. It is assumed that in due course this article will be combined with article 30. Since the principle of pacta sunt servanda is the fundamental principle of the law of treaties, it would appear that it should be enunciated at the very beginning of the codification. In the Charter of the United Nations, the principle is indeed placed in the Preamble.

(b) On the other hand, the principle of good faith has a broader scope than the application and effects of treaties, and it is particularly appropriate as regards the application of the draft articles themselves. It would therefore appear to be necessary to avoid formulating the text in a way which could lead to the impression that the principle of good faith was limited to the application of treaties.

(c) Having regard to the reference, in paragraph (3) of the commentary, to the provisional entry into force of treaties, the question may arise, and require some mention in the commentary at least, of the interrelation of this article with article 24, it being understood, of course, that the general principle of pacta sunt servanda would apply to the underlying agreement upon which the provisional entry into force is postulated.

(d) Paragraph (4) of the commentary has been noted, and meets with approval.

(e) It is not clear whether the commentary has been noted, and meets with approval.

5. With regard to article 56, it is believed that the concordance of the three language versions requires further close examination.
In this article, too, the question of the interrelation with article 24 may arise.

6. There are no observations on articles 57 and 58.

7. With regard to article 59, it is considered that in general the French version expresses the substance of the rule somewhat better than the English, especially in the "if" clause. While the nature of the compromise solution which the Commission has proposed is appreciated, and it is not the intention of this observation to challenge the basic concept of this article, it is suggested that further attention be given to the actual language used. In addition, it is suggested that the last five words should be replaced by "agreed to be bound by that obligation".

8. It is suggested to change the order of articles 59 and 60.

9. With regard to article 61, it is suggested that the provisions of this article require to be more closely co-ordinated with the provisions of part II relating to the termination of treaties, and those of part III relating to the modification of treaties. Article 61 in its present form may be open to the interpretation that it gives to the third State more extensive rights, possibly even amounting to a right of veto, than the principal parties to the treaty themselves have under the general economy of the draft articles. It is suggested that the position of the principal parties should be safeguarded by some reference to articles 38-47 and 49-51, as regards revocation, and that the principles of articles 65-67 as regards modification should also be applicable, in order to govern the legal relationship between the third State and the principal parties to the treaty.

10. With regard to article 62, it is suggested that the opening words should read: "Nothing in these articles precludes".

11. With regard to article 63 the following observations are made:

(a) Further to No. 14 of this Government's observations to article 41 of part II, it is noted from paragraph (12) of the commentary to article 63 that the Commission inclines to the view that cases of partial termination should be removed from article 41 and placed in article 63. This is believed to be correct. In addition, it seems that the interrelation between articles 41 and 63 would be rendered clearer if the element of suspension were also removed from article 41 and placed in article 63. It is believed to be correct. In addition, it seems that the interrelation between articles 41 and 63 would be rendered clearer if the element of suspension were also removed from article 41 and placed either in article 63 or in a separate section which would collect together all the provisions relating to the suspension of the operation of a treaty, as distinct from its termination. If article 41 is then left to deal exclusively with implied termination of a treaty, its situation in the section dealing with termination will be logically correct and the implications of that article will be placed in better focus.

(b) Paragraph 1 preferably refer not only to the obligations of States, but also to their rights.

(c) With regard to paragraph 2, the fundamental legal question which arises is whether the treaty provision must always be taken at its face value, which is what the text seems to imply, or whether it should not be made open to the possibility of a material examination in order to establish whether in fact there is an inconsistency.

(d) Examination of this article has led to a re-examination of all the articles on termination in the light of the proceedings in the Commission's fifteenth session. While the provisions on termination cover the topic quite extensively, it is noted that an important cause of termination, namely obsolescence, is not mentioned by the Commission. It is believed that an understanding of article 63 would be facilitated, and possibly the scope of its application reduced, if place were found in the draft articles, or at least in the commentary, for the problem of obsolescence.

12. With regard to article 64, which, it is submitted, is at present out of place, it is suggested that the last words of paragraph 2 should read: "disappearance of the means necessary for its operation". At the same time, it is assumed that the Commission did not intend to open the door to a contention that the severance of diplomatic relations may become an excuse for even a temporary suspension of the operation of a treaty in the very contingency for which the treaty was made, a matter which can be illustrated by reference to the Geneva Conventions of 1949 regarding the protection of war victims. It is suggested that the article be re-examined from this point of view. It is possible that paragraph (3) of the commentary on this article may similarly be too categorical.

13. With regard to article 65, and having regard to paragraph (7) of the commentary, which correctly recognizes the possibility of an oral agreement or tacit agreement to amend a treaty, it is suggested to commence this article as follows: "A treaty may be amended by agreement in writing between the parties and the rules laid down in part I shall apply...etc.". For comment on the expression "the established rules of an international organization", see No. 14, (f) and (e) below.

14. With regard to articles 66 and 67, the following observations are made:

(a) It is suggested that paragraph 1 of article 66 should carefully distinguish between the impersonal proposal to amend a multilateral treaty, and the right of a party to propose an amendment to a treaty, which right may be restricted by the terms of the treaty itself. In general, it is considered that the obligations of the other parties to the treaty should be determined in the first place by the treaty itself (if it contains provisions on the subject), and only in the second place by general rules. This distinction, it is believed, is not clearly made;

(b) It is noted that article 66 refers to a proposal initially made for amendment in relation to all the parties, and article 67 relates only to proposals initially made for inter se amendments. This distinction is accepted. However, the question arises whether the possibility should not be envisaged that a group of parties to a multilateral treaty might initiate consideration of amendments without its being clear initially what kind of amendments will result therefrom. It is believed that this kind of situation may be more prejudicial to the rights and positions of the other parties than the situations covered by articles 66 and 67. The suggestion is therefore made that the question of notice of proposed amendments should form the subject of an independent provision, coming between articles 65 and 66, which should be couched in such a way as will apply to all proposed amendments. In this connexion, it is pointed out that as this group of articles stands at present, notification of the conclusion of an Inter se agreement as provided in paragraph 2 of article 67 may come too late, having regard, particularly, to paragraph 1(b)(i) of article 67. The other parties to the treaty must be given an early opportunity to determine whether the enjoyment of their rights under the treaty, or the performance by them of their obligations, are likely to be adversely affected by a proposed amendment or modification of the treaty.

(c) It is furthermore suggested that the Commission re-examine the question whether the recipients of any notification regarding proposed amendments, whether general or Inter se, should be limited, at all events for a defined initial period, only to the parties to the treaty. Indeed, circumstances can be envisaged in which a multilateral treaty will not enter into force, for want of a sufficient number of ratifications, unless amendments, the necessity for which has been established only after adoption of the text, are made. The Commission's proposal does not take this possibility into account.

(d) The expression "established rules of an international organization" in article 65 and in paragraph 2 of article 66 seems highly ambiguous in the present context. Does it refer to the established rules of an international organization which apply to the members of that organization as such, or does it refer to those rules which apply to treaties concluded or treaties which have been drawn up within an international organization, the parties of which may not necessarily all be members of that organization?

(e) In this connexion, this Government's proposal to generalize article 48, contained in No. 21 of the observations on part II, is
recalled, and the Special Rapporteur's proposal for a new article 36x (A/CN.4/177) has been noted with appreciation. In the observation on article 48, it was suggested that two separate provisions are required. Further consideration of this aspect in the light of the provision under examination, and generally, leads to the question of the adequacy of the criterion that a treaty may have been drawn up within an international organization. It is believed that the real criterion has to be sought in the material connexion of the treaty with the organization within which it has been drawn up, so that, in effect, the treaty has a material link with the constitution of that organization. The International Labour Conventions supply a good illustration of this. Many treaties which have been drawn up within the United Nations have no material connexion of that kind, or at best one of an extremely tenuous character, with the United Nations, the standing machinery of which may be regarded as having been used primarily as a matter of diplomatic convenience. The connexion is even less evident with regard to conventions drawn up in conferences, convened by one of the organs of the United Nations, in which non-member States have participated on invitation of the convening organ.

(f) With regard to paragraph 2(b) of article 66, it is probably not sufficient to refer only to article 63, but, as indicated above, closer co-ordination generally between articles 59-61 and articles 65-67 seems to be required.

(g) It is suggested to amend paragraph 1(a) of article 67 to read: "The possibility of such an agreement is...etc.".

15. With regard to article 68, the following observations are made:

(a) The meaning of the word "also", in the first line, is not clear. Is it intended to refer only to articles 65 and 66, or does it in addition refer to article 67?

(b) Paragraphs (a) and (b) seem to be redundant. Sub-paragraph (a) is probably covered by articles 41 and 63, especially the latter, and sub-paragraph (b) seems to be indistinguishable, in its practical effect, from paragraph 3(b) of article 69.

(c) There remains sub-paragraph (c) which, from some points of view, may be regarded as also having a logical connexion with the problem dealt with in article 45. It is believed that the substance of sub-paragraph (c) should find an appropriate place in the draft articles. It is based on the passage in Judge Huber's award in the Island of Palmas case quoted in paragraph (3) of the commentary. In that award it appears as the second leg of the intertemporal law, the first leg appearing in the passage from the same award quoted in paragraph (11) of the commentary to article 69. It is noted that in the original article numbered 56 submitted by the Special Rapporteur in his third report (A/CN.4/167), the correct order of posture of the two branches of the law was maintained, as was the case in the Special Rapporteur's original proposals for the articles numbered 70 and 73 in that report (A/CN.4/167/Add.3). No explanation is furnished by the Commission for its reversal of the order which does not introduce new complications into a branch of the law which is already complicated enough. It is appreciated that the distinction between the interpretation of a treaty as a step logically prior to its application, and the modification of a treaty as a consequence of its reinterpretation through its application, does exist from a theoretical point of view. However, the practical consequences of that distinction appear to be so fine that the wisdom of expressing it in the way the Commission has sought to do is questioned. It is therefore suggested that paragraph (c) of article 68 should be brought into closer association with, but placed subsequent to, the first leg of the intertemporal law as it appears at present in article 69, paragraph 1(b).

16. With regard to articles 69 and 70, the following observations are made:

(a) In general, the considerations expressed more particularly in paragraphs (6), (7) and (8) of the commentary are appreciated. Without prejudice to ultimate decisions which will be taken in political organs, it is considered appropriate that the Commission's final draft codification on the law of treaties should contain provisions on the question of interpretation along the lines of those drawn up by the Commission. As already indicated in No. 1 above, it is even considered that in a single draft of articles, the provisions on interpretation, or at all events on the matters dealt with in articles 69-71, should be placed early in the set of articles.

(b) The philosophy of the Commission's approach as expounded in paragraph (9) of the commentary is also accepted as being most in accord with State practice and international requirements.

(c) Paragraphs 2 of article 69 does not, strictly speaking, seem to constitute part of any general rule of interpretation, but in reality to be a definition. This is confirmed by paragraph (12) of the commentary. Indeed, this definition in some respects completes that of "treaty" in article 1, and it also is of general application to the draft articles as a whole. Its removal from article 69 would make the general rule of interpretation clearer. It is accordingly suggested to insert it in article 1. With regard to its text, there may be room for ambiguity over the expression "drawn up" (which appears elsewhere in the draft articles). Compare Shorter Oxford English Dictionary and Webster's Third International Dictionary. A possible understanding of that expression is that it relates to draft instruments, but presumably the intention is to refer to the final texts of the instruments in question.

(d) As a consequence of removing paragraph 2 of article 69, paragraph 3 could be suppressed as a separate paragraph, and its elements combined to form sub-paragraphs (c) and (d) of the existing paragraph 1. The word "also" in paragraph 3 may give rise to confusion. Paragraph (13) of the commentary describes paragraph 3 as specifying "further authentic elements of interpretation", while article 70 as a whole is entitled "Further means of interpretation". It is suggested that the appropriate point of departure for the process of interpretation consists in each one of the four elements, at present separated in paragraph 1 and paragraph 3 of article 69, which stand on an equal footing.

(e) The expression "ordinary meaning to be given to each term" in paragraph 1 of article 69 may become a source of confusion, to the extent that it seems to leave open the question of changes in linguistic usage subsequent to the establishment in the treaty text. Reference is made, in this connexion, to the following sentence in the judgment of the International Court of Justice in the U.S. Nationals in Morocco case: "...in construing the provisions of Article 20 [of the Treaty of 16 September 1836 between the United States and Morocco]...it is necessary to take into account the meaning of the word 'dispute' at the times when the two treaties were concluded". (I.C.J. Reports, 1952, at p. 189.)

(f) Apart from that, care must be taken not to formulate the rule as a whole in such a way as would lead to excessive molecularization of the treaty. The advisory opinion of the International Court of Justice in the Maritime Safety Committee case drew attention to this aspect in the following sentence: "The meaning of the word 'elected' in Article 28 of the Constitution of IMCO cannot be determined in isolation by recourse to its usual or common meaning and attaching that meaning to the word where used in the Article. The word obtains its meaning from the context in which it is used." (I.C.J. Reports, 1960, at p. 158.) These difficulties could be overcome if the introductory sentence of article 69—and leaving aside the question of the time factor—read: "A treaty shall be interpreted in good faith and in accordance with the ordinary meaning given to the language used in its context". The reference to the "context of the treaty" would then have to be removed from sub-paragraph (a). In addition to the necessary adjustment to the introductory phrase of paragraph 1, it is believed that this aspect would be brought more into focus were the order of sub-paragraphs (a) and (b) to be reversed.

(g) With regard to sub-paragraph (b), it seems that the text needs slight adjustment, in order to clarify that the rules of gen-
international law there referred to are the substantive rules of international law, including rules of interpretation, and not the rules of interpretation alone.

(h) In view of the proliferation of multilingual versions of treaties, it is considered that comparison between two or more authentic versions ought to be mentioned in article 69, as this seems to be normal practice. Article 73 deals only with the specific problem of what happens when that comparison discloses a difference. However, the importance of comparison is greater, as it frequently assists in determining the meaning of the text and the intention of the parties to the treaty, and to that extent it forms part of any general rule of interpretation in the case of multilingual treaties.

(i) The reconstruction which is proposed, including in particular the transfer of paragraph 2 of article 69 to article 1, may make it unnecessary and, indeed, confusing to refer specifically to the preparatory work of the treaty in article 70.

17. It is suggested that article 71 be either combined with article 69, or placed immediately after it.

18. With regard to articles 72 and 73, full consideration must await the information to be furnished by the Secretariat regarding drafting practices for multilingual instruments. At the same time it is suggested to make article 73 more consistent with article 72 by substituting the word "versions" for the word "texts" wherever appearing in article 73.

13. JAMAICA

[Part II]

Transmitted by a letter of 22 September 1964 from the Permanent Representative to the United Nations

[Original: English]

Article 33

Where fraud is subsequently discovered, the defrauded party should take steps to invalidate its consent to the treaty within a stated time after the discovery of the fraud. In other words, a party who has discovered fraud at the hands of the other party and continues for an indefinite time to act upon the relevant clauses of the treaty should thereupon be deemed to have subsequently acquiesced in the fraud and be consequently precluded from invoking such fraud as a reason for the termination of the treaty unless the conditions of termination are agreed upon by both parties.

Article 36

The scope of the article could be extended to include circumstances where the threat or use of force does not necessarily involve any strict violation of the principles of the Charter of the United Nations but was nonetheless a material factor in bringing about the conclusion of a treaty.

It should be readily recognized that an improper use of force can be so manipulated as to avoid violation of the principles of the Charter. Such improper use of force (or concealed threat) tends to violate the essential elements of consent in much the same way as fraud may be taken to violate such consent with reference to article 33.

Possibly, when the threat or use of force does not constitute a violation of the principles of the Charter, the treaty could be regarded not as void ab initio but voidable at the instance of the other State concerned.

Article 44

(a) The exceptions under paragraph 3 could possibly be extended to include "fundamental change of circumstances which the parties could reasonably have foreseen and the occurrence of which they impliedly undertook not to regard as affecting the validity of the treaty".

(b) On 14 October 1963, the Jamaican delegation mentioned in the Sixth Committee, inter alia, the desirability of making allowance in this article for fundamental change of circumstances which may sometimes arise out of State succession. This aspect of the matter is sufficiently important to be again mentioned in this memorandum.

Fundamental change of circumstances is not necessarily an inevitable consequence of State succession. There may be, however, instances when a newly independent State finds the terms of a treaty so manifestly unjust or inequitable that that State may be justified in not recognizing such a treaty as one which it should inherit. This situation will perhaps be dealt with by the International Law Commission when it considers succession of States, but it is considered appropriate that article 44 should provide for such a situation notwithstanding the possibility that it may again be dealt with by the Commission under "Succession of States".

General

The Jamaican delegation also raised in the Sixth Committee the advisability of making provision for the individual in the draft articles on the law of treaties.

Whilst the law of treaties is primarily concerned with States relationship, the individual is increasingly being made subject to rights and duties established under treaties and conventions. The Nürnberg Trials, the Genocide Convention and the draft covenants on human rights being considered by the General Assembly are but few examples of the increasing role of the individual in international law (and more precisely in the law of treaties).

The subject, therefore, is considered as deserving "special mention" in any contemporary codification of the law of treaties.

14. JAPAN

[Part I]

Transmitted by a note verbale of 4 February 1964 from the Permanent Representative to the United Nations

[Original: English]

1. General observations

1. The Government of Japan is of the opinion that the draft articles in their ultimate form should be a "code" rather than a "convention". In its view, much of the law relating to the conclusion of treaties is not very suitable for framing in conventional form, for two reasons. First, the conclusion of treaties always involves procedures on two different planes, internal and international. Although the draft articles profess to be concerned only with the international aspect of treaty making, this will inevitably bring repercussions on the internal aspect of treaty making. If it were decided that the draft articles should form conventional norms from which in principle no derogation is permitted, it would in effect be putting an unduly tight strait jacket on the procedural formalities of treaty making in each State. Second, an attempt to prescribe procedures of treaty making in great detail will entail the undesirable results of not being able to cope with the actual needs of finding mutually acceptable procedures by the contracting parties.

2. This is not to suggest that the code as proposed should be another addition to the already numerous codifying attempts of the past, none of which have been endowed with the authority of an official code. It would seem possible to employ a procedure through which the draft articles could be adopted, after full examination and discussion by all the Governments, as an authoritative recommendation regarding the procedures to be followed in concluding international agreements, but not in the form of a convention in the technical sense. This could be done, for instance, by an insertion in the draft articles of a provision of a general character along the following line:
General provisions

State 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.

3. In case the draft articles were to take the form of a "convention", the Government of Japan would like to see the convention formulated on the basis of the following two principles:

(a) That the provisions of the convention should be as concise as possible, leaving out all the detailed technicalities to the decisions formulated on the basis of the following two principles:

(b) That the convention should include a provision of general character, which would enable States to derogate from any of the provisions of the convention by mutual agreement between the parties to each individual international agreement.

4. The Government of Japan has no strong view on the title given to such code or convention. Nevertheless it is suggested that the term "treaties" in the present title might more appropriately be replaced by the term "international agreements". Though the former is clearly used here in the generic sense and not in the specific sense, it might still lead to misunderstanding, as the discussions in the Commission in its second and third sessions have revealed. In spite of the proviso in article 1, paragraph 2, it would seem more appropriate to employ a neutral term like "international agreements".

5. In the view of the Government of Japan, the three parts of the draft articles as envisaged by the Special Rapporteur should ultimately be amalgamated in one. As distinct from the case of the four conventions on the law of the sea, the three parts of the law of treaties are so closely interrelated with one another that it would serve no useful purpose if they form three separate conventions independent of one another.

II. Observations on individual articles

The Government of Japan submits its observations on individual articles as follows. These observations are made, however, with an eventual convention in view, and not a code, for which different considerations would apply.

The draft articles as amended in accordance with these observations are annexed hereto for reference.

Article 1

The definitions given in paragraph 1 should be kept, subject to the following observations:

(a) The enumeration of categories of international agreements by designation in paragraph 1 (a) is not very useful, as it could not hope to be exhaustive in any case.

(b) The term "treaty in simplified form" in paragraph 1 (b), though current in use, seems to be superfluous in the context of the present draft articles.

(c) The term "general multilateral treaty" in paragraph 1 (c) cannot be precisely defined, and will cause a great difficulty in application. It had better be dispensed with.

(d) The distinction between "full powers" and "credentials" as used in article 4 is not very clear. It is suggested to standardize the terminology employing the term "instrument of full powers" in paragraph 1 (e).

(e) It would seem better to replace the word "vary" in paragraph 1 (f) by the word "restrict", since only such statement as would restrict the legal effect of the provisions of the international agreement will properly fall under the term "reservation".

Article 3

1. Paragraph 2 should be deleted, since it does not appear to add much to the provisions of paragraph 1. It is even misleading in that it does not refer to the other element of international capacity to conclude international agreements—the requirement of recognition of such constitutional capacity by the other contracting party or parties concerned.

2. The same could be said of paragraph 3, which therefore should also be deleted.

Article 4

1. The requirement of furnishing evidence of authority referred to in paragraphs 3 and 4 (a) could no doubt be waived by the other negotiating State or States, whatever the international agreement in question might be. This should be made clear in the article.

2. It would perhaps be too strict, in view of the current practice, if the requirement of subsequent production of the instrument of full powers were to be made absolute, in the contingency envisaged under paragraph 6 (b) and (c).

3. The rule stated in paragraph 6 (a) is no doubt correct, but it is doubtful whether this needs express provisions.

Article 5

The article would not have much utility in practice and is to be deleted in its entirety.

Article 6

The subject dealt with in this article does not appear to be directly relevant, though certainly related, to the procedure of treaty-making. It belongs rather to the problem of conference procedures and had better be left with the decision of the conference or of the States concerned.

Article 7

A general rule on authentication applicable both to bilateral and multilateral agreements is not easy to formulate. The precise legal nature of the acts enumerated in paragraph 1 may not be exactly the same. To illustrate the point, the rule stated in paragraph 3 would prove to be too strict in practice for bilateral agreements, if it excluded the possibility of subsequent modification, not of wording (the matter covered by articles 26 and 27), but of substance. It is not very unusual for the negotiating parties to add minor changes of substance to the text already authenticated. For this reason, the article had better be dispensed with, while the substance of paragraphs 1 and 2 of this article may be incorporated into the provisions of articles 10 and 11.

Articles 8 and 9

It is believed best to leave the matter to the decision of the States participating in the conference. The articles should therefore be deleted in their entirety.

Article 10

There are cases where initialling is equivalent to signature (cf. article 21, paragraph 1, of Sir Gerald Fitzmaurice's first report). It seems desirable to take into account this eventuality (see article 10, paragraph 3 (c) of the Japan draft).

Article 12

1. The principle adopted in paragraph 1 should in our view be stated in the reverse, i.e. that the international agreement does not require ratification unless it expressly provides for the requirement of ratification.

2. The only exception to the principle stated above seems to be the one referred to in paragraph 3 (c), and this can be formulated in a new paragraph.
3. The same rule should be applicable, mutatis mutandis, to approval, which in practice is employed as a simplified procedure of ratification in most cases. For this reason, provisions on approval in article 14 should rather be amalgamated with the provisions in this article, and not with those in article 14.

Article 13

Since articles 8 and 9 are to be deleted, it will be necessary to incorporate provisions of paragraph 2 of article 9.

Article 15

1. Paragraphs 1 (b) and 1 (c) are perhaps too technical and trivial to merit inclusion here.
2. Paragraph 2 is stating the obvious and could be dispensed with.
3. The proper place for paragraph 3 would appear to be section V rather than here.
4. The article in its entirety could therefore be deleted, while the essence of paragraph 1 (a) could be combined with the provisions of article 16.

Article 17

1. This article would seem to impose a great obligation, admittedly of good faith, upon a State which has not decided to become a party to the international agreement. The obligation of the nature stated in this article, if any, should not in principle accrue to the State referred to in paragraph 1. For this reason paragraph 1 should be deleted.
2. The wisdom of having an article of this character may legitimately be doubted, since the whole idea underlying it would appear to be too legalistic in approach. Moreover, the criterion given in this article for refraining from certain kinds of acts is in any case too subjective and difficult of application. A better solution would seem to be to leave the matter entirely to the good faith of the parties.

Articles 18, 19 and 20

1. The Government of Japan takes exception to the rules proposed by the International Law Commission on the question of reservation to multilateral international agreements. In its view, the basic principle governing the question of reservation should rather be the reverse, that a State may make a reservation only if the intention of the parties is not against the reservation in question. There is no inherent right of a State to become a party to an international agreement with whatever reservation it pleases.
2. An international agreement is almost always the result of a compromise among various conflicting interests, arrived at through a series of negotiations. If it were allowed to upset this balance of interests, after the agreement has been established, through the loophole of reservations, then it is feared that the whole system under the agreement in question might fall to the ground. The parties to the agreement are entitled to protect this integrity of the agreement.
3. From the standpoint de lege ferenda, the rule proposed by the Commission is to be rejected in that it would in effect encourage the making of reservations by States parties to the international agreement. Since the reservation is the means through which a derogation from the principles established under the agreement is sought, its abuse should be carefully guarded against.
4. It must also be borne in mind that the rules to be proposed in these articles are residual by nature, and applicable only to those cases where the international agreement in question is silent on this point. The parties are always free to choose whatever rule they like on this question by agreement among themselves.
5. According to the provisions of article 18, paragraph 1 (d), a State may not formulate a reservation which is incompatible with the object and purpose of the agreement, which, in consequence, would seem to be null and void. Nevertheless, article 20, paragraph 2 (b) provides that the application of this test of compatibility with the object and purpose of the agreement is left entirely to individual parties, who are entitled to draw its legal consequences. It would seem more logical to set up a system under which the general intention of the parties is ascertained, be it by a certain majority decision or by unanimity.

6. The opinion of the International Court of Justice in the case concerning reservations to the Genocide Convention is certainly to be respected. But it is submitted that the rule enunciated by the Court is not to be regarded as a sacred rule capable of universal application. The Court itself made it abundantly clear that "the replies which the Court is called upon to give to the questions asked by the General Assembly are necessarily and strictly limited to the [Genocide] Convention," and that the Court was seeking these replies "in the rules of law relating to the effect to be given to the intention of the parties [of the Genocide Convention]". Thus the rule to be proposed de lege ferenda need not necessarily follow the line taken up by the Court, which after all was trying to find out what the intention of the parties was in this specific case.

7. It is not very seldom that a declaration attached by a State to an international agreement causes in practice a serious difficulty of determining whether it is in the nature of a reservation or of an interpretative declaration (see, for example, the case of an Indian declaration to the IMCO Convention). For this reason, a new paragraph is suggested in an attempt to eliminate this practical difficulty. Under these provisions, mere silence to a declaration not entitled as reservation will not produce the legal effect of a tacit acceptance of it as provided in article 19 (see paragraph 2 of article 18 of the Japan draft).

Article 21

The principle of reciprocity in the operation of a reservation would seem to require that a non-reserving State in its relations with the reserving State should not merely be entitled to claim, but should be definitively entitled to the same modification effected by the reservation. For this reason it is suggested to delete the word "claim" in paragraph 1 (b).

Article 23

The substance of paragraph 2 is acceptable, but the matter can safely be left to the interpretation of the international agreement in question.

Article 24

The technique of provisional entry into force is in fact sometimes resorted to as a practical measure, but the precise legal nature of such provisional entry into force does not seem to be very clear. Unless the question of legal effect of such provisional entry into force can be precisely defined, it would seem best to leave the matter entirely to the intention of the contracting parties. Provisions of article 23, paragraph 1 could perhaps cover this eventuality.

Article 25

The provisions in this article are on the whole acceptable. However, it is not clear from the letter of paragraph 1 whether the obligation to register under this article concerns the category of international agreements referred to in Article 102 of the Charter of the United Nations, or whether it concerns all the international agreements as defined in these draft articles.

Articles 26 and 27

These two articles will serve a useful purpose in establishing procedures for correction of errors, but they appear to be too detailed for a convention. In the case of a convention, the two articles could better be amalgamated in one article.
Article 29

1. Paragraph 1 is to a great extent redundant with paragraph 1 (g) of article 1. The first sentence should therefore be deleted.

2. Paragraphs 2 to 7 will no doubt provide a useful guide in a code, but it does seem a little out of place as well as proportion to provide for procedural details of a depositary in a general convention on the law of international agreements. The article could be reformulated in a more concise form.

Annex. Japan Draft

Draft articles on the law of international agreements

Part I. Conclusion, Entry into Force and Registration of International Agreements

Section 1: General provisions

Article 1

Definitions

1. For the purposes of the present articles, the following expressions shall have the meanings hereunder assigned to them:

(a) "international agreement" means any 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 or other subjects of international law and governed by international law.

(b) "Signature", "Ratification", "Accession", "Acceptance" and "Approval" mean in each case the act so named whereby a State establishes on the international plane its consent to be bound by an international agreement. Signature, however, also means according to the context an act whereby a State authentically the text of an international agreement without establishing its consent to be bound.

(c) "Instrument of full powers" means a formal instrument of whatever designation issued by the competent authority of a State authorizing a given person to represent the State either for the purpose of carrying out all the acts necessary for concluding an international agreement or for the particular purpose of negotiating or signing an international agreement or of executing an instrument relating to an international agreement.

(d) "Reservation" means a unilateral statement made by a State, when signing, ratifying, acceding to, accepting or approving an international agreement, whereby it purports to exclude or restrict the legal effect of some provisions of the international agreement in its application to that State.

(e) "Depositary" means the State or international organization entrusted with the functions of custodian of the text of the international agreement and of all instruments relating to the international agreement.

2. 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.

Article 2

Scope of the present articles

1. Except to the extent that the particular context may otherwise require, the present articles shall apply to every international agreement as defined in article 1, paragraph 1 (a).

2. The fact that the present articles do not apply to international agreements not in written form shall not be understood as affecting the legal force that such agreements possess under international law.

Article 2 bis

Derogation from the present articles

Notwithstanding the provisions of article 2, paragraph 1, States parties to the present articles may, by mutual agreement, derogate from any of the provisions of the present articles.

Article 3

Capacity to conclude international agreements

Capacity to conclude international agreements under international law is possessed by States and by other subjects of international law.

Section II. Conclusion of international agreements by States

Article 4

Authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept an international agreement

1. For the purpose of negotiating, drawing up or authenticating an international agreement on behalf of a State:

(a) The Head of State, Head of Government and Foreign Minister are not required to furnish any evidence of their authority;

(b) The Head of a diplomatic mission is not required to furnish any evidence of his authority in regard to an international agreement between his State and the State to which he is accredited;

(c) The Head of a permanent mission to an international organization is not required to furnish any evidence of his authority in regard to an international agreement drawn up under the auspices of the organization in question to which he is accredited;

(d) Any other representative of the State shall be required to furnish evidence of his authority by producing an instrument of full powers, unless this requirement is waived by the other negotiating State or States.

2. For the purpose of signing an international agreement on behalf of a State, except where the proposed international agreement expressly provides otherwise:

(a) The Head of State, Head of Government and Foreign Minister are not required to furnish any evidence of their authority;

(b) Any other representative of the State shall be required to furnish evidence of his authority by producing an instrument of full powers, unless this requirement is waived by the other negotiating State or States.

3. In the event of an instrument of ratification, accession, approval or acceptance being signed by a representative of a State other than the Head of State, Head of Government or Foreign Minister, that representative shall be required to furnish evidence of his authority by producing an instrument of full powers.

4. In case of urgency, a letter or telegram evidencing the grant of full powers sent by the competent authority of the State concerned shall be accepted, provided that the instrument of full powers shall be produced in due course unless this requirement is waived by the other negotiating State or States.

Article 5. [Delete]

Article 6. [Delete]

Article 7. [Delete]

Article 8. [Delete]

Article 9. [Delete]

Article 10

Signature and initialling of the international agreement

1. Where the international agreement has not been signed at the conclusion of the negotiations or of the conference at which the text was adopted, the States participating in the adoption of the text may provide either in the international agreement itself or in a separate agreement:

(a) That signature shall take place on a subsequent occasion; or

(b) That the international agreement shall remain open for signature at a specified place either indefinitely or until a certain date.
2. (a) The international agreement may be signed unconditionally; or it may be signed *ad referendum* to the competent authorities of the State concerned, in which case the signature is subject to confirmation.

(b) Signature *ad referendum*, if and so long as it has not been confirmed, shall operate only as an act authenticating the text of the international agreement.

(c) Signature *ad referendum*, when confirmed, shall have the same effect as if it had been a full signature made on the date when, and at the place where, the signature *ad referendum* was affixed to the international agreement.

3. (a) The international agreement, before being signed, may be initialled, in which event the initialling shall operate only as an authentication of the text. A further separate act of signature is required to constitute the State concerned a signatory of the international agreement.

(b) When initialling is followed by the subsequent signature of the international agreement, the date of the signature, not that of the initialling, shall be the date upon which the State concerned shall become a signatory of the international agreement.

(c) Notwithstanding sub-paragraphs (a) and (b) above, initialling may be equivalent to signature provided that the intention is clearly indicated by the circumstances.

**Article 11**

**Legal effects of a signature**

1. Where an international agreement is subject to ratification, approval or acceptance, signature does not establish the consent of the signatory State to be bound by the international agreement.

However, the signature shall:

(a) Operate as an authentication of the text, if the text has not been previously authenticated in another form; and

(b) Qualify the signatory State to proceed to the ratification, approval or acceptance of the international agreement in conformity with its provisions.

2. Where the international agreement is not subject to ratification, approval or acceptance, signature shall establish the consent of the signatory State to be bound by the international agreement.

**Article 12**

**Ratification or approval**

1. An international agreement requires ratification or approval when the international agreement expressly prescribes that it shall be subject to ratification or approval, respectively, by the signatory States.

2. In addition to paragraph 1 above, ratification or approval is necessary in cases where the representative of the States in question has expressly signed "subject to ratification" or "subject to approval" respectively.

**Article 13**

**Accession**

A State may become a party to a multilateral international agreement by accession when it has not signed the international agreement and:

(a) The international agreement specifies accession as the procedure to be used by such a State for becoming a party; or

(b) The international agreement has become open to accession by the State in question through agreement of the States concerned.

**Article 14**

**Acceptance**

A State may become a party to an international agreement by acceptance when:  

(a) The international agreement provides that it shall be open to signature subject to acceptance and the State in question has so signed the international agreement; or

(b) The international agreement provides that it shall be open to participation by simple acceptance without prior signature.

**Article 15.** [Delete]

**Article 16**

**Legal effects of ratification, accession, acceptance and approval**

Ratification, accession, acceptance or approval, which must be carried out by means of communication of a written instrument, establishes the consent of the ratifying, acceding, accepting or approving State to be bound by the international agreement.

**Article 17.** [Delete]

**Section III. Reservations**

**Article 18**

**Formulation of reservations**

1. A State may formulate a reservation to an international agreement, only if:

(a) The making of reservations is authorized by the terms of the international agreement or by the established rules of an international organization; or

(b) The international agreement expressly authorizes the making of reservations to specified provisions of the international agreement and the reservation in question relates to one of the said provisions; or

(c) The international agreement expressly prohibits the making of a specified category of reservations, in which case the formulation of reservations falling outside the prohibited category is by implication authorized; or

(d) In the case where the international agreement is silent concerning the making of reservations, the reservation is not incompat-ible with the object and purpose of the international agreement.

2. A reservation, in order to qualify as such under the provisions of the present articles, must be formulated in writing, and expressly stated as reservation.

3. A reservation may be formulated:

(a) Upon the occasion of the adoption of the text of the international agreement, provided that it shall be confirmed at the time of signature, ratification, accession, acceptance or approval of the international agreement; or

(b) Upon signing the international agreement at a subsequent date; or

(c) Upon the occasion of the exchange or deposit of instrument of ratification, accession, acceptance or approval.

**Articles 19-20**

**The effect of reservations formulated**

1. The effect of a reservation formulated in accordance with the provisions of article 18 shall be conditional upon its acceptance, express or tacit, by all States parties to the international agreement or to which the international agreement is open to become parties, unless:

(a) The international agreement otherwise provides; or

(b) The States are members of an international organization which applies a different rule to international agreements concluded under its auspices.

2. A reservation shall be regarded as having been tacitly accepted by a State if it shall have raised no objection to the reservation during a period of twelve months after it received formal notice of the reservation.
3. An objection by a State which has not yet established its own consent to be bound by the international agreement shall have no effect if after the expiry of two years from the date when it gave formal notice of its objection it has still not established its consent to be bound by the international agreement.

**Article 21**

**The application of reservations**

1. A reservation established in accordance with the provisions of article 19-20 operates:
   (a) To modify for the reserving State the provisions of the international agreement to which the reservation relates to the extent of the reservation; and
   (b) Reciprocally to entitle any other State party to the international agreement to the same modification of the provisions of the international agreement in its relations with the reserving State.

2. A reservation operates only in the relations between the other parties to the international agreement which have accepted the reservation and the reserving State; it does not affect in any way the rights or obligations of the other parties to the international agreement inter se.

**Article 22**

**The withdrawal of reservations**

1. 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. Such withdrawal takes effect when notice of it has been received by the other States concerned.

2. Upon withdrawal of a reservation the provisions of article 21 cease to apply.

**Section IV. Entry into force and registration**

**Article 23**

**Entry into force of international agreements**

1. An international agreement enters into force in such manner and on such date as the international agreement itself may prescribe.

2. If an international agreement does not specify the date of its entry into force:
   (a) In the case of a bilateral international agreement not subject to ratification, approval or acceptance, it enters into force on the date of its signature or, when the international agreement is embodied in two or more related instruments, on the date of signature of the last instrument; and
   (b) In other cases, it enters into force on the date to be determined by agreement between the States concerned.

3. The rights and obligations contained in an international agreement become effective for each party as from the date when the international agreement enters into force with respect to that party, unless the international agreement expressly provides otherwise.

**Article 24. [Delete]**

**Article 25**

**The registration and publication of international agreements**

1. The registration and publication of international agreements entered into by Members of the United Nations shall be governed by the provisions of Article 102 of the Charter of the United Nations.

2. The procedure for the registration and publication of international agreements shall be governed by the regulations in force and established practices for the application of Article 102 of the Charter.

3. International agreements entered into by any party to the present articles, not a Member of the United Nations, shall as soon as possible be registered with the Secretariat of the United Nations and published by it.

**Articles 26-27**

**Correction of errors in the text of international agreements**

1. Where an error is discovered in the text of an international agreement for which there is no depositary after the text has been authenticated, the interested States shall by mutual agreement correct the error in either of the following ways, unless another procedure has been agreed upon:
   (a) By having the appropriate correction made in the text of the international agreement and causing the correction to be initialled in the margin by representatives duly authorized for that purpose; or
   (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 international agreement and the corrections which the parties have agreed to make.

2. Where an error is discovered in the text of an international agreement for which there is a depositary, after the text has been authenticated:
   (a) The depositary shall bring the error to the attention of all the States which participated in the adoption of the text and to the attention of any other States which may subsequently have signed or accepted the international agreement, 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; and
   (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 procès-verbal of the ratification of the text and transmit a copy of the procès-verbal to each of the States which are or may become parties to the international agreement.

3. Whenever the text of an international agreement has been corrected under paragraphs 1 and 2 above, the corrected text shall replace the original text as from the date on which the latter was adopted, unless the parties shall otherwise determine.

4. Notice of any correction to the text of an international agreement made under the provisions of this article shall be communicated to the Secretariat of the United Nations if that international agreement has been registered therewith under article 25.

**Article 28**

**The depositary of multilateral international agreements**

1. Where a multilateral international agreement fails to designate a depositary of the international agreement, and unless the States which adopted it shall have otherwise determined, the depositary shall be:
   (a) In the case of an international agreement drawn up within an international organization or at an international conference convened by an international organization, the competent organ of that international organization;
   (b) In the case of an international agreement drawn up at a conference convened by the States concerned, the State on whose territory the conference is convened.

2. In the event of a depositary declining, failing or ceasing to perform its functions, the negotiating States shall consult together concerning the nomination of another depositary.

**Article 29**

**The functions of a depositary**

1. A depositary of an international agreement shall act impartially in the performance of his functions as custodian of the original
text of the international agreement and of all instruments relating thereto.

2. In addition to any functions expressly provided for in the international agreement and unless the international agreement otherwise provides, a depositary shall have the duty:

(a) To prepare certified copies of the original text or texts and transmit such copies to all States parties to the international agreement or to which the international agreement is open to become parties;

(b) To furnish to the State concerned an acknowledgement in writing of the receipt of any instrument or notification relating to the international agreement and promptly to inform the other States, mentioned in sub-paragraph (a) above, of the receipt of such instrument or notification, or when appropriate, of the fulfilment of the conditions laid down in the international agreement for its entry into force;

(c) On a reservation having been formulated, to communicate the text of such reservation and any notification of its acceptance or objection to the interested States as prescribed in articles 18 and 19-20;

(d) On receiving a request from a State desiring to accede to the international agreement, to communicate the request to the States whose consent to such participation is specified in article 13 as being material; and

(e) On an error having been discovered in the text of the international agreement, to inform all States concerned of such error, and the objection, if any, to the correction of such error, raised by any of them and, on proceeding with the correction thereof under the provisions of article 26-27, draw up and execute a procés-verbal of such correction and furnish them a copy thereof.

3. The depositary shall have the duty of examining whether a signature, an instrument, a notification, a reservation, or an objection to a reservation is in due form under the provisions of the international agreement in question or of the present articles, and, if need be, to communicate on the point with the States concerned.

In the event of any difference arising between a State and the depositary as to the performance of these functions, the depositary shall, upon the request of the States concerned or on its own initiative, bring the question to the attention of the other interested States or of the competent organ of the organization concerned.

15. LUXEMBOURG

[PART I]

Transmitted by a note verbale of 14 December 1964 from the Permanent Representative to the United Nations

[Original: French]

Part I: Conclusion, entry into force and registration of treaties (articles 1-29)

Before dealing in detail with the twenty-nine articles which make up the first series of provisions drawn up by the International Law Commission on the law of treaties, the Luxembourg Government would like to stress the importance it attaches to this part of the Commission’s work and to express its very deep appreciation of the value of the draft articles.

The Luxembourg Government hopes that the Commission’s work will soon result in the conclusion of a world-wide convention on this fundamental subject. It is with that object that the Luxembourg Government takes the liberty of submitting herewith a number of critical comments and proposals. Those articles or parts of articles on which no observations have been made are fully approved by the Luxembourg Government.

Article 1

The expression “treaty”. Paragraph 1(a) of this article assigns the following meaning to the expression “treaty”: “Treaty means any international agreement in written form...concluded between two or more States or other subjects of international law and governed by international law.” It is obviously difficult to define a notion so fundamental as that of an international treaty: indeed, a point has been reached beyond which ideas can no longer be defined in strictly juridical terms. The question therefore arises whether it is advisable to give a legal definition of the terms “treaty” or whether it might not be better simply to state the idea and leave it to doctrine to define it.

The essence of the paragraph quoted lies in defining a treaty as “any international agreement”. But the term “agreement” is nothing else than a synonym of “treaty”. If the International Law Commission wished to maintain a provision of this nature, it appears to the Luxembourg Government that a valid definition of the idea of a treaty should concentrate on three elements:

(a) the consensual nature of a treaty, which represents an agreement between two or more parties;

(b) the nature of the parties, who are either States or other subjects of international law;

(c) the binding effect sought by the parties, in the sense that the treaty (unlike a mere declaration of common purpose, of a political nature) has always as its purpose a legal commitment entered into by the parties.

On the other hand, there might be some question whether it is correct to include in the actual definition of the treaty two elements stated in the International Law Commission’s text, namely, the written form and the reference to international law.

According to the draft text (which should be clear in itself, without reference to the commentary), the question may well arise whether the written form should be regarded as a matter of substance, that is, whether it ought to be a factor in determining the validity of treaties or whether it is simply a way of saying that the future convention shall apply only to treaties in written form. If the second interpretation is the correct one, it would be preferable to eliminate that element from the definition and to add at the end of the article a provision stating that

“The rules laid down by these articles relate only to international treaties in written form”.

Further, the question arises whether it is really necessary to say that the draft articles refer exclusively to treaties “governed by international law”. That qualification seems to be implied by the very nature of the contracting parties; hence, the rules of international law could only be made inapplicable as an exception by inserting a specific reference to another system of juridical rules or possibly by virtue of the very special subject of a particular agreement. That is such an exceptional case that it would be better not to complicate the general definition of a treaty by a reference to that unlikely assumption.

In the opinion of the Luxembourg Government, if the term “treaty” is to be defined, the definition might read somewhat 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.”

“Treaties in simplified form”. The term “treaty in simplified form”, as stated in paragraph (11) of the commentary, could be defined by the form, or rather the absence of form of the treaty. Actually, the indications under sub-paragraph (b) of article 1, paragraph 1, do not constitute a definition, but are merely an enumeration of the various formal procedures characteristic of this category of agreements.

The term described in this sub-paragraph recurs twice in the articles which follow: in article 4, paragraph 4(b) which states that treaties in simplified form may be signed without requiring the representatives of the parties to produce instruments of full powers; and in article 12, paragraph 2(d), which states that such
treaties shall be presumed not to be subject to ratification. Juridically, a treaty in simplified form is therefore characterized by the absence of full powers and the waiving of ratification. The use of certain procedures, such as those indicated in article 1, paragraph 1(c), appears to betoken a determination to waive such formalities. That being the case, the real definition of “treaty in simplified form” would be something like the following: “a treaty concluded in circumstances which indicate as regards the parties the willingness to enter into a commitment without observing the formalities of full powers and ratification”.

The foregoing shows that the term “treaty in simplified form” does not describe a category of agreements which is sufficiently precise to constitute a normative idea; in reality, it is a purely descriptive term, certainly interesting from the point of view of juridical doctrine, but only with difficulty usable in framing a legal definition. For the purposes of these draft articles, it should be sufficient to indicate at the appropriate places in what circumstances the parties should be regarded as having renounced the production of full powers and ratification.

Consequently, the Luxembourg Government proposes the deletion of this part of the definitions.

“General multilateral treaty”. Paragraph 1(c) defines the term “general multilateral treaty” to mean a multilateral treaty which concerns general norms of international law or deals with matters of general interest to States as a whole. Subsequently, this term is used in only one other place in the draft articles, namely in paragraph 1 of article 8, which states that “every State” may become a party to such a treaty. The Luxembourg Government reserves its right to express its views on the substance of this question in its commentary on article 8. For the time being, confining itself to the matter of definitions, it would like to make the following comments.

(a) This specific term is introduced without the text having previously defined the term “multilateral treaty” in general.

(b) In the opinion of the Luxembourg Government, “of general interest to States as a whole” is much too vague a criterion to form the substance of a workable definition. Since the use of the term defined in this sub-paragraph will actually govern the question of the participation of States in multilateral treaties, the application of such a debatable criterion might give rise to insoluble conflicts concerning the general nature of the norms established by a multilateral treaty, or whether they are of interest to States as a whole.

For the reasons given, the Luxembourg Government considers that this sub-paragraph should be deleted from the article on definitions.

The term “approval”. “Approval” is one of the many terms enumerated in paragraph 1(d). As it is commonly understood, the term means the internal formalities to which an international treaty is subject and, more particularly, parliamentary approval of treaties. It is only as a result of an unfortunate confusion of terms that “approval” has come to be used in international affairs as the equivalent of the term “ratification”; the converse is also true, moreover, since the term “ratification” is also frequently used in municipal law to mean parliamentary approval.

The Luxembourg Government invites the Commission to consider whether it should not take advantage of this opportunity to perfect the terminology once and for all; in these draft articles, which are concerned solely with the external and international aspect of the problem, references to the term “approval” of international treaties should be systematically eliminated and only the terms “ratification” and “accession” should be maintained.

**Article 4**

This article seeks to define the powers of the different organs of the State—Heads of State, Heads of Government, Ministers for Foreign Affairs, Heads of Missions—with regard to the different operations leading to the conclusion of international treaties.

According to their position in the national and international hierarchy, these officials can, to a greater or lesser degree, act *qualitate quae*, i.e., without being required to furnish the other party or parties with evidence of their authority to perform the various acts designed to bring international treaties into being and into force. This conception, which is based on the idea that trust should prevail in international relations, must be fully approved.

Since the norms defined in this article do not, however, necessarily coincide with the powers granted by the municipal law of various States—in fact, they attribute to Heads of Governments, Ministers for Foreign Affairs and Heads of Mission wider powers than those which they possess by virtue of the internal laws and usages of certain countries—it would be advisable to make it quite clear that article 4 concerns only mutual relations between States, and is not intended to modify the powers accorded to external organs by municipal law. A clarification of this type would be extremely useful, and even indispensable, for States, such as Luxembourg, which accept the principle that international treaties become an integral part of municipal law.

In practice, it would be a question of completing this article by a final sub-paragraph, worded as follows:

“The provisions of this article do not have the effect of modifying national constitutions, laws and usages as regards the powers of organs of the State in foreign relations.”

Moreover, paragraph 4(b) of this article provides that in the case of “Treaties in simplified form”, it shall not be necessary for a representative to produce an instrument of full powers, unless called for by the other party. This provision opens the door to great uncertainty, for it would be practically impossible to distinguish between treaties which are invalid owing to lack of full powers and treaties which are valid as a result of the utilization of the “simplified form”.

In reality, in the text as drafted it is a question of establishing the cases in which a treaty can be validly negotiated, drawn up, authenticated and signed without it being necessary for the person executing these formalities to possess an instrument of full powers executed in good and due form. Observation of practice shows that the so-called “treaties in simplified form” are most frequently concluded either within the established diplomatic relations between two countries (this is the case of “exchanges of diplomatic notes”), or within an existing international organization (this is the case of the “agreed minute” mentioned in article 1, paragraph 1(b). If full powers are dispensed with in such cases, it is because the negotiation and signing of the agreement take place on the basis of an established and well-tested relationship of trust. It is for this reason that in such cases it is not necessary to call for full powers.

This being so, it would seem dangerous to adopt provisions which would have the effect of encouraging the practice of treaties in simplified form beyond the limits so defined. The Government of Luxembourg therefore proposes that sub-paragraph 4(b) should be deleted.

In fact, it believes that the problem is already solved by paragraph 2, except that in this provision the idea of a “Head of a permanent mission to an international organization” would have to be replaced by the more general idea of “representative”. Indeed, it sometimes happens that a country is represented in an international organization by a member of its Government or by other persons designated *ad hoc* as representatives.

**Article 5**

The International Law Commission rightly notes that the contents of this article are more descriptive than normative. It is indeed difficult to formulate precise juridical rules for the first phase when drawing up treaties: this is governed by simple usages, but from the juridical point of view it is subject to the principle of liberty.

At the most, the period of negotiation could only give rise to juridical problems involving the responsibility which participating
States might incur as a result of their actions during the negotiations. The Government of Luxembourg feels that article 5 in its present form should be deleted.

**Article 6**

This provision is of capital importance to the structure of the whole. The article prepared by the International Law Commission is based on the following system:

(a) The text of treaties drawn up by an international conference convened by the participating States themselves or by an international organization is adopted by a two-thirds majority;

(b) The text of treaties drawn up within an international organization is adopted by the voting rules applicable in that organization;

(c) The text of other treaties is decided upon by the mutual agreement of the States participating in the negotiations. In the commentary it is specified that these "other cases" include bilateral treaties and multilateral treaties concluded between a small group of States otherwise than at an international conference.

This systematization elicits an initial comment. It is difficult to conceive how a multilateral treaty, even between a small group of States, could be concluded otherwise than at an international conference. Any negotiations designed to result in the signing of a multilateral treaty assume, by the force of circumstances, the character of a meeting of representatives of several Governments, which is itself the definition of an international conference, even if such a conference is constituted and operates in an informal manner. Thus, a great number of multilateral treaties which, although the number of parties is more or less limited, play a role of the greatest importance in the European and Atlantic regions, have been drawn up in international conferences. Such is the case of the Conventions which established Benelux, the European Communities, the Council of Europe, the Organization for European Economic Co-operation, the Atlantic Alliance, the Organization for Economic Co-operation and Development, the European Free Trade Association, the Treaty of Brussels and the Treaty establishing the Western European Union, etc. This shows that sub-paragraph (c) of article 6 in reality concerns only the case of bilateral treaties, whereas the general rule regarding multilateral treaties is the clause of sub-paragraph (a) which subjects "international conferences" to the principle of the two-thirds majority.

This rule appears to be based on the general practice at conferences convened under the auspices of the United Nations. It must be recognized that this rule is totally unsuited to the conditions prevailing at conferences of a regional character, where it is inconceivable for negotiations to be undertaken otherwise than on the basis of mutual agreement, that is, unanimity.

The Government of Luxembourg believes that the only principle which is truly consistent with the consensual character of treaties, whether bilateral or multilateral, is the principle of mutual agreement. It must be recognized that as soon as this principle is abandoned, the transition is made from the contractual plane to the institutional plane. For this reason the Government of Luxembourg believes that article 6 could without disadvantage be composed as follows:

(a) At the beginning, it would be necessary to affirm as a general principle that the adoption of the text of treaties takes place by mutual agreement of the States participating in the negotiations.

(b) On the other hand, when a treaty is drawn up within or under the auspices of an international organization, establishment of the text would be governed by the voting rules applicable in the organization. Even this position cannot be affirmed without reservations, for it is known that there are examples of international institutions which make decisions according to the majority principle whose constitutions explicitly refer certain questions to subsequent agreements, precisely in order to guarantee the application of the principle of unanimous agreement. (See, as an example, articles 220, 236 and 237 of the Treaty establishing the European Economic Community.)

(c) Finally, at international conferences the voting rules unanimously adopted by those conferences would be applicable.

The Government of Luxembourg therefore has the honour to submit the following draft to the International Law Commission:

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

"2. In the case of a treaty drawn up at an international conference, the adoption of the text takes place according to the voting rule established by the rules of procedure of that conference.

"3. In the case of a treaty drawn up within an international organization, the adoption of the text takes place according to the voting rule applicable in the competent organ of the organization, except in the case of a derogation resulting from the constitution of the latter."

**Article 8**

This article distinguishes between "general multilateral treaties", that are, generally, open to "every State", and other treaties that are only open to States which took part in the adoption of its text, States to which accession to the treaty was made open by its terms, or States which were invited to attend the conference at which the treaty was drawn up.

It will be recalled that the "general multilateral treaty" is defined in article 1 as being a treaty which establishes "general norms of international law" or "deals with matters of general interest to States as a whole". In its commentary on article 1, the Government of Luxembourg has already explained why it does not think that this definition can be used, in view of the uncertainties that are inherent in the notions it employs.

With regard to the provisions of article 8 itself, the Government of Luxembourg considers that the parties to any multilateral convention have the sovereign right to decide on the participation of States which were not among the original parties. It is not possible to find an a priori solution to this question, since the solution depends very much on the purpose of each individual treaty and on the political and juridical aims of the original parties. The Government of Luxembourg therefore considers that paragraph 1 of this article should be deleted, since the three hypotheses contained in sub-paragraphs (a), (b) and (c) of paragraph 2 give a complete and satisfactory ruling on the matter.

**Article 9**

This article is based on the following distinction: Multilateral treaties may be opened to the participation of other States:

in the case of most multilateral treaties, either by a two-thirds majority decision by participating States—or, as the case may be, by a decision of the competent organ of an international organization;

in the case of multilateral treaties "concluded between a small group of States", by mutual agreement of all the parties.

We first wish to draw attention to the debatable nature of the notion of "a small group of States" to which is subordinated the distinction, a very important one in view of its consequences, between treaties that may be made open by a majority decision and treaties that may be made open by a unanimous decision. But whenever a multilateral treaty is not simply opened to any State whatsoever it could be claimed that one is dealing with a "small group of States".
In accordance with the views just expressed regarding article 6, relating to the adoption of the text of a treaty, the Government of Luxembourg considers the procedure suggested in article 9, paragraph 1, to be inadmissible. Such a procedure would enable third States to accede in spite of the objections that might be raised by a minority of the parties. It would also make it possible to introduce subsequent alterations to the instruments of accession of multilateral treaties. In reality, the opening of a multilateral treaty to the participation of States other than those to which it was originally open is equivalent to altering the accession clauses of a multilateral treaty or to introducing such clauses into a treaty where they did not exist. Such a provision should therefore in principle be subject to the same requirements as the revision of the treaty.

The Government of Luxembourg therefore proposes replacing article 9 with a clause which could be combined with paragraph 2 of article 8 to form a new article, stating simply 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.”

Having established this principle, the question arises as to whether it might not be appropriate to introduce to that effect a simplified procedure which would obviate the need for another international conference. The provisions of article 9, paragraph 3, could, mutatis mutandis, provide the model for such a solution: When the depositary of a treaty receives a request for admission from a third State, he shall consult the original parties in order to discover whether the provisions regarding revision of the treaty are being complied with. Provision could also be made that, at the expiry of a specified time-limit, consent of a party shall be presumed if it has not notified the depositary of its objection.

The Government of Luxembourg considers that this solution, while respecting the consensual nature of international treaties, would provide enough flexibility to allow multilateral conventions to be opened to the accession of other States, without undue inconvenience, subject to the agreement of all the original parties.

Article 10

This article gives rise to two questions which are intended to clear up certain doubtful points.

In paragraph 1, the meaning of the words “in the treaty itself or in a separate agreement” does not seem very clear. International treaties are often set out in a number of documents, including “annex protocols” and “signature protocols”. But the treaty in the legal sense of the word is represented by all these documents put together. The words quoted therefore seem superfluous in this context.

Further, in the text of this article the distinction is not drawn very clearly between a signature “ad referendum” and a signature “subject to ratification”. It seems certain that a signature ad referendum followed by a confirmation only has the effect of a signature within the meaning of article 11, and that such a signature, even if confirmed, can still be subject to ratification, should the occasion arise. In order to avoid any misunderstandings in this matter, it would seem advisable to delete the word “full” in paragraph 2, sub-paragraph (c), as this wording could give the impression that, once a State had confirmed a signature ad referendum, it would be fully committed to the terms of the treaty. This does not, however, seem to be the scope of the confirmation: it simply has the effect of transforming the signature ad referendum into a signature pure and simple, which, in accordance with the provisions of the treaty, will have one of the effects defined in article 11.

Article 11

The Government of Luxembourg would like to make a remark regarding the terminology employed in connexion with this article. As was pointed out with regard to article 1, the use of the word “approval” should be forbidden in any instrument referring exclusively to the international operation of treaties.
the entry into force of treaties, which it is difficult to dissociate from the effect of the instruments mentioned in article 15.

It would seem necessary to distinguish here between two things: firstly, the time at which the mutual undertaking between the parties begins (from that time on, the parties can no longer withdraw unilaterally); secondly, the time at which the treaty enters into force—that is, becomes effective. When a treaty makes no provision in this respect, those two effects (the mutual undertaking and the entry into force) take place at the same time. On the other hand, some treaties provide that the entry into force shall take place later than the mutual engagement.

This analysis reveals that we must distinguish between the procedure for bringing about ratification, accession or acceptance (the subject of article 15) and the question of the time at which the treaty will enter into effect (the subject of article 23). As for such effect, we must distinguish, in accordance with the foregoing, between the time of the commitment of the parties (which takes place at the time agreement is exchanged by the deposit of the formal documents) and the time of the entry into force of the treaty (which may take place later).

In view of these distinctions, the Luxembourg Government considers that articles 15 and 23 should be redrafted.

New provision

The Luxembourg Government now proposes the insertion of a new provision stating that, owing to the effect of the entry into force of a treaty, the parties shall be obliged to take all appropriate measures to ensure the effectiveness of the treaty, specially by ensuring its publication and by taking the necessary measures for it to be carried out. Such a provision 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. Sometimes clauses of this type appear in some treaties (for example, one could cite article 86 of the Treaty to establish the European Coal and Steel Community and article 5 of the Treaty to establish the European Economic Community), but the same obligation is implicit in any international treaty.

The provision proposed above could be drafted as follows:

"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 of publicity, that are necessary to secure the application in full of the treaty in their territories."

Article 25

The Luxembourg Government fully approves the provisions of this article, but queries whether paragraph 2, as drafted, is not, in fact, an amendment to the United Nations Charter. In order to overcome this difficulty, it would be sufficient to redraft the paragraph as follows:

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

[PART II]

Transmitted by a note verbale of 23 December 1964 from the Permanent Representative to the United Nations

[Original: French]

The Luxembourg Government approves the solution adopted by the International Law Commission with respect to failure to observe a provision of the internal law of a State regarding competence to enter into treaties. The rule drafted by the Commission, however, leaves another question open, viz, failure on the part of the representatives of a State to comply with other rules of internal law (more specifically of constitutional law), beside the provisions regarding competence to enter into treaties.

The following might be quoted as examples: a treaty of alliance concluded by a State that is constitutionally neutral; a military treaty concluded by a constitutionally demilitarized State; a treaty modifying the structure and competence of internal authorities as a result of the transfer of sovereign powers to an international organization (this difficulty led to discussions in various European countries at the time when the treaties setting up the European Communities came into force); a treaty containing clauses contrary to the guarantees of fundamental freedoms granted under the constitution, etc. There is no need to point out that to subordinate the validity of international treaties to the observance of such rules, even if included in the constitution of a State, might lead to great uncertainty in international relations. A treaty must be presumed valid once it has been concluded by the organs competent to represent a State internationally; the violation of constitutional provisions—except those relating to the competence to enter into treaties, in the exceptional case referred to in this article—should not therefore be adduced as justification for questioning the validity of a treaty duly entered into.

It would perhaps be advisable for the International Law Commission in its commentary to deal more fully with the question we have just mentioned.

Article 37

The clause proposed by the International Law Commission is likely to create a great deal of legal uncertainty.

From a formal point of view one should ask first of all what "peremptory norms of general international law" mean here. Does it mean international usage, certain general principles of law, or can it also mean peremptory norms defined by international treaties? If the latter assumption is correct—and such would indeed appear to be the case from the commentary to the article—we should then ask, starting from what general level could an international treaty be regarded as validly establishing a peremptory norm which would be binding on other treaties. Moreover, the proposed clause would have the effect of introducing the whole question of the conflict of rules resulting from successive international treaties, whenever the source of a norm regarded as peremptory was an international treaty concluded previous to the treaty in dispute. By combining with this article the rule pacta sunt servanda (which is undoubtedly a peremptory norm), any international treaty incompatible with a previous treaty could be claimed to be null and void, except where the authors of the later treaty unquestionably have the power to abrogate the first treaty.

The uncertainty would be no less great from the substantive point of view. Indeed, as the Commission itself has pointed out, there is no authority in international life that is competent to define which norms are peremptory in relations between States and which are not. Precisely because of the contractual nature of all international treaties, it may even be claimed that all rules formulated by treaty are peremptory since each one represents an undertaking of a State towards other States. Indeed, a law which has its origin in a contract, owing to the mutual undertaking which it implies, is always more coercive than the law which is simply the law of a country, certain provisions of which allow wider freedom to the subjects to whom they relate.

It appears to the Luxembourg Government that the International Law Commission wished to introduce here a cause of nullity similar to the criteria of morality and "public policy" which in internal law are used to assess the compatibility of private contracts with certain fundamental conceptions of the social order. It is questionable whether such conceptions are suitable for transfer to international life, which is characterized by the lack of any authority, political or Judicial, capable of imposing on all States certain standards of international justice and morality. Consequently, the proposed clause, far from serving its purpose, is likely only to have the effect of creating uncertainty and confusion. Much to its regret, the Luxembourg Government concludes that
in the present state of international relations it is not possible to define in juridical terms the substance of peremptory international law.

Lastly, the question arises who would be qualified to claim the nullity contemplated by this article: could such nullity be claimed only by the States parties to the treaty held to be incompatible with a peremptory norm? In that case the application of the provision would imply a contradictory attitude of the party claiming nullity, since that party itself would have contributed to the preparation and entry into force of the treaty disputed by it; it would be a kind of venire contra factum proprium. On the other hand, if it was assumed that third parties could claim the nullity of a treaty which they regarded as incompatible with a peremptory rule, this would be inconsistent with the principle of relativity, which, in the absence of any supra-national authority, continues to dominate the entire subject of international treaties.

**Article 39**

The Luxembourg Government proposes that the part of the text concerning “statements of the parties” should be clarified by the insertion of the word “concordant”. This addition would prevent a party from invoking its own unilateral statements in order to secure the right to denounce a treaty or withdraw from it.

**Article 40**

The situation contemplated by the International Law Commission as justification for the provisions of paragraph 2 is not sufficient reason for the introduction of such a complicated rule. If it was really desired to safeguard against the—in fact highly improbable—inclinations of a small number of States which were the first to accede to a multilateral convention and wished to terminate it by mutual agreement, paragraph 2 might be replaced by a provision to the effect that States that had taken part in drawing up a treaty, but had not become parties to it, could still bring that treaty into force among themselves, even after the original parties had terminated it by mutual agreement.

It would certainly be preferable, however, to delete paragraph 2 of this article altogether.

**Article 45**

In accordance with its comments on article 37, the Luxembourg Government proposes that article 45 too should be deleted.

**Article 48**

The distinction drawn in the commentary on treaties drawn up “within” and those drawn up “under the auspices” of an international organization is too vague to serve as the criterion for the application of this provision. The Luxembourg Government considers that the clause in article 48—the fundamental idea of which it fully approves—should apply only in cases where a connecting link is established between a treaty and the statute of the organization concerned. Such a link should be considered to exist, for example, whenever there is a necessary relationship between the position of a State as a party to a treaty and its position as a member of the organization within which the treaty was negotiated and concluded. On the other hand, this clause should not apply when an international treaty, although concluded under the auspices of a specified organization, is open to States which are not also members of that organization.

Thus, to give some specific illustrations, the Treaty instituting the Benelux Economic Union provides that the States parties should conclude supplementary conventions on various matters (e.g. freedom of movement and legal co-operation) included in the Union’s aim: in this case the connecting link is clearly established. The same is true of the conventions envisaged in article 220 of the Treaty establishing the European Economic Community, the object of which is the protection of persons and their rights, the elimination of double taxation, the mutual recognition of companies and the reciprocal recognition and execution of judicial decisions. The same is also true of the European Convention on Human Rights, which is intimately linked to the aims and operations of the Council of Europe.

The difficulty is to define this connecting link between a treaty and the law of an international organization in a sufficiently specific and precise way. For this purpose, a second sentence worded as follows might perhaps be added to the article:

“**This provision shall not apply when a treaty drawn up within an international organization is open to States which are not members of that organization.**"

**General comments on grounds of nullity and the termination of treaties**

Articles 33 to 37 and 42 to 43 indicate a number of grounds the effect of which is either to make a treaty void ab initio (fraud, error, coercion, conflict with a peremptory norm) or to terminate its operation (breach, impossibility of performance, fundamental change of circumstances, emergence of a new peremptory norm). These rules are not without analogy in certain civil law provisions. But unlike internal law, where there is always a judge competent to settle disputes arising out of contracts concluded between individuals, there is no authority at the international level capable of determining if the nullity or termination of a treaty on one of the grounds indicated, is invoked with good reason by a particular State. As the International Law Commission has repeatedly brought out in its commentary, this state of affairs entails a real danger for the permanence of international treaties. The danger is particularly marked in the case of a ground of nullity as vague as that of conflict with a peremptory norm of general international law, and, as far as the termination of treaties is concerned, in cases of breaches of undertakings, impossibility of performance, and, even more, fundamental changes of circumstances.

The Luxembourg Government considers that it is not possible in practice to embody in a formal treaty the various grounds of nullity, and particularly the motives for termination of treaties, if the various States do not undertake at the same time to submit, as far as the application of those provisions is concerned, to a jurisdiction or compulsory arbitration. Since it is illusory to believe that such a state of law can be reached in the foreseeable future, the Luxembourg Government ventures to propose the following solution.

At the end of the articles, a new provision should be inserted authorizing States parties to make a reservation, under which the provisions mentioned could not be invoked against them by States which were not bound in regard to them by the acceptance of arbitration or a compulsory jurisdiction. The effect of such a clause would be that the provisions of these articles could be taken in two ways:

In relations between States bound by an undertaking of an arbitral or judicial nature, the provisions relating to the nullity and termination of treaties would have full legal force;

In the relations with other States, only the general rules of international law would be applicable. That would not mean that the provisions drawn up by the International Law Commission would be unimportant; but between such States they would be for guidance only, and not have the force of legal rules proper.

The article proposed by the Luxembourg Government might be worded as follows:

“Upon acceding to these articles, States parties may, without prejudice to the general rules of international law, exclude the application of the provisions relating to the invalidity and termination of treaties in regard to any State that has not accepted in respect to them an undertaking concerning compulsory jurisdiction or compulsory arbitration, regarding a treaty alleged to be invalid or to have terminated.”
The provisions of this article would not apply to the extent that a State had made use of the reservation proposed in the new article given above. In fact, as no legal obligation would then exist between such a State and any other State which had not undertaken with regard to the former State an obligation to submit to arbitration or a jurisdiction, the procedure laid down in the article would no longer serve any purpose.

16. MALAYSIA

[PART I]

Transmitted by a note verbale of 26 July 1963 from the Ministry of External Affairs

[Original: English]

The Ministry of External Affairs, Federation of Malaya presents its compliments to the Office of the Secretary-General of the United Nations and ... has the honour to inform the latter that the Government of the Federation of Malaya has no objection to part I of the draft articles on the law of treaties of the report of the International Law Commission issued at its fourteenth session held from 24 April to 29 June 1962.

[PART II]

Transmitted by a note verbale of 15 September 1964 from the Ministry of External Affairs

[Original: English]

...the Government of Malaysia has no objection to part II of the draft articles on the law of treaties...

17. NETHERLANDS

[PARTS I AND II]

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

[Original: English]

The scope of the draft articles

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

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Article 1

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

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

Quite apart from the adoption of the definition of the word "party" proposed above, the Netherlands Government believes it is self-evident that the same meaning should be attached to the word "party" in all treaties; if a definition of the word "party" is given, it even becomes essential to do so. The Netherlands Government would draw attention to the anomalous meaning of the word "party" in paragraph 2 (a) of article 15 and to the suggested amendment.

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

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

Other amendments suggested are:

Paragraph 1 (c): "...deals with other matters of general interest to the community of States";

Paragraph 1 (d): in the first and second lines, "Acceptance" and "Approval" to be replaced by "and Acceptance" (see below under article 14);

Paragraph 1 (f): "accepting or approving" to be replaced by "or accepting".

Article 3

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

Paragraph 2

The Netherlands Government would point out that this paragraph may also be applicable to other forms of States than "federal unions", for instance, to the Kingdom of the Netherlands with its three autonomous countries. The Statute of the Kingdom provides for the delegation by the Government of the Kingdom to the Governments of the individual countries of powers to conclude certain categories of treaties. The Netherlands Government would be glad if the Commission would refer in its commentary to this example of a form of State that is different from the better-known federal form.

Paragraph 3

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

Article 4

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

Article 5

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

Article 6

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

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

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

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

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

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

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

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

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

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

Article 8

Paragraph 1

The Netherlands Government shares the views of the members whose opinion is quoted in paragraph (4) of the Commission's commentary on article 9.

Paragraph 2

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

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

(a) becomes (b);

(b) becomes (a) and "unless the treaty states otherwise, or, in case (a) and (c), unless the treaty should so provide (or) otherwise be altered.

Article 9

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

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

Suggested modification of text:

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

Article 11

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

Suggested modifications of text:

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

Article 12

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

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

The following text is proposed:

"Article 12

"Ratification"

"1. A treaty requires ratification where:

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

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

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

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

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

(b) The treaty is one in simplified form;

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

3. In cases not covered by paragraph 1 (a) and (b) a signatory State will become bound by the treaty by signature alone, if the credentials, full powers, or other instrument issued to the representative of the State in question authorize him by his signature alone to establish the consent of the State to be bound by the treaty without ratification."
“4. In cases covered by paragraph 2 above, a signatory State shall nevertheless become bound by the treaty only upon ratification, if the representative of the State in question has expressly signed ‘subject to ratification’.”

Article 13

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

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

The Netherlands Government would also observe that in the text no account has been taken of the not unusual case of a signatory State not ratifying the treaty within the time-limit, but becoming a party to the treaty all the same because the latter provides for the Protection of Literary and Artistic Works, dated 26 June 1948.

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

Article 14

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

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

It is proposed that the text be modified as follows:

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

Article 15

Suggested modifications to the text:

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

The words “two differing texts” in paragraph 1(c) to be replaced by “two alternative texts”;

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

Article 16

The Netherlands Government believes there have been two instances (one within the United Nations and one connected with the Greek ratification of the IMCO Treaty) of instruments of ratification having been withdrawn a short time after they had been deposited. Opinions may vary as to whether depositing an instrument of ratification, accession or acceptance constitutes an irrevocable act. It might be argued that the final formality in the procedure of becoming a party to a treaty is so important (in most countries the relative documents must be signed by the Head of State) that it cannot but be looked upon as an irrevocable act. Sir Gerald Fitzmaurice, the former Special Rapporteur, endorses this view in paragraph 5 of article 31 of his first report in the following words: “Ratification once made cannot, as such, be withdrawn” (see also paragraph 1 of article 33). On the other hand, it cannot very well be argued that the effect of such an act is irrevocable.

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

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

Suggested modifications:

The words “acceptance and (or) approval” to be replaced by “and (or) acceptance” in three places, viz. in the title and in the second and fifth lines;

“Article 13” in the third line to be replaced by “articles 12, 13 and 14”.

Article 17

Paragraph 1

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

Paragraphs 1 and 2

The words “acceptance or approval” should be replaced by “or acceptance”.

Article 18

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

Suggested modifications of the text:

The words “accepting or approving” in the second line of paragraph 1 to be replaced by “or accepting”;

The words “acceptance or approval” to be replaced by “or acceptance” in paragraph 2(a)(iii) and in paragraph 2(b).

Article 19

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

Suggested modification of the text:

The words “acceptance or approval” in paragraph 2(a) to be replaced by “or acceptance”.

Article 20

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

**Article 22**

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

**Article 23**

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

Suggested modifications of the text:

The word "small" in paragraph 2(b) to be replaced by "same";

In paragraphs 2(a) and (b), "acceptance, or approval" to be replaced by "or acceptance";

The words "accepted or approved" in paragraph 2(c) to be replaced by "or accepted".

**Article 24**

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

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

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

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

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

The words "acceptance or approval" in the first sentence to be replaced by "or acceptance";

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

**Article 27**

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

**Article 29**

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

"To execute a proces-verbal" (paragraph 3(c));

"To furnish an acknowledgement in writing" (paragraph 3(d));

"To communicate" (paragraph 5(a) and (b));

"To inform" (paragraph 7(a));

"To draw up a proces-verbal" (paragraph 7(b)); and

"To bring to the attention" (paragraph 8).

The Netherlands Government feels that it would be preferable to use a single, uniform, simplified formula, unless the treaty expressly states otherwise. Another advantage of a uniform formula is that it could include by implication the notifications not mentioned in the article about denunciation, extension of territorial application, amendments, renewal, statements to the effect that States continue to be bound, etc. The Netherlands Government has in mind the text of article 19 of the Convention on the Recovery Abroad of Maintenance concluded at New York on 20 June 1956 entitled "Notifications by the Secretary-General"; the beginning of which reads:

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

(a) Of communications under paragraph...

(b) Of information received under paragraph...

(c) Of declarations and notifications made under...

(d) Of signatures, ratifications and accessions under...

(e) Of the date on which the Convention has entered into force under...

(f) Of denunciations made under...

(g) Of reservations and notifications made under...

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

Suggested modifications of the text:

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

**Part II**

**Terminology**

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

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

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

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

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

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Section I: General provision

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

Since it is a recognized fact in international law that a state of war invalidates some treaties while it suspends the operation of others, it would be irrational to ignore in part II of the draft articles on the law of treaties the fact that treaties may be invalidated or rendered inoperative for reasons other than those mentioned in article 31 and subsequent articles, as has been done in article 30.

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

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

Article 30
No comment.

Article 31
The Netherlands Government endorses the Commission’s guiding principle underlying this article, namely that as a rule the violation of national laws regarding the manner in which the consent of a State to a treaty is to be obtained or the way in which it is to be conveyed does not invalidate consent expressed by a State internationally. The Netherlands Government considers the principle that international law takes precedence over national laws of great importance to the development of the international legal system.

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

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

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

Article 32
No comment.

Article 33
Since paragraph 1 mentions both the defrauded State and the State which has committed the fraud, the reference to “the State in question” in paragraph 2 is not sufficiently clear. It is suggested that “the State in question” in the second line of paragraph 2 be changed to “the injured State”.

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

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

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

Article 36
The Netherlands Government fully endorses the principle underlying this article, but the manner in which it is formulated prompts a few questions.

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

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

Article 37
The Netherlands Government endorses the principle underlying this article, i.e. that according to modern ideas the will of the contracting parties is no longer the sole criterion by which to determine what can be lawfully contracted. However, the Netherlands Government feels that it is a pleonasm to say “a peremptory norm from which no derogation is permitted”.

Article 38
No comment.

Article 39
With the possible exception of some old treaties, the insertion in which of a clause regulating the termination or the denunciation was simply overlooked, it is hard to imagine that contracting parties nowadays would be so careless as to “forget” to make such provisions. Consequently, the fact that no mention is made of ways in which a modern treaty may be denounced should be ascribed rather to the parties deliberately having avoided the subject. If in such cases the travaux préparatoires were referred to, it would almost invariably be found that the subject had indeed been discussed by the parties, but that for political reasons it was not thought opportune to mention the conditions under which the treaty should cease to operate, or that the parties disagreed on what those conditions should be, or that they took the effect of such conditions as a matter of course, or that there were some other reasons or a combination of reasons for the parties having refrained from making any stipulations in respect of the duration or termination of the treaty.

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

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

It is suggested that article 39 be modified as follows to make it suitable for existing and future treaties:
Seventh line: "...intended to admit under certain conditions denunciation or withdrawal. Under those conditions, a party may denounce or...".

**Article 40**

**Paragraph 2**

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

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

Suggested changes in the text:

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

**Article 41**

No comment.

**Paragraph 2(a)**

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

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

**Paragraph 2(b)**

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

**Paragraph 4**

As regards paragraph 4, see remarks under article 46.

**Article 43**

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

**Article 44**

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

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

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

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

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

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

**Article 45**

As regards paragraph 2, see remarks on article 46.

**Article 46**

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

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

**Article 47**

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

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

Suggested modifications:
Third line: “...under articles 31 to 35...”;
Paragraph (b), second and third lines: “...in the case of articles 31 to 35...”.

Article 48

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

No comment.

Article 49

No comment.

Article 50

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

Article 51

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

No comment.

Article 52

No comment.

Paragraph 3(c)

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

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

Article 54

No comment.

ANNEX

to the Netherlands Government’s comments on part II of the draft articles on the law of treaties

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

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

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

4. However, the difficulties outlined under 1 have not been overcome completely by the distinction made under 2. They have not been overcome in respect of the “objective” reasons, because it might well be that the cancellation of part of a treaty does not “interfere with the operation of the remaining provisions” (see paragraph (6) of the Commission’s commentary under article 46), while that cancellation might still run counter to the “object and purpose” of the treaty.

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

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

A very broadly worded article might meet the case (deleting the special provisions regarding separation in articles 33, 34, 35, 36, 37, 39, 42, 43, 44 and 45). Something on the following lines might do:

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

2. If a ground mentioned in articles 31, 32, 33, 34, 35, 36, 37, 39, 42, 43, 44 and 45 for nullity, termination, suspension of the operation of a treaty or withdrawal from a treaty, applies only to particular clauses of a treaty, and a party to the treaty wishes to uphold the remainder of the treaty, the other party or parties shall accept the continuing validity and operation of the remainder of the treaty, unless such acceptance cannot reasonably and in good faith be required from such other party or parties.

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

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

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

[PART III]

Transmitted by a letter of 1 March 1966 from the Permanent Representative to the United Nations

[Original: English]

Introduction

1. In its report on part II of the draft articles, the Netherlands Government expressed the desire with regard to article 51 that the obligation to submit to international jurisdiction disputes on points of law which cannot be resolved in any other way be generally recognized. The article under consideration at the time concerned the procedure for suspending or terminating other treaties, in which no provision was made for their suspension or termination. In pursuance of a regulation to be inserted in article 51, disputes on such treaties could be referred to the International Court of Justice.

The points raised in the ILC's comments on that article included the absence of a regulation governing disputes on the interpretation and application of the articles in question concerning the law of treaties. In its commentary on this last part of the law of treaties, the Netherlands Government would lay particular stress on the desirability of an article on the settlement of disputes that may arise in connexion with the articles in question. To formulate regulations especially for the codification of the law of treaties without establishing a procedure for settling disputes would be doing things by halves.

2. If the articles relating to the law of treaties are included in one or more treaties, it would seem desirable to arrange at the same time in what circumstances States which are, or are to become, parties to that treaty or those treaties may make reservations with respect to some provisions thereof. It might not be advisable to place a general ban on reservations. This can only be decided when the articles are available in a more definitive form.

Section 1: "The application and effects of treaties".

Article 55: "Pacta sunt servanda".

3. No comment.

Article 56: "Application of a treaty in point of time".

4. Paragraphs 5 and 7 of the ILC's comments have not convinced the Netherlands Government of the desirability of choosing for the end of paragraph 2 of this article a wording different from that chosen for the end of paragraph 1. The Netherlands Government would not expressly rule out the possibility that the "very nature of a treaty indicates that it is intended to have" certain legal consequences even after its termination. Therefore the Netherlands Government proposes (to emulate the set-up originally proposed by rapporteur Sir Humphrey Waldock in his article 57) that one and the same wording be used for both contingencies.

5. Where the first paragraph rightly excepts "any situation which ceased to exist", the second makes a similar exception for "any situation which exists". The Netherlands Government assumes that what is meant in the second paragraph is a "situation which comes into existence".

6. Proposal concerning the text of article 56, paragraph 2: "... or any situation which comes into existence after the treaty has ceased to be in force with respect to that party, unless the contrary appears from the treaty."

Article 57: "The territorial scope of a treaty".

7. The Netherlands Government considers this provision acceptable as a general principle. It is assumed that the subject of international law constitutes a unity.

Only the word "territory" implies a limitation which is not always encountered in practice. In fact, treaties intended to apply mainly to the territories of the parties need not to that end be limited in their operation. The operation of treaties which lend themselves to application, for instance, to ships sailing under the flag of and aircraft registered in a State party must not, on the grounds of this provision, be deemed as ruled out in respect of ships or aircraft outside the territory of that State. The same thing can be said of treaties which lend themselves to application by diplomatic or consular representatives in the territory of a State which is not a party to the treaty; or for application on the continental shelf, which does not belong to the territory of a State but falls within the jurisdiction of the coastal State for certain purposes pursuant to the relevant 1958 Treaty of Geneva. Particularly in the latter case it is quite conceivable that disputes may arise, for instance, on whether or not customs treaties relating to minerals won on the continental shelf or to operational material placed on that shelf are applicable.

Accordingly, account should be taken in article 57 of the operation of treaties outside the territory of the parties, as far as the jurisdiction of a State extends under international law. A proposal for a text to this effect will be found in point 11.

8. Article 57 only gives the general rule, without allowing for special factors such as the federal structure of a State or the position of dependent territories. It might be said that protectorates, trust territories and colonies do not form part of the "entire territory" of a State: this cannot be so readily said of autonomous parts of a State, such as the Isle of Man and also Zanzibar in certain respects, or of the component parts of a federal State such as the Federal Republic of Cameroon, the Federal Republic of Nigeria and the Swiss Federal State. Yet nowadays the autonomous or component parts of States with different constitutional structures are frequently seen to be competent to decide for themselves whether or not they shall be bound by treaties, vide the Ukraine, Byelorussia and the three parts of the Kingdom of the Netherlands, to mention only three.

9. If the territorial validity of a treaty is not laid down in the treaty itself, a State may in the first instance wish to become a party for one of its territories, leaving it to the government of each other part to decide whether or not the treaty shall be accepted later for that part, too. If the treaty itself prescribes no other procedure, expression can be given to this territorial differentiation when the treaty is signed and/or ratified. It would not be appropriate to lay down in the law of treaties a rule depriving States of the opportunity of availing themselves of territorial differentiation which present international legal practice offers them, thus curtailing the autonomy due to a single part of the State within the whole and obstructing in the future the conclusion of treaties whose purpose is to serve the common weal.

In practice, it is only States with federal structures and constitutions granting the component parts autonomy with respect to treaty commitments that need (at all events initially) the opportunity to become parties to treaties for only one or some of their component parts, and perhaps for some other part or parts at a later stage. The Netherlands Government does not know of any instance of this faculty having been abused by a State with a different structure,
Nevertheless, if the existing faculty is expressed in a rule of the law of treaties, it would seem right to make that rule as accurate a reflection of the usual practice as possible and to restrict it to States whose component parts, under the constitution of the State, can decide for themselves autonomously whether or not to accept the rights and obligations of a treaty.

Moreover, it is natural that the federal government should be required to make it clear, when the State becomes a party to a treaty, whether it is doing so as a complete unit or for some of its federal States only, and in the latter event, for which. Generally speaking, the other parties to the treaty cannot be expected to be so well acquainted with the constitutional structure of a federal State that without any notification from that State they can be certain that the treaty is effective in one or all of its parts.

10. This point might conceivably be settled under article 19 and succeeding articles on reservations. However, as a rule “territorial reservation” is not reservation in the material sense, i.e. not a reservation on any provision laid down in the treaty. (It is of course a different matter where territorial treaties are concerned.) It would not seem right therefore to adopt in respect of statements regarding the territorial application the same procedure as that prescribed for material reservations.

11. The foregoing considerations have prompted the drafting of the following, which is suggested for article 57:

“The scope of a treaty extends to the entire territory of each party, and beyond it as far as the jurisdiction of the State extends under international law, unless the contrary appears from the treaty or, in accordance with paragraph 2 of this article, from the act by which the State expresses its consent to be bound by the treaty.

A State consisting of parts which under constitutional provisions decide autonomously and individually whether they shall accept a treaty shall, provided the contrary does not appear from the treaty, declare in the act by which it expresses its consent to be bound by the treaty to which of its constituent parts it shall apply. This declaration shall not be regarded as a reservation within the meaning of article 18. In the absence of such a declaration the State shall be deemed to be bound by the treaty with respect to all the constituent parts of that State.”

**Article 58:** “General rule limiting the effects of treaties to the parties.”

12. The principle that a treaty “neither imposes any obligations nor confers any rights upon a State not party to it without its consent” does not apply to all treaties. One consequence of a treaty defining the frontier between two States or transferring a piece of territory is to alter the area over which the consuls of third States may exercise jurisdiction. Another consequence may be that agreements formerly effective in the area transferred are no longer so, or vice versa. A treaty relating to the demarcation of the continental shelf, concluded in pursuance of article 6 of the relevant 1958 Treaty of Geneva, may result in a customs agreement becoming, or ceasing to be, applicable to minerals won from the part of the shelf concerned.

Broadly speaking, treaties governing the territorial demarcation of sovereignty (or with respect to the continental shelf, the territorial delimitation of “sovereign rights”) certainly do involve rights and obligations for third States. Such treaties constitute a separate category as opposed to all other treaties, which concern matters relating to the exercise of that sovereignty. Cf. a similar commentary by the Netherlands Government on article 44.

The ILC might consider the addition of a clause to article 58 covering this exception to the general principle.

**Article 59:** “Treaties providing for obligations for third States.”

13. No comment.

**Article 60:** “Treaties providing for rights for third States.”

14. In some circumstances the faculty of “implied assent” by a third State provided in paragraph 1(b), combined with the ban imposed by article 61 on revoking or amending the provision in question without the third State’s consent may place a very heavy burden indeed on the contracting parties. This combination will be particularly unfortunate in the case of a treaty that accords rights to a large group of States or to the community of States in general, like the treaties on the freedom of shipping in some of the international waterways. Giving a voice in matters concerning the regulations operative for those waterways to a State which has never formally reacted to the conclusion of the treaty, and whose subjects have only in exceptional cases availed themselves of the rights accorded, would be going further than is compatible with reasonable practice, quite apart from the fact that the parties concluding the treaty would then be unable to find out which States had given “implied assent”.

15. Suggested modification of end of article 60, para. 1:

“...and (b) the State expressly assents thereto”.

**Article 61:** “Revocation or amendment of provisions regarding obligations or rights of Third States.”

16. The combination of articles 60 and 61 has already been commented on under point 14. The Netherlands Government has considered whether the objective, i.e. the denial of rights to third States which have scarcely if at all reacted to the offer of a right, could also be achieved by leaving article 60 intact and adding to article 61 the requirement: “and provided the State has actually exercised the right” (and, if desired: “and complied with the obligation”). Although theoretically formulation on these lines would appear to have a more equitable effect than that described under 14 and 15, in practice it would be so difficult to produce evidence of “traditional rights”, that the clearer arrangement recommended under 14 and 15 is preferable.

17. The Netherlands Government would make three remarks on the text of article 61:

Firstly, the ILC has not made it clear in paragraph 1 of its commentary why the complete or partial withdrawal of an obligation imposed on a third State should require the assent of the third State. Its assent does indeed seem to be required if modification of the original obligation gives rise to a new or more onerous obligation, but article 59 would appear to be automatically applicable in such a contingency.

Secondly, the modification of a right granted to a third State need not be mentioned separately in article 61. For if such modification amounts to partial withdrawal of the right, it is governed by the rule governing withdrawal, and if the modification involves the granting of a new or more comprehensive right, article 60 is applicable.

Finally, the Netherlands Government considers that the rule laid down in article 61 is intended to protect the third State against withdrawal (or modification) of the right accorded, not against withdrawal (or modification) of the treaty provision from which that right is derived.

For these reasons it is suggested that article 61 be worded as follows:


“When under article 60 a right has arisen for a State from a provision of a treaty to which it is not a party, the right may be revoked only with the consent of that State, unless it appears from the treaty that the right was intended to be revocable.”

**Article 62:** “Rules in a treaty becoming generally binding through international custom.”

18. No comment.
Article 63: "Application of treaties having incompatible provisions."

19. Paragraph 4: Unlike the wording of article 67, in paragraph 1(b)(ii) of which account is rightly taken of the object and purpose of the treaty as a whole, that of article 63, paragraph 4, suggests that every multilateral treaty can simply be divided up into a number of bilateral legal relationships, leaving no remainder. The ILC itself does indeed acknowledge in paragraph 13 of its commentary, that paragraph 4 is worded as though the problem of successive treaties between parties, some of which are the same parties, giving rise to incompatible obligations only has to be settled from the points of view of priority of the rights and obligations of the States concerned (paragraph 4) and of liability for non-compliance with the obligations of a treaty (paragraph 5).

The ILC has not lost sight of the coherence of the various provisions and of their joint connexion with the object and purpose of the treaty, i.e. of its integrity. On the contrary, paragraphs 14, 15 and 16 of the commentary are evidence of the great care with which it has approached this problem from various angles. Nevertheless, the very one-sided result seen in paragraph 4 is unsatisfactory.

There might be some justification for concluding that the problem is not yet ripe for codification. Customary international law has not yet crystallized in this respect. So far, international relations have not been regulated well enough to allow a clear rule of law to be formulated.

Article 64: "The effect of severance of diplomatic relations on the application of treaties."

20. No comment, except that paragraph 3 can be dispensed with in the light of the proposal made earlier by the Netherlands Government for the modification of article 46, which should then include reference to article 64.

Section II: "Modification of treaties."

Article 65: "Procedure for amending treaties."

21. The first few words of the second sentence, viz. "If it is in writing", imply recognition of the possibility of a written and ratified treaty being amended by a verbal agreement. Although in practice this is very occasionally resorted to, it is not recommended. The Netherlands Government would therefore suggest that no mention be made of it in this article.

It should be noted that deletion of these words does not rule out the possible significance of a verbal agreement in connexion with the present article. A verbal agreement with "subsequent practice" is recognized in article 68(b). Without "subsequent practice" a verbal agreement would be of little or no importance.

22. Suggested text, second line: "...the parties. The rules laid down...".

Article 66: "Amendment of multilateral treaties."

23. Paragraph 3: In its present form, this paragraph could be taken to mean that, conversely, a State party which has not signed the agreement (nor otherwise clearly intimated that it does not wish to oppose the amendment) is indeed liable if there is a breach of treaty.

The Netherlands Government would note here in the first place that under paragraph 1 of the article the said treaty State would have taken part in the preliminary consultation on the desirability of an amendment, in fact initially it would probably have assisted in drawing up the amendment agreement. Adopting the line of thought expounded by the ILC in paragraph 13 of its commentary, the Netherlands Government considers that liability for a breach of treaty would as a rule be out of place in this amendment procedure, even if it involved a State party that had dissociated itself from the proposed amendment in the course of the procedure.

24. Suggested modification of text:

It would be advisable to delete paragraph 3.

Article 67: "Agreements to modify multilateral treaties between certain of the parties only."

25. The notification prescribed in paragraph 2 may be post-factum notification. A considerable time might even elapse between conclusion of the "inter se agreement" and its being made known to the other States parties, without the regulation in paragraph 2 being violated. The Netherlands Government considers that notification should be given in good time. In many instances it will be virtually impossible to notify the other States parties when the first proposals for the agreement are tabled. But when the States concerned have reached an accord in substance on the proposed inter se agreement and when its conclusion is only a question of making that accord definitive, there would seem to be nothing to prevent the other States parties from being informed at once.

26. Suggested modification of paragraph 2:

"Except in a case falling under paragraph 1(a), the intention to conclude any such agreement shall be notified to the other parties to the treaty."

Article 68: "Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law."

27. No comment.

Section III: "Interpretation of treaties."

Article 69: "General rule of interpretation."

28. If it must be assumed that it is desirable to lay down interpretation rules, the Netherlands Government can concur with the ILC on the two basic principles adopted, namely that the actual text of the treaty is the most authoritative source from which to learn the parties' intentions, and that the text should be judged in the very first place in good faith.

29. Paragraph 1: The rule given in paragraph 1(b) is applicable only to terms used in treaties whose significance derives partly from the fact that they have a more or less established meaning in international law. In other words, where a treaty refers, or appears to refer to concepts of international law, observance of this rule would mean that efforts must be made to discover the intention of the parties concluding the treaty by considering the meaning of these concepts elsewhere in international law and independently of the treaty to be interpreted. The Netherlands Government believes that when interpreting a treaty it is essential that the intention of the parties be ascertained from the treaty itself in accordance with the rule under (a); any endeavour to discover that intention from international law in general is a matter of secondary importance. The rules under paragraph 1(a) and (b) are therefore not of equal value: rule (b) is less important than rule (a) and would not be applied until rule (a) had proved ineffective.

Rule (b): The Netherlands Government cannot agree to reference to the "law in force at the time of (the) conclusion (of the treaty)". Some legal terms will certainly have to be given the meaning they had when the treaty was concluded. The example given in paragraph 11 of the ILC's comments, viz. the interpretation of the term (Canadian) "bay" according to its meaning at the time, confirms this. But it is just as certain that in other cases legal terms will have to be interpreted according to their meaning in the legal rules in force at the time the dispute arises and again in other cases in the light of the law in force at the time of interpretation. For example, in treaties concerning a specific use of the "territorial sea" or of the "open sea", the meaning of these terms will have to be regarded as keeping abreast of changing legal views.

Accordingly, the Netherlands Government is in favour of deleting paragraph 1(b). Deletion of the entire sentence is more likely than deletion merely of the words "in force at the time of its conclusion"
to leave unanswered the question whether any term should be interpreted in any specific case according to the law in force at the time or to that in force now. It would seem more correct and quite enough in itself to allow oneself to be guided solely by good faith when answering the question.

30. Paragraph 3: Having regard to the ILC's arguments as set down in paragraph 14 of its commentary, the Netherlands Government can agree to no separate reference being made in paragraph 3(b) to "subsequent practice of organs of an international organization upon the interpretation of its constituent instrument". This question should indeed be dealt with under the law relating to international organizations. Meanwhile, however, the present article may not discount the possible influence of what is conventional within the organization.

The present wording of paragraph 3(b) would appear to rule out that influence, or at least greatly to restrict it, by requiring the "understanding of all the parties".

Yet even after deletion of the word "all" the clause "which clearly establishes the understanding... etc." would amount to a needless and therefore undesirable curb on the interpretation procedure, making it unnecessarily rigid. The Netherlands Government suggests that the words "which clearly... etc." up to and including "its interpretation" be deleted from paragraph 3(b).

31. Proposed texts for paragraph 1 and paragraph 3(b):

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term in the context of the treaty and in the light of its objects and purposes."

"3. (b) Any subsequent practice in the application of the treaty."

Articles 70 to 73 inclusive:

32. No comment.

General remarks:

33. As regards the form in which the codification of the law of treaties would take, the Netherlands Government has noted that in the years 1956-1960 the ILC and its rapporteur Sir Gerald Fitzmaurice assumed when drafting the articles that they would be included not in a treaty but in an "expository code". Paragraph 16 of the 1962 ILC report reiterates some arguments for this form, "a code of a general character". The set-up was modified in 1961, when the ILC decided to reword the articles in such a way that they could be incorporated in a treaty. The arguments supporting such a move are given in paragraph 17 of the 1962 ILC report.

The final choice between Code and Treaty will have to be made by the General Assembly of the United Nations. Before the final decision is taken as to the form in which the findings shall be set down, it would be a good thing if the ILC were to study the various possibilities more closely and state how they imagine a code would be put into effect and what binding force or authoritative power it is likely to possess.

18. PAKISTAN

[PART I]

Transmitted by a note verbale of 7 January 1963 from the Permanent Representative to the United Nations

[Original: English]

The Permanent Representative of Pakistan to the United Nations has the honour to state that all the draft articles contained in chapter II of the report of the International Law Commission covering the work of the fourteenth session are in accordance with settled principles of international law and the Government of Pakistan are in full agreement with all the provisions thereof.

...
4. It might be advisable to consider whether the adoption of such a wide formula as "incapable with the object and purpose of the treaty", contained in article 18, paragraph 1(d), would not lead in practice to a considerable restriction of the right of States to make reservations to treaties. Such a restriction might consequently reduce the possibility of their participation in certain treaties. This would be particularly undesirable with regard to general international treaties.

[PART II]

Transmitted by a note verbale of 21 July 1964 from the Permanent Mission to the United Nations

[Original: English]

In the view of the Government of the Polish People's Republic, part II of the draft articles on the law of treaties constitutes a considerable contribution to the codification and progressive development of international law and, in general, is acceptable. The following provisions, however, rouse some reservations:

Article 36

Coercion as defined in this article should include not only "the threat or use of force" but also some other forms of pressure, in particular economic pressure, which in fact represents quite a typical kind of coercion exercised sometimes on concluding treaties.

Article 39

In the phrase "from the character of the treaty and from the circumstances..." the conjunction "and" should be replaced by "or". For it seems sufficient that the appropriate intention of the parties should result only from the character of the treaty or only from the circumstances accompanying its conclusion, or from the statements made by the parties.

Article 40, paragraph 2

In order to avoid any excessive dependence of the future operation of a treaty upon the will of countries that have not undertaken any obligations under that treaty, the term provided for under this paragraph should be as short as possible and at any rate should not exceed four years. Such a period of time is in general quite sufficient for carrying out in the countries concerned the procedure connected with the ratification or adoption of the treaty.

Article 50, paragraph 2

The revocation of the notice by a party to the treaty should be subject to the agreement of the remaining parties. For their interests should be safeguarded, taking into consideration the fact that after the notice of termination, etc., has been communicated by the country concerned, the other parties to the treaty frequently take appropriate steps in order to adjust themselves to a new situation that will arise if that country ceases to be a party to the treaty. Moreover, it may happen that in connexion with a notice communicated by a country, another country withholds its own intended notice and, after the revocation of the notice by the former country, the latter country would be unable to communicate its own notice on account of the expiration of the period of time provided for under the relevant agreement for giving such a notice.

20. PORTUGAL

[PART II]

Transmitted by a note verbale of 27 August 1964 from the Permanent Mission to the United Nations

[Original: English]

Article 30

This article contains a general provision affirming the principle of the validity of treaties and of their continuance in force and operation, provided that the prerequisite conditions laid down in Part I are complied with.

At the same time the exceptions it mentions give a concise notion of the structure of Part II, since it foresees the nullity, termination or suspension of the operation of the treaty or the withdrawal of one of the contracting parties.

Our observations on this principle and the various exceptions will be found in the commentaries on the articles under these specific headings.

Article 31

The subject-matter of this article is of the highest importance, as is apparent not only from its possible practical implications but also from the special attention devoted to it as a matter of doctrine. The object is to determine the scope of the constitutional provisions of each State governing its competence to conclude treaties, or more precisely to find out if these provisions can affect the validity, in international law, of the consent given to a treaty by the representative of a State, if it is apparent that he was qualified to express such consent.

Logically, the position to be taken must be based upon consideration of the constitutional texts in question. In the case of Portugal, these do not solve the problem. Article 81, paragraph 7 of the Portuguese Constitution empowers the President of the Republic to negotiate international conventions and treaties, submitting them through the Government to the National Assembly for its approval. This approval is expressly mentioned in article 91, paragraph 7, as being among the powers of the Assembly. This approval enables the President of the Republic to ratify the treaties.

The question has arisen with regard to similar constitutional provisions whether they should be considered as determining whether the State can be deemed to be bound by the consent given by a representative who was apparently authorized to give it.

Two opposing currents of opinion have come to light concerning the doctrine of the powers of representatives of contracting States, one upholding the pre-eminence of internal law and the other that of international law.

According to the first, international juridical validity ought to be attributed only to a treaty concluded by representatives who are fully (plenamente) authorized by internal law to contract the obligations in question. The provisions of internal law concerning the limitations placed upon the competence of the State organs to conclude treaties must be considered as part of international law. Hence if the agent of a State purports to represent it in violation of its constitutional law, that State is bound neither under its internal law nor under international law.

On the other hand, the second group maintains that internal constitutional law should be resorted to only for the purpose of determining which organ or person has the power to represent the State; but that when this representative has definitively bound himself in the name of the State in question, this obligation subsists in international relations, even if an excess has been committed in the exercise of the powers of representation. International law lays down only the procedure and the conditions which permit States to express their consent to treaties, as well as the conditions which must be fulfilled by the different organs and agents in order to be recognized as authorized to act under these procedures in the name of the State. Again, while internal law determines the organs and the procedures by which the will of the State to conclude treaties is formed, international law only takes into account the external manifestations of that will on the international plane. It is thus possible that a treaty may be valid in international law,

11 Only in urgent cases is the Government permitted to approve international conventions and treaties (article 109, paragraph 2). The existence of an urgent situation is assessed at his discretion by the President of the Republic. (Cf. Prof. Marcelo Caetano, Curso de Ciencia Politica e Direito Internacional, 3rd ed., vol. II, p. 182).
while remaining invalid in internal law, a situation which may render the agent responsible under domestic law, because of the juridical consequences of his actions.\textsuperscript{13}

The growing complexity of the constitutional provisions in each State and the difficulties of their interpretation, even without underrating recourse to internal law, have in the meanwhile increasingly emphasized the need in international law for placing treaties under the shelter of the juridical questions thus raised. That is the reason why restrictions designed to ensure stability in the application of treaties are placed in the way of referring back to internal law—a point on which there are an important number of opinions both in theory and in international practice.

Whether one speaks of incorporating national law into international law as regards the competence of the organs acting in representation of the State, or of the mere conformity of international law with national law in this respect, it is certain that, leaving aside those two opposing trends, an attempt is made to formulate a rule which should, without refusing to apply constitutional law, appropriately safeguard the position of the contracting States. A principle of good faith is thus invoked, by virtue of which, where the organ acting in the name of a certain State did so in such a way as to convince the opposing State in good faith that it was competent to enter into the contract, the treaty will be binding upon the State thus represented, even if the representative exceeded the powers conferred on him by his internal law.\textsuperscript{15}

On the other hand, it is taken as generally recognized that a treaty concluded in disregard of the provisions of the constitutional law governing the formation of the will of a State does not bind the latter, if such provisions are expressly laid down and have a “sufficiently notorious character”.\textsuperscript{14}

Thus, as a result of this preoccupation with safeguards in concluding a treaty, and principally in executing it, a doctrine has emerged which, without afflicting the applicability of constitutional restrictions, formulates reservations with regard to their indiscriminate application, centred as it is, above all, on the apparent powers of the organs representing the States in accordance with their constitutional laws.

It is precisely this doctrine that article 31 seeks to establish. Naturally, in order to achieve a proper understanding of this article, it is not possible to think only of cases where a representative of the Portuguese State may conclude a treaty in violation of constitutional rules. If it is advantageous to invoke such a violation in order to consider the treaty as not binding, it is also necessary to bear in mind, and perhaps with greater reason, those other cases of treaties in which Portugal may intervene in good faith, in the rightful belief that the intervention of the organ of the other State or States is in conformity with their domestic laws.

From this point of view it appears to be more in conformity with the requirements of the international community to regard as valid the intervention of an organ having authority as set forth in article 4, and only to accept that the State may declare itself not bound when the violation of its internal law is manifest.

This exceptional hypothesis is couched in rather vague terms, but it does not seem appropriate, or even possible in the present stage of international law to substitute a different wording with a more limited and stricter connotation. We might speak of a violation that is “absolutely manifest”, as in paragraph (12) of the commentary on the draft, or of one that is “sufficiently notorious”, as preferred by De Visscher, without achieving appreciably greater precision. It is even necessary to underline that cases in which a binding treaty results, despite disregard of constitutional norms, are exceptional. And it would seem that a vague expression such as that in article 31 will make it possible to decide, according to the circumstances of each case, whether knowledge of the rule or rules of the internal law of another State regarding competence to conclude treaties could be demanded from a State about to enter into a contract with that other State.

Hence, while recognizing the imprecise nature of the limitation contained in this article, we do not see any juridical disadvantage in accepting the proposed text, which appears otherwise to conform best to international practice and jurisprudence.

Finally, it should be stated that what is perhaps the most flagrant instance of a failure to bind a State—namely, that in which the representative does not fulfil the conditions laid down in article 4 and is nevertheless permitted to express the consent of this State—is regulated by article 32 in terms which in practice amount to an important limitation within this exception. And this is one more reason for rendering it acceptable.

**Article 32**

Once it is pointed out that this article has in view only those cases where an unauthorized representative claims to express the consent of his State definitively so as to produce a binding effect and where consequently there is no possibility of a subsequent ratification or approval, it becomes obvious that the only solution can, in principle, be that the treaty is not binding upon the State: the representative has failed to comply with the conditions laid down in article 4 necessary to express the consent of his State, and nevertheless has expressed it.

This solution becomes inescapable not only in view of the principles regulating representation in national and international law, but also because of the exigencies of the very structure of the draft, which in article 4 sets out the qualifications which the representative should have in order to be accepted as such.

It would be stretching this consequence too far, however, if we refused to concede that the State can ratify the action of its representative, expressly or implicitly. It is on this basis that the exception contained in the last part of paragraph 1 of this article is understood.

Paragraph 2 contains a principle related to the preceding article—the external appearances of consent are relevant in international law—but which naturally gives way when the limitations imposed upon the powers of the representative have been communicated in due form to the other contracting States. Since the latter cannot allege ignorance of these limitations, it must strictly be held that they entered into the contract with the representative in the precise terms in which he was empowered to do so. It would, therefore, be unjustifiable that despite this knowledge these States should be able to take advantage of the circumstance that the representative expressed consent unconditionally.

**Article 33**

The theory of vitiated consent has not been studied in international law with the same precision and to the same extent as in domestic law. This has been prevented by the circumstances in which international agreements have developed, allowing the contracting parties to obtain a more profound knowledge of each other, and requiring as a rule safeguards as to the manner of action. For this reason the list of cases where such flaws have existed and produced an effect is restricted. On the other hand, a complete theory concerning these vitiations has been considered in international law as a possible cause of conflicts, and a dangerous weapon enabling States to refuse compliance with obligations assumed.\textsuperscript{16}


\textsuperscript{14} See Balladore-Pallieri, *op. cit.*, p. 130.

\textsuperscript{15} Charles De Visscher, *Théories et réalités en droit international public*, 2nd ed., p. 311.

This does not in any way imply the irrelevance of error, fraud and coercion in international law, which in this regard avails itself of many of the principles in force in domestic law on this question. And it must be stressed that, despite the rare occasions on which these vitiations are found to occur in practice, they occasion certain scruples in this field for two reasons which we must set out: firstly, because international law, following in this aspect the less evolved juridical orders, contents itself with the external manifestation of the will, making it correspond, in principle, to the real will; and secondly, because as a rule the declaration of the will is imputed, not to its physical author, but to the juridical community in representation of which the organ has acted. For this reason, the vitiation normally occurs only when the will expressed by the representative does not correspond with the real will of the competent internal organ. Lack of accord between the declaration of the organ of representation and its own will is an exceptional situation.\footnote{See in this respect Paul Guggenheim, Traité de droit international public, vol. I, pp. 92 and 93.}

Now, passing over these particular aspects which we may call internal, article 33 only refers, in the commentary, to the “fraudulent conduct” of a contracting State as having induced a State to give consent to a treaty.

The difficulty, stressed in the Report, of being unable to arrive at a universally accepted notion of deceit led to the use in the various texts of the draft of the French word “dol”, the English word “fraud” and the Spanish word “dolo”. In the absence of any precedents that would help to elucidate the precise scope of the notion of fraud, it was thought best to leave it to be worked out in practice and in the decisions of international tribunals. This appears to be reasonably prudent.

On the positive side, article 33 lays stress upon deceit as vitiating the will, just as in domestic law, and considers it as a cause of nullity of a treaty. This nullity is relative, and this corresponds to the present state of theory: that is to say, only the State whose will has been so vitiated can invoke and avail itself of the nullity.\footnote{Cf. Louis Cavare, loc. cit.}

We note that this article omits aspects that are doubtful in theory, for instance, the question who is to decree the annulment. It is, however, understandable that the draft should not make allusion to it, this being a matter to be regulated if necessary in texts regarding arbitration or the competence of international tribunals.

Paragraph 2 makes it possible to apply the allegation of fraud only to the clauses affected by it. The mere statement of this possibility would soon provoke the objection that partial nullity of a treaty is in some cases impracticable, because the clauses which have been the object of the fraud are not separable from the instrument. Nevertheless, the reference to article 46 restricts partial nullity to cases in which such clauses are clearly separable from the rest of the treaty with regard to their application, or in which the acceptance of these clauses has not been made an essential condition of the consent of the parties to the treaty as a whole.

This being so, partial nullity is restricted in reasonable terms.

The consequences of nullity are set out in article 52.

\textbf{Article 34}

Regarding error as vitiating consent, the considerations set out above in regard to fraud are valid mutatis mutandis. Further error is seldom proved and the solutions given in the present article are based on the rare cases which become obvious.

Paragraph 1 formulates a general principle regarding an error as it may affect the substance of a treaty. It attributes to it the same effects of relative nullity as in the case of fraud; it is permissible to conclude that only essential error was contemplated. No distinc-

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remained for the advocates of this view to support the validity of these treaties on grounds of the social order, or rather the desirability of establishing a general stability which demanded that there should be an end to conflicts—an end which, it is claimed, would be secured precisely by a respect for such international instruments. Although it is recognized that this solution in no way satisfies our sense of justice, it has been persistently supported on the ground that it is in conformity with the nature of positive law, which has to limit itself to a realistic basis and to achieve a modus vivendi acceptable among States.

The establishment of the United Nations, however, and the acceptance of its Charter, Article 2, paragraph 4 of which prohibits any recourse to the threat or use of force in the solution of international disputes, ought to have opened new perspectives in this field, with a corresponding and necessary influence on the positive law of treaties, as indeed had previously been brought about by the old League of Nations.

What has just been stated relates to coercion exercised collectively on the State itself. But this may be very clearly distinguished from the coercion which is brought to bear on the will of the physical person representing the State. If this person coerced the principles of private law are applied and the consent thus obtained is considered null. 21

The most important innovating aspect of these two articles lies in the unification of the rules in the two cases. Whether the coercion is exercised upon the subject of the law or upon his agent, it is always relevant: in the first case it annuls the treaty, and in the second, the consent on which its conclusion was based.

This nullity is absolute, for it does not need to be invoked by the State concerned as in the cases of fraud and error which have been examined above. Also, in assessing the gravity of the consequences resulting from coercion, the two articles are in accord with the most modern theory, which admits in international law both kinds of nullity, absolute and relative, but upholds only the latter in cases of consent procured under coercion. 22

We may thus see the gravity which is attributed in the draft to procuring consent by coercion, since it is given a unique position, that of the more rigorous of those two kinds of nullity.

This approach is praiseworthy as being the best calculated to ensure the rule of morality in international relations.

Article 35, which deals with coercion of the representative of a State, refuses juridical protection of any kind to consent thus expressed and, as can be seen, adopts the line of traditional doctrine.

Its paragraph 2 is similar to articles 33, paragraph 2, and 34, paragraph 2, already examined when dealing with fraud and mistake, and does not call for observations different from those made in those cases.

The doctrine expressed in article 36 is also an innovation; it lays down the law concerning the coercion of a State by the threat or use of force. The report states that it was thought desirable to go back to the principles of the Charter of the United Nations and that it was considered that the precise scope of the acts in question should be determined in practice by interpretation of the relevant provisions of the Charter.

Given the close connexion between this subject of coercion in the conclusion of treaties and the above-mentioned principle of the Charter, which is of almost universal validity, it is judged best as a precaution, not to go more deeply into details respecting the methods of this coercion.

Article 37

Even in our times it is still stated that the rules of international law are not of a peremptory character, and that treaties may have a wide content, without limitations of any sort. The reason for this is seen in the absence of any norm prohibiting treaties which are contra bonos mores or contrary to a fundamental principle of international law. However, it may be stated that mainly from the coming into force of Article 20 of the Covenant of the League of Nations, it has come to be understood that there are limitations to the juridical objects of a treaty. Under Article 20 members of the League agreed that in future they would not undertake obligations contrary to the Covenant. And doctrine has been moving with increasing force towards acceptance of the rule that every convention violating international law, rules of universal morality and fundamental human rights must be considered null owing to the unlawful character of its purpose. Even those authors who, keeping in mind the possibility of a treaty modifying international custom, recognize the difficulty of solving the question, and ask if all treaties which affect principles which are essential to the structure of international society should not be considered null, as for example, those providing for recourse to piracy or disrespect for the human person. 23

Today, under Article 103 of the Charter of the United Nations, it is accepted that the obligations of Member States under the Charter shall prevail over those under any international agreement if there is a conflict between the two.

Article 37 of the draft seeks to confirm this new trend in positive international law. But the decision that we are still in the early phase of producing a positive rule, compatible with the evolution of this branch of law. That this is so is shown by the allusion made to "a peremptory norm of general international law", without singling out from among these rules those from which no derogation is permitted and which can be modified only by a subsequent norm having the same character. A mere enumeration of examples, as emphasized in the report, would incure the risk of rendering interpretation difficult in regard to other cases of incompatibility not expressly mentioned.

Nor would it profit much, as far as the certainty of this provision is concerned, to include in it, according to some suggestions, acts constituting crimes against international law, such as genocide, or other offences constituting violations of human rights or the principle of self-determination. It is well known how much these notions have become corrupt in reality, so that any reference to them would in no way contribute in practice towards removing them from the confusion existing with regard to them. Again, any reference would not in any way add to the clarity or efficacy of this article.

We are of the opinion, therefore, that the position adopted by the Commission regarding article 37 is a balanced one, and that it will be difficult to go further in the definition of jus cogens and its effect on treaties which appear to be incompatible with it.

Article 38

Section III of the draft contains a series of articles relating to the duration of treaties. Although it would be possible to evaluate

20 See in Louis Cavaré, op. et vol. cit., p. 54, the series of arguments supporting this thesis of the irrelevance of coercion in regard to treaties. This irrelevance is supported in relation to moral and material coercion by Paul Fauchille in his Traité de droit international public, vol. I, p. 298.

21 See Diena, op. cit., p. 409; Balladore-Pallieri, op. cit., p. 213; Prof. A. Marques Guedes, Direito Internacional Público, vol. II, pp. 293 and 294. It is clear that this problem is not acute in normal cases where ratified by the Head of State, on whom the effects of coercion are not felt, is a means of impeding the effects of the treaty. But there are still cases where the organ coerced is the same that ratifies and cases in which the coercion is not known by the ratifying organ.


23 See, in defence of the first point of view, Guggenheim, op. cit., p. 57; and in support of the second, which would limit the juridical object of treaties, or at least expressing doubts regarding the unlimited scope of that object, Fauchille, op. cit., pp. 301 et seq.; Diena, op. cit., p. 409; Madame Paul Bartid, Cours de droit international public approfondi, 1959-1960, p. 127.
them as a whole, it is more convenient to study each one of the cases, or groups of cases, provided for in each rule.

Article 38 mentions the most frequent of the relevant cases, generally deemed in international affairs to be causes of termination intimately connected with the nature of the treaties. This makes detailed comments superfluous.

Paragraph 1 deals with the termination of treaties through the operation of their own provisions. Such clauses are currently applied in international instruments and fulfill the function of resolutory conditions.

Paragraph 2, which refers to denunciation of bilateral treaties, points out the special advantage of fixing a date on which the denunciation is to take effect. The formula used is not very clear, since reference is made to the date of denunciation of the treaty, a circumstance which can in certain cases lead to difficulties in interpretation. However, it would be difficult to lay down a more precise principle. It is understood that denunciation is effected by the normal procedure, that is through notification of the desire to exercise the right of denunciation.

The same can be said of clause (a) of paragraph 3, which deals with the application of the principle of the denunciation of bilateral treaties to multilateral treaties.

The ground for termination of a treaty provided in clause (b) of paragraph 3—reduction of the number of parties below a minimum number agreed upon as being necessary for the treaty to continue in force—covers the application of a clause like those in some recent treaties, for example, that on the political rights of women. The final part of this clause, which states that termination does not result from the mere fact that the number of parties falls below the number initially fixed as a condition for the treaty to enter into force, represents in reality a restrictive interpretation of the first part of the clause. It might, indeed, be understood that to fix the number of parties necessary to enable a treaty to enter into force showed a belief that this number was a requisite and paramount condition for its continuance in force. It was sought to do away with this condition, for a plausible reason: a treaty may be terminated by agreement, by denunciation or by withdrawal of the contracting parties. This means that when it is desired to terminate a treaty by reason of the reduction of the number of the parties it is necessary to state this in an express clause inserted in the instrument.

This rule is commendable since it ensures a greater certainty in application.

Article 39

If a treaty contains no provisions regarding its termination, then it is possible to lay down two principles: either to make its denunciation upon the withdrawal of one of the parties impossible in any event or purely and simply to let the solution of each case depend upon the will of the parties or an appreciation of other factors.

The discussion of this issue, of which the report gives an account, makes fully patent the difficulties experienced in reconciling the need for stability of treaties with the exigencies of a just solution and of a balanced satisfaction of interests. It is conceded that, side by side with treaties the nature of which excludes the supposition that the contracting States had any intention of permitting denunciation or withdrawal of one of the parties, e.g. treaties of peace and of delimitation of frontiers, there are others in which the existence of such an intention may be easily proved. On the other hand, it is necessary to take into account the fact that there is no clause regarding denunciation or withdrawal. It seems therefore reasonable to establish, as is done in article 39, a negative principle, in order later on to admit such a possibility of denunciation or withdrawal on the basis of three factors:

The character of the treaty;

The circumstances of its conclusion;

The statements of the parties, made either before or after conclusion.

This rule is not supplemented by any guidance as to the method for interpreting the joint will of the contracting parties. Once the interpretation of treaties is classified as an operation of juridical technique, the existence of a certain number of general rules is recognized, which make up a logical system very often not coinciding with private law. Any interpretation that may be given to them cannot be separated from their useful effect, expressed in the maxim ut res magis valeat quam pereat. On the other hand, the express mention of the statements of the parties, which the report explains as including the preparatory work and the subsequent conduct of the parties, gives the required emphasis to this spirit of interpretation, which De Vischer calls "the polite in the interpretation of treaties".

We think, in brief, that the summary of the basic elements of interpretation contained in article 39 leaves sufficient latitude for the application of those principles, and leads one to believe that the special nature of the subject discussed was kept in mind.

The notice period of at least twelve months for signifying intention to denounce or to withdraw is justified as being a means of duly safeguarding the interests of States which may continue to be parties to the treaty.

Article 40

International theory recognizes as a rule that treaties may be terminated either when an intention of such a possibility is made clear in a clause initially inserted, or when a common declaration to that effect is made later on. It is with this latter manner of terminating a treaty that the present article deals.

There is nothing noteworthy about paragraph 1, which admits three fully justifiable forms of agreement.

Paragraph 2, which relates especially to multilateral treaties, embodies one of the points of view evolved during the discussion of the draft. According to this point of view, it is laid down as a supplementary rule that such treaties may be terminated with the consent of all the parties and, in addition thereto, with the consent of at least two-thirds of the States which drew up the treaty.

This rule is noteworthy because it seeks to give importance to the consent of States which took part in the drafting of the treaty and which still have the right of becoming parties to it. It does not seem reasonable, however, to wait indefinitely for them to become parties and in the meantime to continue to require their consent to termination. Their consent will be of importance only up to a certain moment. The draft does not mention the number of years after which their consent will no longer be necessary, but the report states that the points of view of the various Governments consulted are being awaited.

In our view this period should not exceed 5 years. The operation of the treaty over this period appears to us normally sufficient to enable the States to decide whether to become parties to a treaty; and when they are not interested in becoming parties, no principle involving protection of their interests, even potential interests, can render defensible the need for their consent to the termination of the treaty.

But we wish to say clearly that other considerations bearing on international practice may not prevail over this logical reasoning and make advisable a different time-limit. The period would then depend upon the evaluation of factors not placed before us.

24 Op. cit., pp. 313 et seq. Regarding the true will of the parties to treaties, the difficult situation of the student is better understood when one recalls the phrase of Paul Valéry: "Les véritables traités sont ceux qui se concluraient entre les arrière-pensées"—cited in Principes de droit international public by Charles Rousseau (Recueil des Cours de l'Académie de Droit International, 1958, p. 501).
The extension of the rules laid down in paragraphs 1 and 2 to cases in which application of a treaty is suspended does not call for any detailed criticism.

_Article 41_

This article, dealing with the total or partial termination of a treaty by another subsequent treaty, points in clause (a) to an incontestable case, namely that the parties have indicated their intention that the matter should be governed by a later treaty.

But clause (b) is more complex and raises a question of interpretation to which the observations made regarding article 39 could apply. The issue here is to demonstrate the incompatibility of the provisions of the new treaty with those of the old one, and to assess the true intention of the parties as to whether the latter should prevail.

The text of this article indicates that the incompatibility here dealt with is true incompatibility. From this it follows that it is not possible to harmonize the obligations resulting from the new treaty with those resulting from the old one.†

There is no doubt that where a new treaty is concluded which shows this degree of incompatibility in relation to the old treaty, the will of the parties can only be understood as intending to put an end to the latter. Hence the impossibility of applying the provisions of both treaties simultaneously will lead to the application only of the provisions of the more recent one.

However, in a desire to respect the will of the parties, paragraph 2 lays down that the original treaty must be applied where it appears from the circumstances that the latter treaty was only intended to suspend the application of the first. On a very strict construction, this principle is already contained in paragraph 1, since in the case it deals with there was no intention to regulate the matter wholly in the new treaty, nor is there true incompatibility between the two.

Thus complete interpretation permits us to find in paragraph 1 the guidelines for the situation dealt with in paragraph 2.

Despite this, the last paragraph is useful, as it stresses the intention of the draft to ascertain the will of the States, and as it gives a greater sureness for asserting that the first treaty is suspended, notwithstanding the fact that the subsequent treaty regulates the same matter.

_Article 42_

Failure to comply with the obligations assumed in a treaty is generally recognized as a ground for suspending or even for terminating its operation. This is a principle of domestic law at present in force (see article 709 of the Portuguese Civil Code), but it is modified in public international law.

The solution contained in paragraph 1 for bilateral treaties does not raise doubts as to the possibility of one party dissociating itself from a treaty with which the other party has failed to comply, and even less as regards the possibility of simple suspension.

In any case, it appears necessary to recognize this right only when the violation is of a certain gravity, or renders impossible the achievement of the objectives aimed at. This is laid down in paragraph 1 which speaks of “material breach” and in clauses (a) and (b).

When dealing with multilateral treaties, certain aspects will be seen which did not pass unperceived by the Commission. There is indeed a need for distinguishing between cases where only one party reacts to the violation, and cases where all affected parties by common agreement invoke the breach. In the first case the situation is the same as in bilateral treaties, but the affected party may not go further than suspension of the treaty, wholly or partly.

Where, however, all the affected parties combine to take joint action, they are permitted to suspend the treaty, wholly or partly in relation to the defaulting State, or may even terminate it.

On this point we have two observations to make.

The first observation relates to the terms of the solution given in the draft, for a certain current of opinion among jurists makes a distinction, as far as the rights of the parties affected by the violation are concerned, between contractual treaties and law-making treaties. Although in regard to contractual treaties the principle is applied without hesitation that it is permissible for the injured party to free itself of its obligations under the treaty, in regard to normative treaties—that is to say, treaties which formulate rules of objective international law—it is held rather that the norms continue in force despite the violation, and despite the fact that the injured parties have also for their part temporarily given up complying with them.

Paragraph 2 of this article does not go beyond permitting the injured parties the alternative of suspending or terminating the treaty, without making any distinction between the categories to which the treaty is question may belong.

In connexion with this, a second observation must be made.

Should the decision to suspend or terminate the treaty be left to the free determination of the parties? Or should not rather a guiding principle be laid down, according to which the party or parties concerned should go beyond suspension only where the violation is of a certain character?

In our opinion, the latter is the preferable solution, in order to ensure greater stability of treaties and better discipline in international relations. The Commission naturally must have also had in mind these requirements, as its report, when alluding to the cessation of application through concerted action of the injured parties, mentions the case where the violation has frustrated or undermined the operation of the treaty as between all parties.

It appears necessary, however, that this should be embodied in an article or at least mentioned in paragraph 2(b)(ii). Expressed as a mere observation in the report, it will not even possess the value given by article 39 to the statements made by the parties before the coming into force of the treaty in relation to that treaty.

Paragraph 4 refers to article 46, as is done by articles 33, paragraph 2, and 34, paragraph 3. On this we have no comment to make.

Paragraph 5 gives emphasis to any provisions in the treaty or in any related instrument which may regulate in a different manner the rights of the parties in the event of a breach. This rule justifies itself.

_Article 43_

International doctrine has always admitted impossibility of performance as a ground for terminating a treaty.† This impossibility may be either physical or juridical, and both cases are covered by the letter of this article.

As an example of the first, we may mention the submersion of an island, and of the second, the case where the performance of a treaty in relation to one of the contracting parties constitutes per se a breach of that treaty, e.g. a treaty of alliance among three States, two of whom are at war with each other.

It is obvious that the disappearance or the total and permanent destruction of the subject-matter of the rights and obligations agreed upon in the treaty should not involve the same consequences as when such disappearance or destruction are temporary. Permanent impossibility permits the termination of a treaty, but temporary impossibility permits only its suspension (No. 2).

The reference to article 46 regarding impossibility of performance only in respect of a few clauses, contained in paragraph 3, is justified.

†† This case is distinguished from non-authentic incompatibility, which does not render impossible the simultaneous application of two documents; as the later one limits itself to restricting the rights flowing from the first. Cf. Guggenheim, op. et vol. cit., pp. 144 and 145.

in the same manner as in the case of similar provisions examined by us earlier.

**Article 44**

Although this article does not mention the principle *rebus sic stantibus*, it provides for its application. The article is thus in line with theory, jurisprudence and positive international law.

The difficulty does not lie in the acceptance of the principle, but in the terms in which it has to be formulated. The great majority of writers accept the principle where there is a *substantial alteration* of the circumstances which really determined or influenced the conclusion of a treaty.\(^{27}\)

It is considered that it is not logical to presume that this principle is implicit in the generality of treaties. On the contrary, where there are no elements for concluding that there was a will, either tacit or express, as to the consequences of any alteration of the *de facto* circumstances in regard to the rights of the parties, the most that can be said is that the parties did not foresee this contingency. And if this alteration is liable to affect the treaty to a greater or lesser degree, this is because a norm of international law permits it. This norm, which may be more or less clearly expressed, and which has been accepted since long ago, even in international litigation, is now incorporated in this article 44.

In the interests of the stability of treaties, already mentioned, this principle cannot be accepted without limitations, for it is certain that States are subject to continuous changes of circumstances, and it would not be in any manner justifiable that such changes should serve as a ground for each State to liberate itself, by a unilateral denunciation, from complying with the obligations under a treaty which they had freely concluded. Hence the State should not be able to make indiscriminate use of such changes.

Even more: this principle must be invested with an exceptional character, since it is very important to the international community that undertakings subscribed to in instruments of this kind should be fulfilled. It is this character that is implicitly recognized when speaking of a fundamental change in the *de facto* circumstances, or of the danger of persisting in a binding obligation that might seriously affect the right of self-preservation of a contracting State (Diena), or of a grave change of circumstances (Cavare), or of an essential change (Anzilotti), etc.

It is precisely this exceptional character that is recognized in paragraph 1 of article 44.

Paragraph 2 stresses only the "fundamental change" which has occurred with regard to a fact or situation existing at the time when the treaty was entered into and defines it in terms which, although not indisputable, we deem adequate in the present phase of evolution of this branch of law. Clause (a), when speaking of the essential basis of the consent of the parties to a treaty, goes back in the last resort to the interpretation of the will of the parties. Clause (b), although strictly speaking covered by the preceding clause, should be maintained.

The essential change in the character of the obligations undertaken in a treaty should only be taken as relevant when it is proved that they constitute an essential basis of the consent of the parties to the treaty. But in any event, the usefulness of clause (b) is to be found in its positive reference to the change in the nature of obligations.

It is clear that, with only these two clauses, this article permits some doubts to subsist in regard, for example, to substantial political changes within each contracting State. Nevertheless, we are of the view that it is better to have a somewhat vague formula such as the one on "fundamental change of circumstances", so as to permit consideration in each case of the applicability of the said principle.

The two exceptions contained in paragraph 3 have been justified on unequal grounds. The first—a treaty fixing a boundary—justifies itself more in a negative way; that is to say, as being an exception destined to avoid friction between States on account of the frontier delimitation, tends to reflect the change of circumstances referred to in paragraph 2.

But clause (b) justifies itself in a positive fashion, to the extent that it provides for cases which the parties indirectly agreed would not be subject to the application of the principle *rebus sic stantibus*, since with regard to the change in certain circumstances of fact they inserted special clauses in the treaty itself, adopting various solutions.

Paragraph 4 makes the principle of the separability of treaty provisions applicable to this article and is fully acceptable.

**Article 45**

This provision is closely linked to article 37, to such an extent that during the work of the Commission doubts arose as to whether both should not be incorporated in a single article. Thus, just as a treaty incompatible with *jus cogens* is null, so too it is inevitable to establish that even where a treaty was concluded under conditions of perfect validity it would lose that validity so soon as an imperative norm begins to take effect, causing the nullity of all treaties concluded in conflict with that norm. Paragraph 2 is yet another reference to article 46, which is reasonable because the new imperative norm of international law may be incompatible with only one or some of the clauses of the treaty.

This article is likewise connected with article 53, paragraph 2, wherein are set out the consequences of the application of a treaty which becomes invalid when a new rule of *jus cogens* is established. These consequences will be commented on later.

**Article 46**

The indivisibility of a treaty is established in paragraph 1 of this article as the rule, for the purposes of nullity, termination, suspension or withdrawal by one of the parties.

Paragraph 2 has a double object: it establishes an express relation with the provisions, already examined by us, in which the separability of a treaty is admitted, and, on the other hand, it defines the cumulative conditions necessary for a partial utilization of the treaty. The first of these conditions is based on a practical criterion, whether the treaty can be executed if the clauses in question are separated from the rest of the treaty. The second condition rests on an interpretation of the will of the parties and leads to the functioning of the principle of indivisibility, notwithstanding the fact that the clauses are clearly separable from the rest of the treaty as regards performance. For indivisibility it is sufficient that the clauses in question constituted an essential condition of the consent of the parties to the treaty as a whole.

Once the object and the functioning of the principle of indivisibility are understood in these balanced terms, we have no fundamental objection to it.

**Article 47**

The loss of the right to allege the nullity of a treaty as a ground for terminating it or withdrawing from it is regulated in terms which are in our opinion reasonable. Clause (a), in recognizing waiver of the right as a ground for loss, seeks to apply a general principle. We are dealing here with a right which does not have an unrenounceable character.

Clause (b) refers to the conduct of the parties and gives importance only to "fundamental change of circumstances", so as to permit consideration in each case of the applicability of the said principle.

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\(^{27}\) For all writers, see Balladore-Pallieri, *op. cit.*, pp. 301 et seq., and the authors there cited on p. 302, note 22.
nullity mentioned in articles 31 and 34 as being the ones provided for in the article.

We suppose that there is an inexactitude in the text of the article, which probably goes back to one of the earlier drafts before the final draft was agreed upon. For when we deal with the loss of that right, the loss is only understandable when the application of the treaty depends on the attitude of the parties, either by waiving the right or by conducting themselves in a manner equivalent to an express waiver.

Article 35, dealing with the consequences of coercion exercised on the person of the representative of a State, has not established that the treaty may be annulled, nor, therefore, that the State has the right to invoke the fact of coercion. On the contrary, the solution presented is nullity ipso facto, that is to say absolute nullity of the treaty to which consent was secured in such circumstances. This being so, it is not understood why, in relation to such a rule, article 47 should seek to regulate the waiver of a right to invoke the nullity of a treaty which is considered automatically void.

On the other hand, one does not see the reason why the case covered by article 31, according to which the validity of consent may be disputed by a State whose representative acted in manifest violation of his domestic law, is excluded from the waiver provision.

We think for this reason that it is through error that reference is made in the text of article 47 to articles 32 and 35 and that in reality the intention was to refer to the cases considered under articles 31 and 34.

**Article 48**

The reciprocal relations between multilateral treaties and international organizations are of particular interest. The latter owe their existence only as of the effective date, even though notice of or a ground for terminating a treaty in answer to a demand for such an organization is made in the text of article 47 to articles 32 and 35 and that in reality the intention was to refer to the cases considered under articles 31 and 34.

**Article 49**

The knowledge which we have of the rules contained in article 4 of part I of the draft, relating to evidence of authority to conclude a treaty, comes from a copy of the first report on the law of treaties by Sir Humphrey Waldock, a document in the archives of the Office of the Attorney-General (Procuradoria Geral da República) of Portugal.

After examining the text of this article 4 as worded in the above-mentioned report, we do not have any hesitation in accepting the rule that the evidence of authority, therein minutely regulated in regard to the power of a representative of a State to negotiate, sign, ratify, accept, or accede to a treaty, should be the same when it is sought to denounce, terminate or suspend the operation of a treaty, or even to obtain a severance of the ties which had been evolved through the treaty.

In all cases, it is sought to ensure that the organ or representative of the State is authorized to execute acts of the nature described.

**Article 50**

This article seeks to embody in paragraph 1 the international practice regarding the method to be used when it is intended to notify that it is sought to terminate, withdraw from or suspend the operation of a treaty, under a right expressly or impliedly provided for in the treaty. At the same time the article denies that public declarations made by the responsible organs have any effect as a notification, and requires a formal notice in all cases.

Paragraph 2 grants the power to revoke the notification at any time before the date on which it takes effect. Once this principle is established, the other contracting States may at their discretion take their stand only as of the effective date, even though notice has been given at the proper time.

We think, therefore, that this principle is acceptable.

**Article 51**

The procedure to be followed in the cases mentioned in the preceding article, otherwise than under a provision of the treaty, is set out in a manner which is somewhat cautious as well as vague. The fundamental purpose is to find a method of settling disputes between States. The Commission has recognized that the obligation to give notice to the other party or parties, and the conditions incumbent upon the State alleging the nullity of a treaty with respect to the States that are notified, constitutes a step forward. If the parties notified should raise objections, the course will lie in searching for a solution of the dispute in conformity with Article 33 of the Charter of the United Nations which, as is known, calls upon the parties to any dispute likely to endanger the maintenance of international peace and security, to seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

We are convinced that to go much further in the formulation of this rule in article 39 would be tantamount to considering it a dead letter in anticipation, and we judge paragraphs 1, 2 and 3 acceptable.

As regards paragraph 4, we must observe that, since this draft comes from an organ of the United Nations, the reservation which it makes regarding "the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes" is too broad. We are of the opinion that these rights or obligations should have been reserved only when they are incompatible with the Charter.

It would, in fine, be the application of a principle based on the same grounds as article 48.

Paragraph 5 presents another opportunity, independent of the formalities described above, enabling a party to invoke the nullity of or a ground for terminating a treaty in answer to a demand for the performance of the treaty or to a complaint alleging violation of the treaty.

No reason is seen why in such cases such invocation should be impeded. Perhaps in a well-systematized discipline of private interests such a solution would not have been the most appropriate. Since, however, we are dealing with relations between States, it is not possible to deny that paragraph 5 shows an exact consideration of the realities involved.
Article 52

Apart from any considerations of doctrine, this article purports, through logical criteria, to determine the effects of the nullity of a treaty with regard to acts executed before such nullity was alleged. It would be possible to support views that nullity produces effects ex tunc, since the nullity vitiates not merely acts executed under the aegis of the treaty, but the international instrument itself. It is not possible, however, to ignore the good faith with which a party has acted till then, and this consideration compels recognition of the legality of acts done by that party in the conviction that the treaty was valid. This is what results from paragraph 1, clause (a).

In order to prevent the legality of these acts from subsisting beyond the moment when nullity is invoked, clause (b) permits the re-establishment, as far as possible, of the position which would have existed if the acts had not been performed.

Under paragraph 2 the validity of the said act cannot be invoked by the party whose fraud or coercion has been the cause of the nullity. This position seems to us defensible, on the basis of exactly the same principle of good faith which confers legality on such acts.

There is no reason for refusing to extend these same principles to the legal consequences of nullity of consent given to a multilateral treaty. This is done in paragraph 3 in terms which do not call for any observation.

Article 53

The legal consequences of the nullity of a treaty are summarized in a principle formulated in paragraph 1. The parties are freed from any obligation to continue to apply the treaty; on the other hand, the legality of acts performed in conformity with the treaty, of any situation which may have resulted from the application of the instrument, are preserved.

A reservation is made, however, in paragraph 2 which deals with the case where a rule of jus cogens is the ground for the nullity of the treaty. Whenever this happens, any situation resulting from the operation of the treaty retains its legality only in so far as it is compatible with this rule.

This solution is not free from doubt. It may be considered more equitable to apply in this case the rule of paragraph 1, and respect, therefore, the situations resulting from the treaty, for its nullity of the treaty does not go back to its constitution which was according to rule but to a later moment and to an extraneous fact, that is, to the subsequent coming into existence of a peremptory norm of law. The imperative nature of the latter would have made itself sufficiently felt if it only produced the nullity of the treaty, but respected the situations existing prior to its own date which were brought about legitimately.

It seems to us that this question is linked, to a certain extent, with the lawfulness of the content of treaties, a matter examined already in our comments on article 37. If it is understood, as we have presumed, that contents are limited by imperative norms of international law, it will be easier to maintain that situations brought about in conformity with the juridical order in force at the time might subsist when a change occurs therein through a new rule.

The contrary course laid down in paragraph 2 does not appear to us, in substance, to be completely divorced from the view which does not accept any limitation on the content of treaties, because of a want of norms of international law which could establish such limitations. If this were so, the formulation of one of these rules should refuse legitimacy to prior treaties where they are not in harmony with it. It would then be easy to foresee the existence of treaties contrary to certain structural principles of international society.

We must bear in mind, however, that today, as we have shown, such treaties, where they exist, must be considered null.

For the rest, confronted by the possible formulation of rules of imperative law that have their source in international organizations, which are not representative of the highest principles of social inter-
Article 56

The principle that treaties are not retroactive is generally accepted in public international law, save where they contain provisions to the contrary or where it can be proved that the parties intended them to have retroactive effect.

Paragraph 1 of this article states the rule that a treaty is not retroactive "unless the contrary appears from the treaty".

It is explained in the commentary that this expression was considered preferable to the phrase "unless the treaty otherwise provides". This preference was based on the view that the expression selected is the more general of the two and that it allows for cases where the very nature of the treaty indicates that it is intended to have retroactive effects.

We assume that it was also desired to recognize, as a basis for the retroactive application of treaties, cases where such application is based on the interpretation of the will of the parties: that is to say, cases where the treaty contains no express provisions sanctioning retroactivity. This question of interpretation, however, will receive special attention later, when articles 69 and 71 are under consideration.

At all events, it seems to us reasonable to include a rule on non-retroactivity.

The provisions of paragraph 2, to the effect that a treaty does not apply to any fact or act taking place or any situation existing after it has ceased to be in force, are also acceptable. It is noted, however, that the formula considered less appropriate to the hypotheses in paragraph 1 has been used here, where there is more justification for it: namely, the clause making the application of the treaty to facts subsequent in date to the expiry of its validity dependent upon express provisions of the treaty permitting such application.

The reference to article 53 is necessary.

This article, as was stated in Opinion No. 74/63, regulates the legal consequences of the lawful termination of a treaty: it releases the parties from any further application of the treaty, and does not affect the legality either of any act done in conformity with the provisions of the treaty or of any situation resulting from the application of the treaty.

The doubt felt about the doctrine propounded in article 53 was expressed in the commentary on that article, to which the reader is referred. However, it appears that the Commission has now come to consider that the text of article 53 needs revision.

Article 57

On the basis of international practice, the decisions of international tribunals and the teachings of the literature, the Commission has embodied in this article the rule that treaties apply in principle to the entire territory of the parties. However, since many treaties are, by their very nature, limited in territorial application, the Commission has allowed for exceptions to the principle where indicated by the treaty itself.

It should be noted that care was taken to avoid any reference to "territories for which the parties are internationally responsible", which would immediately have focused attention on the so-called "colonial clause", with all the interpretations to which that clause has given rise. We have no further comment to make on this article.

Article 58

The affirmation of the principle that a treaty applies only between the parties, and neither imposes any obligations nor confers any rights upon a State not party to it without its consent, affords no grounds for misgivings. It is, after all, an application of the old principle "Pacta tertii nee nocent nee prosum!". In relation to other States a treaty is res inter alios acta, constituting an affirmation of their independence and equality. Many decisions handed down by international tribunals have been guided by this fundamental rule. However, the question which is discussed in the literature, and which the Commission itself discussed, is whether exceptions can be made to this rule of international law. This problem will be taken up in our comments on the articles which follow, and which record the solutions favoured by the Commission after long discussion.

Article 59

The creation of obligations for a State not a party depends, according to this article, upon two conditions:

(a) The parties must have intended the provision in question to be the means of establishing an obligation for the State not a party to the treaty;

(b) The State in question must have expressly agreed to be bound by the obligation.

This means that the State not a party can be bound only with its express consent, and not ipso jure. It may be said, then, that the basis of this obligation is not the treaty, but the agreement thus established between the parties to the treaty, on the one hand, and the third State on the other. Consequently the sovereignty of the last-mentioned State is not affected.

This being so, there is no objection to the acceptance of the rule laid down in this article, which is also accepted in the literature. 80

We also note with approval that, keeping aloof from the more liberal school of thought, the article gives no weight to tacit consent but requires that consent should be express.

Article 60

In essentials, this article re-states the rule laid down in the preceding article as it affects the rights arising for a State from a treaty to which it is not a party.

Although at first sight this seems a less complex aspect of the subject than the one dealt with in article 59, inasmuch as it relates to the recognition of rights and not the imposition of obligations, it is really a more delicate matter, because the rights thus conferred can be waived at any time, so that the treaty would tend to lack the necessary sureness and stability in this respect.

From the discussion of this point in the literature we may discern two main trends of thought: one asserting that rights conferred on a State not a party are non-existent until that State manifests its expressed acceptance of them, and the other maintaining that such rights exist until they are disclaimed or waived, even if tacitly, by the State concerned.

In an endeavour to reconcile these trends of thought, and noting that in practice they would produce different results only in very exceptional circumstances, the Commission sought a solution as nearly neutral as possible. It therefore prescribed, firstly, that the parties must intend to accord such a right, and secondly that the beneficiary State not a party must give its express or implied acceptance.

This appears to be a balanced solution resembling, in the view of some authors, the requirements of ratification which are put forward in the transaction of business. 81

Paragraph 2 of this article states, in fairly broad terms, the conditions for the exercise of the right by the beneficiary State not a party; those conditions are not confined to the express and direct provisions of the treaty concerning the exercise of the right, but also include conditions established in conformity with it. The latter clause takes into account cases in which the treaty provides for this matter to be dealt with in a supplementary instrument or even by unilateral decision of one of the parties.


81 See, in this connexion, Cavare, op. et vol. cit., p. 129.
Article 61

It is reasonable that, in principle, the consent of a State not a party should be required for the revocation or amendment of treaty provisions from which obligations or rights have arisen for that State. Some attempt is thus made to avoid placing the beneficiary State in the unprotected situation described by writers on the subject, in which the State would have no right to demand, through effective legal and practical channels, the application of the treaty, and would be unable to ask for its revision.

It is naturally understood that, in the absence of the consent referred to above, the provisions of the treaty can be revoked or amended only by the parties, without producing any effects for the State not a party.

Article 62

The Commission prudently took the view that it would be premature to formulate rules on treaties creating so-called "objective régimes"—that is, rights and obligations valid erga omnes—and preferred to rely on international custom. Thus, if a provision which is included in a treaty, and which is intended to bind third States not parties to the treaty, has already become a customary rule of international law, there is nothing to prevent it from over-riding what is laid down in articles 58 to 60.

This takes into account both the existence in international practice of treaties creating "objective régimes", such as those relating to freedom of navigation in international rivers or maritime waterways, and the teachings of legal theorists in favour of the admissibility of treaties which are of general importance and which are applicable even to States not parties to them.

Such multilateral treaties, containing "objective" legal rules which are laid down in the interests of States in general and which represent a stage in the progressive evolution of international law, cannot fail to influence all States not parties provided that they conform to the principles of international law, and thus possess general binding force.29

This binding force will certainly be required where there is no doubt about the existence of the customary principle or about its general binding force.

It is on this basis, therefore, that article 62 is acceptable. The customary rules of international law which we are discussing must, of course, meet the prescribed requirements. Only thus can they be recognized as affording sufficient grounds for a departure from the rules laid down in articles 58 to 60.

Article 63

Article 103 of the United Nations Charter, providing that the rules laid down in the Charter shall prevail over rules which are laid down in treaties and which are incompatible with the Charter rules, finds expression in article 63, paragraph 1.

Paragraph 2 provides for the case in which an earlier or a later treaty prevails in virtue of a provision to that effect in another treaty. It is clear, however, that this rule is to be applied only when the parties to both treaties are the same.

If this is not the case, the situation calls for the application of the two rules that follow.

Paragraph 2 determines in the most acceptable manner, by means of a current rule of interpretation of law, the applicability of a treaty to which any other treaty refers.

Paragraph 3 establishes a connexion with article 41, which was examined in the aforementioned Opinion No. 74/63. The Commission considered it necessary to regulate, in this paragraph, cases of total or partial incompatibility, suggesting at the same time that the expression "in whole or in part" should be eliminated from article 41. The relationship between an earlier treaty, still in force, and a later treaty on the same subject is regulated as follows: the earlier treaty applies only to the extent that its provisions are not incompatible with those of the later treaty.

Paragraph 4, sub-paragraphs (b) and (c), concerning the hypothesis that not all the same States are parties to both treaties, give effect to the principle laid down in article 58 and do not call for any comment from us.

The same can be said of sub-paragraph (e), which deals with the case where the same States are parties to both treaties.

The reservation concerning the responsibility incurred by concluding or applying a treaty the provisions of which are incompatible with obligations towards another State under another treaty is acceptable in the terms in which it is expressed.

When the various solutions given in this article are examined in the light of contemporary theory, it is seen that they represent a laudable attempt to stabilize practice in the settlement of conflicts between treaties.

It is often found that there are no special difficulties in connexion with treaties of a type for which the scope of practical application has already been demonstrated by experience, whereas, in the case of treaties embodying clauses of new or uncommon content, the lack of reliable legal criteria on which to determine their compatibility or incompatibility is bound to be felt.

The more or less markedly political character of some treaties makes the determination of this compatibility a delicate undertaking. Conflicts between the rules laid down in international treaties are dominated by political factors to this day.

Once incompatibility has been established, it is a praiseworthy step forward to be able to determine which treaty is applicable. This is accomplished in paragraphs 3 and 4 of this article.

The whole difficulty, however, will lie in establishing incompatibility. As Charles Rousseau points out, the application of the technical process of positive law cannot but leave a certain virtually irreducible and insoluble margin of incompatibility.30

For this reason it would be imprudent to go further by laying down criteria for incompatibility.

Moreover, the solution given in paragraph 3 and paragraph 4, sub-paragraph (e), seeks to reconcile so far as possible the application of two treaties having the same objective; and the solutions given in paragraph 4, sub-paragraphs (b) and (c), are conditioned by the position of the State not a party.

In view of all the foregoing, we see no reason to object to this article.

Article 64

Of the various grounds admissible in international relations for suspension of the operation of treaties, this article deals specifically with the severance of diplomatic relations between parties. It does so, however, in order to affirm that such severance does not in itself constitute grounds for suspension, and to make it a condition for suspension that the severance of diplomatic relations should make the application of the treaty a practical impossibility (paragraphs 1 and 2).

Consistently with the general view that the parties should so far as possible be held to compliance with the obligations they have assumed, paragraph 3 seeks to safeguard all those clauses of the treaty which are not affected by the impossibility of application.

Article 46, which is referred to in paragraph 3, states the principle of the inseparability of treaty provisions and lays down the conditions

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30 Principes de droit international public, in Recueil des cours, 1958, I, p. 506.
the agreement amending the treaty and afterwards signs that agreement or otherwise clearly indicates its consent thereto, it amending it.

all the States parties and hence gives rise to a problem of application the amendment to the treaty does not receive the approval of the treaty. Its signature of consent places it under the same legal between the provisions of the treaty and those of the agreement in article 58; it is justified on the same grounds as that principle of the foregoing principle and an application of the rule laid down which must be regarded as clearly linked to the obligation assumed the rights defined in paragraph 1, sub-paragraphs (a) and (b) even on the hypothesis that some of the States parties may proceed to alter a treaty without equality among States. This principle is not upheld in its entirety and that rule.

Article 65

In view of the difficulty of deriving from international practice a code of rules on the modification of treaties, the Commission confined itself to formulating certain general rules concerning the process of amendment and the use of inter se agreements. Not being in possession of the text of part I, we are unable to evaluate the relationship between the rules in question and those laid down in some of the articles in part I. Apart from the specified relationship to part I of the draft articles, the rule laid down in article 65 merely recognizes the possibility that a treaty may be amended by the parties; this seems a desirable provision.

Writers on the subject frequently refer to the need to modify treaties which, because of a change in the circumstances in which they are applied, have ceased to afford effective protection for interests. Provided that the amendment is made by agreement between the parties, there is no reason why the possibility of such amendment should not be accepted in broad terms.

Article 66

Article 66 is concerned only with the modification of multilateral treaties in relation to all the parties thereto.

In this article, the Commission rejects the idea sometimes put into practice that certain States can proceed to alter a treaty without consulting the others.

There is no doubt that such a practice violates the principle of equality among States. This principle is not upheld in its entirety even on the hypothesis that some of the States parties may proceed to modify the treaty by themselves and that the remainder will then accept or ratify the modification.

For this reason it must be considered desirable to recognize the rights defined in paragraph 1, sub-paragraphs (a) and (b), which must be regarded as clearly linked to the obligation assumed by the parties to perform the treaty in good faith.

The provision of paragraph 2, sub-paragraph (a), is a consequence of the foregoing principle and an application of the rule laid down in article 58; it is justified on the same grounds as that principle and that rule.

The reference made to article 63 covers those cases in which the amendment to the treaty does not receive the approval of all the States parties and hence gives rise to a problem of application in relation to the non-ratifying States where there is incompatibility between the provisions of the treaty and those of the agreement amending it.

Paragraph 3 is fully justified since, if a State is not a party to the agreement amending the treaty and afterwards signs that agreement or otherwise clearly indicates its consent thereto, it cannot invoke the application of that agreement as a breach of the treaty. Its signature of consent places it under the same legal obligation as the States among which the agreement was concluded.
However, it would be a mistake to underestimate the importance of the trend of opinion which claims that the interpretation of treaties requires a logic of its own, often irreconcilable with that applied to the interpretation of contracts in private law.

Hence the references made in conversation to "the political element in the interpretation of treaties", and the divergence observed between judicial practice, stamped with the particular characteristics of specific cases, and the theoretical ideas found in the literature. 24

The Commission endeavoured to encroach as little as possible on the freedom of the interpreter, but without refusing him a number of guiding principles drawn from the practice of international tribunals and from a common fund of theoretical writings.

In article 69, the Commission accordingly formulated four rules.

The first of these flows from the principle expressed in article 55 (Pacta sunt servanda)—the true starting point in determining the meaning of any provision; it proclaims that this should be done in good faith.

Closely bound up with this is the second rule, to the effect that the ordinary meaning must be given to the text. It seems to us that in this point, notwithstanding the apparent simplicity of the formula, many doubts may arise, as indeed they do arise in matters of private law. The expressions "ordinary meaning", "natural meaning", "normal meaning" and "clear meaning" are used in an attempt to describe texts which do not require any reference to other sources for the purpose of defining their meaning.

It is assumed, to begin with, that the words of the provision have been used in their usual sense. However, the determination of that sense is not so straightforward as it would appear at first sight.

This observation is not made in order to replace that formula by another, or in order to shift the use of that formula to a later stage in the process of interpretation, for it seems to us common sense that, in the absence of convincing reasons to the contrary, the ordinary meaning should be accepted. Our intention is merely to stress that the true practical efficacy of this second rule lies in so guiding the interpreter that he will seek that meaning before anything else; but in order to arrive at it he may have to use the various technical processes open to him. Thus it is not a matter of avoiding interpretation, but of interpreting according to certain logical guidelines.

The third rule needs no clarification, given the evident and recurrent necessity of referring to the context of the treaty and to its objects and purposes.

Lastly the fourth rule, which enjoins that attention should be paid to the rules of international law in force at the time of conclusion of the treaty, is based upon many decisions of international tribunals.

However, we feel bound to point out that, while this rule is clearly included in the general theory of interpretation of legal acts, its broad application may in many cases present considerable difficulties where treaties are concerned. It should be borne in mind that a dispute may arise many years after the treaty was concluded, and that the conditions of international life and the rules of international law may have changed considerably in the interim.

What, then, stands in the way of an up-to-date interpretation of the provisions in question? Fear that one of the parties may take refuge in the pretext that de facto conditions have changed and that innovations have been made in the rules of international law? But the same fear may be felt where the party concerned relies on a state of affairs that has ceased to exist.

At all events it was necessary to point out that this rule is perhaps excessively rigid when applied to the interpretation of treaties, especially the so-called law-making treaties. It is also necessary to relate it to the principle of "relub sic stantibus", which is evaluated in the aforementioned Opinion in connexion with article 44 in part II of the draft articles.

Article 69, paragraph 2, states a rule that is generally accepted in the literature and in the practice of international tribunals: the rule that a treaty should be read as a whole, and its clauses clarified by reference to one another. 25 It seems to us that recourse to elements outside the treaty, but bearing a close connexion with it, is wholly justified.

Paragraph 3 calls for no comment, since an agreement between the parties regarding the interpretation of the treaty and subsequent practice in its application may often constitute important sources of information from which to deduce the true intention they expressed in concluding the treaty.

Article 70

This provision supplements the preceding one by providing for recourse to further means of interpretation when the interpretation according to article 69 proves to be insufficient. Although it has been affirmed, manifestly on the basis of municipal law, that once treaties have entered into force they have an autonomous existence independent of the preparatory work, there is no doubt that the preparatory work is generally recognized as important in reconstructing the real intention of the parties. 26

This article does not make a distinction, as the writers sometimes do, between preparatory work latm sensu and strietio sensu; it should be noted that the former category includes some work, such as the records of closed meetings between heads of delegations, which may give a false picture of the course of negotiations.

We believe that there is nothing to be gained by making such a distinction, and that the interpreter should be left free to make use of the various items of preparatory work in whatever way seems most appropriate in each case.

Article 71

The principle embodied in this article is not open to question: since the purpose of interpretation of the provisions is to determine the real intention of the parties in concluding the treaty, it is natural that in some cases they will be found to have used certain terms in a meaning other than their ordinary meaning.

It is, however, open to question whether there is any need to make this rule, which is clearly included in the preceding ones, the subject of a separate provision.

However, the rule was formulated in the interests of greater clarity, and in particular in order to emphasize that cogent reasons are needed to carry the conviction that the parties have departed from the ordinary meaning referred to in article 69, paragraph 1.

On the basis of these considerations, the formulation of a separate rule is accepted.

Article 72

The principle laid down in paragraph 1 of this article seems to us acceptable inasmuch as it gives equal validity to the text of a treaty in different languages when the text has been authenticated in those languages, and makes a reasonable exception where a different rule has been agreed upon by the parties.

Paragraph 2 also recognizes an agreement between the parties as conferring authenticity on a version of the treaty drawn up in a language other than one of those in which the text of the treaty was authenticated; it also recognizes the existence of a rule laid down by an international organization to the same effect.

There is no doubt that this article will help to determine the exact validity of the text of a treaty in the various languages in which it has been drawn up.

24 In this connexion see De Visscher, op. cit., p. 311.

25 On this point see Cavard, op. et vol. cit., p. 95.

The only question which might arise is whether it would not be appropriate to allow here for a possibility similar to that envisaged in article 69, paragraph 3, and recognize, in addition to an agreement between the parties, any practice adopted by them which shows in an unequivocal manner that they have conferred authority on a version drawn up in a language not used for the authenticated texts.

**Article 73**

Paragraph 1, in conferring equal validity on the different authentic texts of a treaty, makes a natural exception where the treaty itself provides that, in the event of divergence, a particular text shall prevail.

It follows from this that, as provided in paragraph 2, the terms of a treaty are presumed to have the same meaning in each text. The second sentence of paragraph 2, which refers back to the general rules for interpretation laid down in articles 69 to 72, provides for cases, other than that referred to in paragraph 1, in which a comparison between authentic texts discloses a difference in meaning or some ambiguity or obscurity. As a remedy for this deficiency a rule is laid down which, although vague, provides some guidance, namely, that the different texts should be reconciled so far as possible.

We see no valid reason why this principle should not be accepted.

21. Sweden

**[PART 1]**

*Transmitted by a letter of 7 October 1963 from the Royal Ministry for Foreign Affairs*

*Original: English*

The law of treaties is of fundamental importance to the regulation of relations between States, and clarification, codification and development of its contents may be expected to facilitate treaty relations and reduce the risk of controversies caused by differing views of the law. It is, therefore, most gratifying that the International Law Commission has devoted much time and energy to this field of international law. The repeated changes of rapporteur on the topic and the Commission’s engagement upon other fields of law have delayed the presentation of draft articles on the law of treaties. Although this may be regrettable, there is fair compensation in the fact that the successive reports on the topic have been of great value and, in themselves, useful not only to the scholar but also to the judge and the legal practitioner.

The Commission has now submitted a first group of draft articles for consideration. Without prejudicing the position it will take to the final proposals that the Commission will submit, the Ministry for Foreign Affairs wishes to make the following observations at this stage.

The question whether the codification of the law of treaties should take the form of a convention—or several interconnected conventions—or of a code has been discussed in the Commission. The Ministry for Foreign Affairs has no objection to the decision in favour of a convention. It is of the opinion, however, that this decision must have important consequences for the contents of the convention. A convention is an instrument by which the parties undertake legally binding obligations. It is not a place for describing convenient practices and procedures. Such descriptions might perhaps usefully be made in a code of recommended practices, which may be subjected to such modifications from time to time as the current needs of States indicate.

Much of the contents of a procedural nature that was contemplated by Judge Sir Gerald Fitzmaurice for a code of the law of treaties has rightly been discarded in the draft articles for a convention that are now presented. It seems, nevertheless, that a number of the articles presented are still of this character. In the opinion of this Ministry, it would be wise to omit such provisions. They appear to be unnecessary and may prove to become quickly obsolete and a burden in an instrument that is intended to be legally binding for a long time to come. There is no need for such an instrument 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 are largely dispositive, i.e. the parties may depart from them by agreement. There is hardly any need to state examples of the various ways in which such departures may be made, or in which the parties may exercise their freedom where no rule exists. What is needed, rather, are statements of the residuary rules of international law which govern a specific question where the parties have not solved the question. In addition, cogent rules—from which the parties may not depart—should obviously be stated, if indeed any are found.

Applied to the present draft, the considerations advanced above lead to the conclusion that certain articles might be omitted, or perhaps transferred to a code of recommended practices.

As there is nothing in the law of treaties to prevent States from issuing full powers either “restricted to the performance of the particular act in question” or more generally, article 4, paragraph 6(o) seems unnecessary and rather in the nature of a procedural recommendation. Article 5, as the Commission itself recognizes, is only descriptive and seems superfluous unless there be the ambition systematically to present all aspects of the conclusion of treaties.

Similarly, article 6, sub-paragraphs (b) and (c) seem redundant as, in effect, they only state that an agreement between the parties on the manner in which a text is to be adopted shall be governing. They do not appear to lay down any residuary rules.

Article 7 seems to be more instructive as indicating possible procedures than helpful as legal guidance. Legal content may, however, be read into the article if it is meant to lay down that, in case of doubt, signature ad referendum, initialling, incorporation of a text into the final act of a conference, or in a resolution of an international organization, amounts to an authentication of the text. This would require also that the act of authentication has any legal effect, which seems very doubtful. The commentary to article 7 suggests 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. But, it may be asked, can any modifications be made, but for agreement, in a text before authentication?

Article 8—the substance of which will be discussed below—read along the following lines might be simplified if drafted in accordance with the approach suggested here.

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

A general multilateral treaty shall be deemed to be open to every State;

Other treaties shall be deemed to be open to 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.

As the article reads at present, the impression may be gained by paragraph 2 that a State which took part in the adoption of a treaty text cannot be excluded from participation even by an express clause to that effect, a contingency that is most unlikely, but would hardly be illegal.

While most of the provisions of article 9 contain legal—and indeed seemingly new rules, from which States may not depart even by agreement—the stipulations of sub-paragraph 3(a) relate to procedure, and it is hard to see why they should be non-dispositive. If that is not the intention, they might perhaps be transferred to a code of recommended practices or to a commentary.

Article 10 would be improved and considerably abbreviated if recast as residuary rules, governing only in the absence of agreement between the parties. Paragraphs 1 and 2(o) would be un-
necessary. Paragraphs 2(b) and (c) and 3 contain useful rules. It should be made clear, however, that they operate only in the absence of agreement between the parties. As it reads, paragraph 3(a) gives the impression that initialling can only function as authentication, which is not true in all instances. Under article 10, paragraph 2(b), signature ad referendum is only treated as an act authenticating a treaty. It would perhaps be well if States agreed that this would always be the significance they attach to the reservation. The Commission has not expressed any view on the practice, which nevertheless exists, attributing to this reservation the meaning "subject to ratification".

Given the provisions in articles 8 and 9 and the freedom of States to prescribe in treaties applicable procedures for participation in a treaty, the need for articles 13 and 14 may perhaps be doubted. While some provisions of article 15 contain important legal rules, other parts appear to be exclusively procedural. Illustrative of this is paragraph 1(c). It requires that in case a treaty offers to the participating States a choice between two differing texts, the instrument of ratification must indicate to which text it refers. It does not, however, give any legal guidance in case this procedure is not observed.

Articles 18 and 19, likewise, contain much that simply exemplifies what the parties may prescribe and much that merely amounts to procedural rules, which would fit better in a code of recommended practices. Such a code would also, it seems, be the most appropriate place for the rules contained in articles 26 and 27 relating to the correction of errors. Both article 28 and article 29 regarding depositaries contain legal rules of a dispositive nature. Even so, it may perhaps be questioned whether the rather detailed duties imposed upon depositaries in article 29, paragraphs 3-8 are of such permanent nature that they ought to be included in a convention.

The observations made above are not intended as criticism of the various provisions the omission of which is suggested, but are only prompted by a desire to see the convention limited to basic rules of a strictly legal nature, and to see convenient procedures and rules, possibly subject to frequent modifications, treated only in a special code of recommended practices. In addition to these observations, the Ministry wishes to offer a few comments upon the contents of some of the rules which, in its opinion, should be retained in a convention.

The provision on capacity—article 3, paragraph 1—is stated in broad terms, and necessarily so. In view of the circumstance that the conclusion of treaties by an entity may perhaps constitute the chief indication of its being a subject of international law, it becomes obvious that the statement that treaty-making capacity is possessed by subjects of international law is not very helpful. However, any elaboration in detail on this point is bound to meet great difficulties. The development of the law on the point might better be left to take place in the practice of States and of international organizations and in the judgments of international tribunals.

The formulation of article 4 is not wholly satisfactory. The point seems to have been lost that the legally relevant question is whether a representative is competent to bind the authority he purports to represent. The procedural rule that the Head of a State or a Foreign Minister is not required to produce an instrument of full powers, for instance, is a consequence of the legally more important rule that they are, by their offices, deemed competent to bind at any rate the executive branch of the Government they represent. The rule contained in paragraph 3 gives the impression that States must furnish the representatives concerned with full powers. In practice, this is often dispensed with. To have legal meaning, the paragraph should state that the competence of these agents 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. Such formulation would not obligate States actually to make use of full powers, but would indicate that a State which accepts the signature of certain representatives without examining full powers takes the risk of the treaty being denounced as concluded by one who did not have requisite authority or one who has exceeded his authority.

Paragraph 4(b) of article 4 merely reflects and accepts the common practice that States, when concluding treaties of an informal character, often do not ask for full powers. The legally interesting question, however, is whether they do so at their own risk. It is believed that the answer must be in the affirmative. The rationale of such a rule would be that it is easier for a State to ask a foreign representative to present full powers than it is for a State to prevent all its representatives from acting without authority. If the answer were in the negative, the conclusion would ensue that representatives signing this kind of treaties are always competent to bind the authorities they purport to represent. This can hardly be accepted.

The rule embodied in paragraph 6(b) of article 4 regarding telegraphic full powers again merely seems to record what has been thought to be common procedure. In fact, telegraphic full powers are often accepted as sufficient evidence of authority without any requirement of subsequent confirmation. The question is whether they offer adequate guarantees of authenticity. If not, the rule should be that States accepting them do so at their own peril.

The novel provision in article 6, sub-paragraph (a), although in itself perhaps not undesirable, may have complicated consequences at conferences between States some of which are parties to the convention on the law of treaties and others are not. Less than universal adherence to that convention may also very much complicate the application of article 9.

The "all States" formula which has been proposed in article 8, paragraph 1 seeks to establish a right—which does not exist under present customary international law—for every State to participate in general multilateral treaties. Although the effect of the provision may, if so desired, be excluded by express provisions in such a treaty, and although there are arguments in favour of the inclusion of such a residuary rule as is submitted, the objection must be raised that such a rule should preferably not be introduced without a complementary provision on method or machinery for determining which entities purporting to be States shall be deemed to possess statehood. A similar problem, it must be admitted, arises with respect to the question which of two rival governments is competent to bind a State under a treaty. A suggested solution to this problem, too, would be welcome.

Article 12 seeks to solve, in a very complex form, an old problem which the Commission characterizes as largely theoretical. The Commission recognizes that the difference between the elaborate provisions it submits and the simple rule that ratification is not necessary unless expressly agreed upon by the parties is not very substantial. If the same boldness were displayed on this point as on several others, the latter formulation should be preferred, perhaps with the qualification that ratification would also be required in cases where there is a clear implication that the parties intended the treaty to be subject to that procedure. No dangers would flow for States from such a residuary rule, as they may always by express clauses prescribe ratification.

A rule along the lines expressed in article 17 may be usefully included in a convention. It seems, however, that the present draft goes too far in imposing obligations, e.g., upon States which only take part in the drawing up of a treaty text within the framework of an international organization—and perhaps even vote against the adoption of such text.

The legal problem of reservations is admittedly most difficult. The draft provisions submitted in articles 18-20 represent a respectable effort to cover the problem. Further analysis nevertheless seems necessary, and an attempt should perhaps be made to differentiate even more between different types of treaties.

With respect to article 23, it should be noticed that the cases do not seem to be covered where a treaty does not stipulate any date on which or the mode in which it is to enter into force, but is simply
signed or simply provides for ratification. The residuary rule of international law would presumably point to the entry into force on the date of signature and ratification, respectively.

The text of draft article 24 seems to require an agreement between the parties to a treaty to terminate provisional application of the treaty. The commentary seems to suggest, however, that termination may occur when it is clear "that the treaty is not going to be ratified or approved by one of the parties" (emphasis supplied). As provisional application is often provided for because internal constitutional procedures have not been completed, and as there is often no absolute assurance that the outcome will be to confirm the provisional acceptance of the treaty, it is believed that the commentary comes closest to the legal position underlying present practice.

[PART II]

Transmitted by a letter of 2 April 1965 from the Royal Ministry for Foreign Affairs [Original: English]

The Swedish Government wishes first to submit some views on the terminology used in the draft to describe the various forms of invalidity of treaties and the various grounds for invalidating treaties.

In article 31 a State is authorized to withdraw its consent to a treaty under certain circumstances. It does not seem clear, however, whether such withdrawal of consent will affect the treaty only from the moment it is expressed or retroactively from its conclusion.

Articles 32(1) and 35(1) prescribe that treaties are to be without any legal effect. According to comment (3) to the latter article, this expression would mean that the treaty is ipso facto void and absolutely null. It is not clear whether the expression is deemed to have the same meaning in article 32, although this is made likely by the fact that article 47 refers to nullity both under article 32 and article 35 and provides that treaties stricken by such nullity may nevertheless be valid by acquiescence. It may be queried whether it would not be desirable to use more uniform terminology.

Under articles 36, 37 and 45 treaties become void under certain circumstances. In comment (6) to article 36 the treaties dealt with in the article are said to be "void ab initio", rather than voidable. It is not clear whether this flows from the article itself or from articles 47 and 52. Nor is it clear whether the treaties void under article 37 because of conflict with a peremptory norm are, likewise, void "ab initio". They are characterized as null in comment (4) to article 37, but unlike the treaties dealt with in article 36, they are subject to article 52.

Under articles 33 and 34 fraud and error may be invoked as invalidating the consent given by a State to a treaty. Comment (8) to article 34 declares this to mean that the treaties are not automatically void, but if the ground is invoked, the treaties will be void ab initio. It appears from article 47 that these treaties may also be characterized as null. Again, it would seem desirable to achieve more uniform terminology. It may be queried whether the expression may be invoked as invalidating the consent is adequate to convey the desired meaning. Any fact, presumably, may be invoked. The relevant question is whether a given fact has any legal consequence. The expression does not appear to answer that question.

With respect to the particular articles, the Swedish Government, without prejudice to the final position it may take, wishes to submit the following comments:

Article 30. In view, inter alia, of the draft article 8 submitted by the Commission, that "every State may become a party to general multilateral treaties unless otherwise provided by the treaties or the established rules of an international organization the case must be envisaged that a State recognized by some parties to a multilateral convention may become a party to such a convention, although it is not recognized by one or several of the other parties to the convention. The practice seems to be followed in this matter that a party which, because of non-recognition, finds itself unable to accept the obligation to apply the multilateral convention to another party, formally notifies the depositary of the position taken.

Article 31. The Swedish Government shares the view of the Commission that it would introduce serious risks for the security of treaties generally to leave it to internal law to determine the competent treaty-making organ of a State, and that the basic principle should be, as the Commission suggests, "that non-observance of a provision of internal law regarding competence to enter into treaties does not affect the validity of a consent given in due form by a State organ or agent competent under international law to give that consent".

The exception to this rule contemplated by the Commission covers the cases where a violation of internal law is manifest. The formulation of that exception does not seem quite satisfactory: if the consent in these cases is indeed "invalidated", it could not very well be "withdrawn". A better formulation of the present substance would seem to be:

"... 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."

Article 32. The provisions contained in this draft article are closely connected with the draft presented on article 4, which was criticized by the Swedish Government in its comments to the first part of the Commission's draft. It was pointed out in that context that rather than prescribing that agents should be provided with full powers—something that is often dispensed with in practice—the draft ought to answer the legally interesting question what effect, if any, should be attributed to consent expressed by a representative who had not been asked to present any evidence of authority and who, in fact, had not possessed authority.

For systematic reasons it may be desirable to retain in the first part of the draft rules regarding the existence of competence, and to insert into the second part the corresponding rules relating to the effect of lack of competence. A reformulation of article 4 seems nevertheless desirable to eliminate what may be viewed as procedural recommendations and to insert only rules of legal significance. Sub-paragraphs 1 and 2 of article 4 would not call for any modification. Sub-paragraph 3, however, might be changed to read along the following lines:

"No other representative of a State shall be deemed (by his offices and functions), and without presenting evidence in the form of written credentials, to possess authority to negotiate on behalf of his State."

While the original text would seem to imply a duty to request the presenting of full powers—which in practice is commonly dispensed with—the above text would simply lay down that a State which negotiates or signs an agreement with a representative not presenting full powers may find that the latter was not authorized. Such a formulation would tie up well with draft article 32(1).

Sub-paragraph 4(a) of article 4 might similarly be changed to read along the following lines:

"Subject to the provision of sub-paragraph 1, a representative of a State shall not be deemed (by his offices and functions), and without presenting evidence in the form of written credentials, to possess authority to sign a treaty on behalf of his State."

Such formulation, again, would well tie up with the provision of article 32(1), while the present formulation of sub-paragraph 4(a) would seem to lay down as mandatory that full powers must be requested.

The substance of draft article 4, sub-paragraph 4(b) relating to agreements in simplified form was criticized in the earlier Swedish comments. It was suggested to be easier for a State to ask a foreign representative to present a full power than it is for a State to prevent all its representatives from acting without authority. To this argu-
ment is added the circumstance that it is extremely difficult to delimit the concept of agreements in simplified form. If that concept cannot be well defined, there would be a large group of cases where, under the draft presented by the Commission, it would be uncertain whether the lack of authority of the agent would render the treaty invalid under article 32. From the point of view of clarity it would therefore be preferable to treat the conclusion of agreements in simplified form in the same way as the conclusion of other agreements. This is best done by the exclusion of article 4, paragraph 4(b). That modification would simplify the application of article 32.

The question may further be raised whether in article 32(1) the burden of denunciation should not be placed upon the State whose representative has acted without authority. Even though the other State should bear the risk when it has not checked the existence of authority, it would not be unreasonable—in view of the fact that such risk-taking is most common—to ask that the first State should denote the agreements as soon as it becomes aware of it, or else be held bound. The commentary (4) to article 32 as well as article 47 point in this direction, but an express modification of the last part of article 32(1) would seem to be required.

Articles 33 (fraud) and 34 (error) deal with contingencies that must be very rare and there may be a question on this ground whether they are really needed at the present stage. However, the formulations appear unobjectionable.

Article 35 (personal coercion) likewise deals with a contingency that is most unusual. As there have been some well-known cases of this kind, however, and as the rule has a good deal of support in doctrine, an express provision on the matter might perhaps be desirable.

Articles 36 (coercion of a State), 37 (violation of a peremptory norm), 44 (fundamental change of circumstances), and 45 (violation of an emerging peremptory norm) represent a bold tackling of difficult problems that are connected with the very structure of present-day international society. It is, of course, only logical that when the threat or use of force against a State is forbidden under Article 2(4) of the United Nations Charter, a treaty imposed by such threat or use of force should also be invalid. Rules prescribing the invalidity of treaties violating existing or emerging peremptory norms likewise may be said to be required from the viewpoint of logic and consistency. The formal inclusion of such rules in an instrument covering the law of treaties, however welcome from the standpoint of theory and progressive development, must necessarily also be considered in the context of present-day political organization of the international society.

The stability of State relations, cannot, of course, but be threatened by the conclusion of treaties through coercion or in violation of peremptory norms of international law. One cannot, however, completely disregard the fact that invalidation of a great many existing treaties—especially border treaties—which have been brought about through some form of coercion, would dangerously upset the existing stability. It should also be borne in mind that so long as the international community is not equipped with an organization capable of ensuring peaceful change and effectively implementing its decisions, unfortunately treaties may continue to be made—armistices, peace settlements and other—ln contravention of legal principles, and yet continue to be upheld and gradually—like past peace treaties—even become an element of stability.

To the concern voiced above, is added concern for the method by which the invalidity of a treaty is envisaged to be determined. The circumstance cannot be disregarded that while the draft submitted considerably develops and specifies the grounds on which treaties may be claimed to be invalid, it does not similarly develop the methods by which such claims may be examined and authoritatively decided. The orderly procedure prescribed in article 51 is thoughtfully drafted and useful as far as it goes. It does not, however, offer any safeguards against abusive claims of invalidity that a State may be tempted to advance on the basis of any one of the many grounds provided in the draft. Even more disconcerting is the fact that the article does not appear to answer whether a treaty is subject to unilateral termination or remains valid, once the means indicated in Article 33 of the Charter have been exhausted without result.

In this connexion attention must also be paid to article 51(5). If the meaning of this provision is that a State—to take the examples cited in paragraph (7) of the comment—discovering that an error or change of circumstances has occurred, may cease immediately to perform under the treaty and merely invoke the error or the change of circumstances as a ground for termination, the strength of the article, limited as it is, will be even further reduced.

Problems connected with a policy of "non-recognition" of treaties deemed invalid would not, of course, disappear even if compulsory jurisdiction were given to the International Court of Justice to determine claims of invalidity based upon provisions regarding, for instance, changed circumstances. Such jurisdiction would, however, do much to reduce the risk of abusive claims.

Articles 38(1), (2) and (3)(a) (termination of treaties through the operation of their own provisions) contain interpretative rules, the need for which may be somewhat doubtful. The provision laid down in sub-paragraph (3)(b) seems to be a useful residuary rule.

Article 39 offers a reasonable and partly new solution to the problem raised by treaties containing no provisions regarding their termination.

Article 40(2) and (3) likewise seem to contain useful innovations regarding the termination or suspension of the operation of multilateral treaties, while the need for sub-paragraph 1 is less obvious.

Article 41 (termination implied from entering into a subsequent treaty) likewise lays down a rule of construction that may be useful.

Article 42 deals with the important question of the effect of breach of treaty obligations. The limitation of the article to "material breach" seems well advised and the definition of that concept acceptable. The question may be raised whether the procedure prescribed in article 51 offers an adequate and sufficiently rapid response to the urgent problem of breach of a treaty.

With respect to breach of a multilateral treaty the provisions suggested might, in most instances, be adequate. It is noted, however, that the draft only entitles a party to a multilateral treaty to suspend or terminate the treaty in relation to another party which has violated it or to seek the agreement of the other parties in order to free itself wholly from the treaty. Circumstances might be such, however, that the State ought to be allowed even to terminate or suspend the treaty unilaterally, e.g. if the participation of the State committing the breach was an essential condition for the adherence of the other State.

Article 43 on supervening impossibility of performance may be useful, even though the contingency envisaged is probably rare. (Articles 44 and 45 have been commented upon above.)

Article 46 on separability appears on the whole to be a most useful and necessary complement to the development of grounds of nullity and termination. The—perhaps inadvertent—reference in sub-paragraph (1) to the possibility of a treaty providing about its own nullity might well be avoided.

Article 47 on waiver and acquiescence seems likewise to be an indispensable complement to the rest of the draft. It would seem desirable in addition expressly to provide in this article that a State may by its conduct or through acquiescence be debarred from exercising its right under article 31 to withdraw its consent.

Article 48 contains a special rule on the termination of constituent instruments of international organizations and of treaties which have been drawn up within international organizations. Such a rule would seem to be required. As several of "the provisions of part II, section III" referred to will be clearly inapplicable to
the treaties concerned, it might be preferable to refer to "relevant provisions of part II, section III".

The provision contained in article 49 on evidence of authority to denounce, terminate or withdraw from a treaty might perhaps with advantage be attached to article 4 itself. It would seem even more important to provide expressly that lack of such authority might entail invalidity of the act in accordance with article 32.

The rule contained in article 50 that a State may revoke its notice of termination or denunciation may be framed in too general terms. While the rule suggested may be reasonable in cases such as a breach, it is doubtful whether it is acceptable regarding normal notices of termination in accordance with express provisions for notice in treaties. The purpose of such provisions would seem to be to enable other parties to take suitable measures in good time to meet the new situation. These measures could not be taken with confidence if notices of termination were susceptible of being revoked. The rule suggested might also have the effect of neutralizing provisions requiring advance notice, as it would, in fact, make it possible for a State to defer its decision to terminate until the day before the notice given would take effect.

Article 51 has been commented upon above.

Article 52 regarding the legal consequences of the nullity of a treaty deals in very general and abstract terms with problems of great complexity. A fuller discussion than that offered in the commentary would seem desirable to illustrate and analyse the various cases that may arise. The expression "may be required" in subparagraph (i) of the provision contained in article 52(1)(e) seems inadequate.

Article 53 regarding the legal consequences of the termination of a treaty similarly calls for further clarification. The delimitation between article 53(2) and article 52 is not obvious: article 52 deals with the nullity of treaties, and thereby presumably refers at any rate to all treaties termed void, a term used in article 52(1)(e), but article 53(2), too, refers to treaties which are void.

It might perhaps be preferable to speak, in article 53, of releasing parties "from any further obligation to apply a treaty", rather than releasing the same parties "from application of the treaty". Cf. article 54. The expression "a situation...shall retain its validity" also seems to require improvement.

Although article 54 on the legal consequences of the suspension of the operation of a treaty is somewhat less complex than the previous articles, further illustration of the effect of the abstract rules might be clarifying.

22. TURKEY

[PART II]

Transmitted by a note verbale of 15 January 1965 from the Permanent Representative to the United Nations

[Original: English]

1. It is envisaged in article 36 of the draft that treaties concluded under the threat or use of force in violation of the principles of the Charter of the United Nations shall be void. In order to enforce this article, it is essential that the threat or use of force be in violation of the principles of the Charter of the United Nations. The article does not specify what kind of threat or use of force is intended. This has been left to the interpretation of the principles of the Charter of the United Nations. Presumably, it is thought that the evolution resulting from such interpretation will be applied in the field of the law of treaties. It is obvious that this will have certain disadvantages. First of all, as a rule, the principles in question will in general be interpreted in connexion with the solution of political questions. Such a political interpretation can hardly be expected to possess the degree of clarity required in juridical matters. Besides, this interpretation may not be acceptable to countries not members of the United Nations. Furthermore, it is always possible that the principles in question may be changed in the future. Therefore, it would be helpful to define the threat or use of force envisaged in this article in order to eliminate these drawbacks.

2. Article 37 of the draft states that a treaty is void if it conflicts with a peremptory norm of general international law. This article, which at first glance appears to be essential and useful, cannot easily be applied without modification. First of all, the examples cited to prove the usefulness of this article are not compatible with reality. It is not customary today for nations to conclude treaties dealing with the use of force, with crime, traffic in slaves and genocide. That is why one should act with caution before including the notion of jus cogens in international law. What is meant by jus cogens is not defined in the article. This will make it possible for every nation to interpret jus cogens to fit its own needs. As a matter of fact, this is just what has happened. Since the mechanism of compulsory jurisdiction has not been set up in international law, these different interpretations, rather than meeting the needs of the international community, will give rise to new misunderstandings. For this reason, it would be wrong to include the notion of jus cogens unilaterally in the law of treaties without first establishing a competent machinery vested with authority to settle the differences arising between nations over jus cogens or entrusting existing organizations such as the International Court of Justice with this duty.

3. Although article 39 stipulates that a treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation, it recognizes exceptions from this principle for certain treaties. These exceptions do not exactly reflect the needs of our times. As the International Court of Justice has observed, the majority of treaties concluded today contain provisions regarding termination or withdrawal. When such a provision is not inserted into a treaty, it means that the parties do not desire to make termination or withdrawal possible. Despite this practice, to recognize exceptions for certain treaties might, in the final analysis, result in ignoring the will of the parties. It is not appropriate to cite as an example the commercial treaties of today which are generally concluded for short durations. In case no exception was recognized, would treaties concluded without limitation last forever? The answer to this question depends upon whether priority should be given to the interest of one party, of both or all parties concerned or to the maintenance of international law and order. We believe that it will be in the benefit of the international community if in exceptional cases envisaged in article 39, each party were to be given the right to request the reviewing of the treaty in question instead of the right of termination or withdrawal.

4. In our opinion, in paragraph 2 of article 40, the period after which a treaty may be terminated with the agreement only of the States parties to it should be ten years.

5. Article 44 of the draft has accepted the principle that a change in the circumstances existing at the time the treaty was entered into may only be invoked as ground for terminating or withdrawing from a treaty under the conditions set out in the present article. Although it is gratifying that the International Law Commission has taken care to state the essential limitations to the application of this principle—which happens to be one of the most controversial subjects in international law—the acceptance of this principle without first providing for full guarantees in regard to its application might create conditions harmful to international law and order. Since the commentary on this article does not define the place of this principle in present day international law with sufficient clarity, we will refrain from expressing a detailed opinion on this subject. The principle under discussion was reached by the article. The article recognizes, under certain limitations, the right to invoke termination of or withdrawal from a treaty because of change of circumstances. Turkey does not concur in this view. Substantial changes in conditions taking place after the treaty has been signed can only entitle the parties to request negotiations for the adaptation of the treaty to changed circumstances. If the parties cannot reach an agreement in this respect,
they can always seek arbitration or apply to international juridical organs. Therefore, Turkey suggests that the article be amended in such a way as to provide that the parties concerned should first enter into discussion among themselves and subsequently refer the dispute to the International Court of Justice should they fail to reach an agreement.

6. Regarding article 45 of the draft, Turkey believes that the views expressed in article 37 are valid in respect of this article also. We would like to add as a reminder that in the majority of the present day multilateral treaties, certain clauses are included to show the connexion between these treaties and those signed previously.

7. Article 51 of the draft defines the methods to be followed in determining the nullity or for terminating, withdrawing from and suspending a treaty. Paragraph 3, which sets out the methods to be employed, contains the most important provisions of the article. According to this paragraph, if the parties cannot reach an accord on the points cited above, they shall resort to methods enumerated in Article 33 of the United Nations Charter.

The commentary on article 51 states that in the opinion of some delegations no compulsory settlement is envisaged, with the explanation that no such clause exists in other treaties. Reference is also made to the view expressed by some members that the method of compulsory settlement is not realistic. Turkey believes that this remark holds true in respect of other articles as well.

Provisions which do not enjoy the concurrence of all nations cannot be incorporated in international law without first providing for appropriate guarantees. Therefore, Turkey proposes that paragraph 3 of article 51 should be complemented by the addition of a paragraph to the effect that the parties shall have the right to apply to the International Court of Justice.

[PART III]

Transmitted by a note verbale of 4 October 1965 from the Permanent Representative to the United Nations

[Original: English]

Article 55. The confirmation by the International Law Commission of the rule of pacta sunt servanda, which is the basis of the law of treaties, is useful and necessary in view of the opinions which have been advanced during the last few years. Particularly the effectiveness of this principle may be enhanced if it is strengthened by the principle of good faith. The draft prepared by the Special Rapporteur has put a clear emphasis on the principle of good faith. Although the International Law Commission observed in its commentary on the article that the principle of good faith constitutes an inseparable part of the rule of pacta sunt servanda, this observation has not, nevertheless, been fully and clearly reflected in the text. The Government of Turkey is, therefore, of the opinion that a paragraph similar to the second paragraph of the draft submitted by the Special Rapporteur should be included in the article, and that it should be clearly stipulated that the parties to a treaty should refrain from calculated acts to prevent the application of treaties. Furthermore, paragraph 4 of the draft of the Special Rapporteur stated that the parties not respecting the treaties should be held responsible for their action. Although this rule is principally concerned with the subject of international responsibility of States, the Government of Turkey believes that a paragraph similar to paragraph 4 of the draft of the Special Rapporteur should be added to the article until the eventual codification of the international responsibilities of States. The fact that such a specific provision was incorporated in paragraph 5 of article 63 renders this addition as suggested by the Turkish Government necessary.

Article 56. The Government of Turkey recognizes that the provisions of a treaty should, as a principle, be applied only in relation to facts and acts taking place while the treaty is in force. Nevertheless, it would seem that in view of the nature of the exception to this principle set out in the last part of paragraph 1 of the article and for the sake of avoiding misunderstandings which might subsequently arise in its interpretation, the exception should be restricted to more specific and definite cases. The Turkish Government therefore suggests that the words "unless the contrary appears from the treaty" in the last part of paragraph 1 of the article should be replaced by the words "unless the treaty stipulates otherwise".

Article 60. The Government of Turkey recognizes the general principle formulated in the article with regard to treaties providing rights for third States. Nevertheless, it considers that the conditions required for enjoying such rights are inadequate. Paragraph 2 of the article stipulates that a State, which is not a party to a treaty, exercising a right in accordance with paragraph 1, should comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty. This paragraph, in actual fact, restricts the powers of States, parties to the treaty, to conclude, a new treaty in the extent of vested rights of third States. This situation is not only a restriction of the powers of sovereign and independent States, but it also causes an imbalance and injustice between their responsibilities. It may be possible for a certain number of States, parties to a treaty, to amend the rights recognized to third States under certain conditions by concluding among themselves a separate treaty similar to the original treaty but not based on provisions thereof.

To restrict the right to conclude a new agreement to exclusive compliance with the provisions of the existing treaty, as provided for in paragraph 2, runs contrary to the changing requirements of international life. With this view, the Government of Turkey suggests that the words "or established in conformity with the treaty" in the last part of paragraph 2 of the article should be deleted from the text and replaced by the words "or established by a new similar treaty".

Article 61. According to this article, a third State, acquiring an implicit right pursuant to section (b) of paragraph 1 of article 60, may suspend the application of the treaty to which it had not given its expressed consent. Such a legal situation is untenable. Article 61 can only be accepted if the word "impliedly" in section (b) of paragraph 1 of article 60 is deleted. Article 61 which would thus be based on a collateral agreement would be acceptable to parties. The stipulation that "unless it appears from the treaty that the provision intended to be revocable" in article 61 would not suffice to remedy this shortcoming. Turkey can accept article 60 only if the word "impliedly" is deleted from section (b) of paragraph 1 of article 60.

Article 68. Although the commentary on section (c) of the article includes a statement to the effect that account was taken of a new general rule of international law, this point was not reflected in the text of the article with sufficient clarity. Because of this, difficulties may arise in the future. For instance, since the term "general international law" has been utilized in paragraph (b) of article 69, it may be claimed that the terminology of article 68 has a different connotation. In order to avoid such misunderstandings, the Turkish Government proposes the inclusion in the text of section (c) of article 68 of the word "general" immediately after the word "international".

Article 69. Interpretation of international treaties is an important subject related to their application. There are sufficient numbers of rules for interpretation as confirmed in the decisions of the International Court. A consensus to be reached on the principles on which these rules are based and on the order of their priority will pave the way for their codification and remove the difficulties encountered in their application. The elimination of the difficulties and disputes arising from differences of interpretation will enhance the application of international treaties. The Turkish Government, imbued with this desire, supports the efforts of the International Law Commission in codifying the rules concerning the interpretation of treaties. Turkey is also in accord with the principles employed by the International Law Commission as the basis of the rules of interpretation of treaties.
23. **Uganda**

**[PART II]**

*Transmitted by a letter of 16 October 1964 from the Permanent Representative to the United Nations*

[Original: English]

As far as I can see there may be some difficulties in the interpretation of article 31 of the draft. This article stipulates that if a representative who had been given authority to conclude a treaty signs a treaty the terms of which conflict with any internal legislation of that State, this fact will not invalidate the treaty unless the parties should agree that the internal law is clearly violated. In this respect I feel that the other parties will have to examine the "internal law" which is alleged to be violated by the treaty so concluded, thereby interfering with the sovereignty of that State. Am I right in assuming that the procedures followed in the ratification of treaties will take account of any conflicts between the proposed treaty and internal law? I am aware that the other contracting parties would wish to have some sort of assurance that the treaty they have signed would not be declared null and void, but still it is, I think, a dangerous principle which leaves room for internationally concluded treaties to bypass constitutional procedures of a Member State.

I am very much in favour of article 36 which attempts to depart from the hitherto recognized procedure of coercing States to become parties to a treaty. I understand that before the First World War coercion was an accepted procedure for forcing States to accede to treaties, and we are glad to see that article 36 eliminates this element of coercion which has definitely become out of date.

24. **Union of Soviet Socialist Republics**

**[PARTS I AND III]**

*Transmitted by a note of 15 June 1965 from the Permanent Mission to the United Nations*

[Original: Russian]

**[PART I]**

The competent authorities of the Union of Soviet Socialist Republics have the following comments on the draft articles on the law of treaties, prepared by the United Nations International Law Commission at its fourteenth to sixteenth sessions:

**Participation in multilateral treaties** (articles 8 and 9)

The competent Soviet authorities consider that, in codifying the law of treaties, it is necessary to proceed from the assumption that general international agreements should be open to participation by all States. This is required by the principle of the equality of States. Moreover, as such treaties usually regulate matters of interest to each and every State and are intended to establish or develop universally recognized principles and rules of contemporary international law which are binding on all States, to deny certain States the possibility of becoming parties to such treaties is contrary to their very spirit and purpose and is harmful to international cooperation.

**Ratification** (article 12)

Since the expression "treaty" in draft article 1 means any agreement (treaty, convention, exchange of notes or letters, etc.) concluded between two or more States and since the majority of such agreements are not at present subject to ratification, article 12 must be based on the assumption that an international treaty is subject to ratification if the treaty itself so stipulates or if the representative of a State has signed it "subject to ratification".

**[PART III]**

**Treaties providing for obligations for third States** (article 59)

It must be borne in mind that there are cases where obligations under a treaty may be extended to a third State without its consent being required. This is true, for example, of treaties which, in accordance with the principle of the responsibility of States, impose obligations on aggressor States guilty of launching and conducting a war of aggression.

The above comments on the draft articles on the law of treaties are not exhaustive or final. The competent authorities of the Soviet Union reserve the right to present further comments and observations on the draft articles at the appropriate time.

25. **United Kingdom of Great Britain and Northern Ireland**

**[PART I]**

*Transmitted by a letter of 20 December 1963 from the Permanent Representative to the United Nations*

[Original: English]

**Article 1, paragraphs 1(a) and (b)**

Her Majesty's Government are not entirely satisfied with the definitions of "treaty" and "treaty in simplified form". In particular it is doubted whether the list of expressions contained in the definition of the term "treaty" is either necessary or desirable. It would be better to mention any examples in the commentary. The element of an intention on the part of the States concerned to create legal obligations has not been, but should be, included in the definition.

**Article 3, paragraph 1**

In the view of Her Majesty's Government, article 3, paragraph 1, in the Special Rapporteur's draft articles is to be preferred to the International Law Commission's formulation, which does not adequately define the expression "subjects of international law". There exist many States and territories which possess less than full sovereignty. In certain cases, such States and territories have been enabled themselves to conclude treaties with foreign States by treaty entrenchments and similar means. The article and commentary do not take account of the existence of these means.

**Article 8**

In the opinion of Her Majesty's Government, the presumption in paragraph 1 is unsatisfactory and, in any event, the drafting of the article will require further attention. Particularly, in paragraph 2 it is unclear to which cases the opening words ("In all other cases...") relate; what constitutes taking part in the adoption of the text; and whether the final expression ("...unless the treaty otherwise provides") qualifies sub-paragraphs (a) and (b) as well as (c). It is considered that the final expression should qualify at least sub-paragraphs (a) and (c). An international conference should not be rendered incapable of excluding from participation in a treaty a State which has taken part in the adoption of the text. Economic conditions might for instance justify exclusion in the case of a commodity agreement; or a State may be excluded until it has fulfilled a prior condition, such as the ratification of a related convention.

**Article 9**

Whilst the underlying idea of this article is acceptable, it may be difficult to operate in practice. For example, it will be many years before a convention on the law of treaties comes into force for all States and during that interim period some States will be parties and others will not. In relation to a particular multilateral treaty, it is likely therefore that some contracting States will also be parties to a convention on the law of treaties and some will not. A proposal to open the multilateral treaty to new States in accordance with this article might be opposed by these latter States who would be under no obligation to comply with the article. Again, it is unclear what effect the provision would have upon a treaty forming the constitution of an international organization and containing express provisions on membership. The majority of such organizations have comprehensive membership articles.
The expression "a small group of States" is imprecise and should be clarified both here and wherever it occurs in these articles.

**Article 12**

The principle in paragraph 1 that treaties require ratification unless the contrary intention appears reflects the provisions regarding the ratification of treaties which appear in the constitutions of many States. However, this is a principle which has not been applied by many other States. 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 provides otherwise. Her Majesty's Government fear that the rather complicated system of presumptions laid down in the present text will give rise to difficulties which do not at present exist.

**Article 17**

Whilst the principle of this article is sound, its application in practice may cause difficulties unless the drafting is made more precise. Particularly, the expressions "takes part in the negotiation ..." (paragraph 1), "signifies that it does not intend ..." (paragraph 1) and "unduly delayed ..." (paragraph 2) are unclear.

**Article 18**

Her Majesty's Government note that this article deals only with reservations and assumes that the International Law Commission intends to take up the related matter of statements of interpretation in a later report.

**Articles 19 and 20**

Her Majesty's Government appreciate the effort of the International Law Commission to deal with this difficult and controversial subject. However, they feel that the two articles are not completely satisfactory and there may be difficulties in applying them in detail in practice. This comment relates in particular to paragraphs 3 and 4 of article 19 and to paragraphs 2 and 3 of article 20.

In general, it is considered that a reservation which is incompatible with the spirit and purpose of a treaty should not be capable of being accepted under article 19, and that provisions such as those made in articles 19 and 20 might be more readily acceptable if this interpretation and application were made subject to international adjudication.

**Article 22**

The article provides that a withdrawal of a reservation shall take effect when notice of it has been received by the other States concerned. Such a withdrawal might, however, necessitate adjustments by these other States to their laws or to their administrative practices and, in the view of Her Majesty's Government, they 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.

**Article 23**

Her Majesty's Government consider that an automatic rule would be preferable to that provided in paragraph 3, which depends on the parties reaching a further agreement. The rule should, it is suggested, be that a treaty which is not covered by paragraphs 1 and 2 of the article 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.

**Article 25**

The registration of treaties is already dealt with under Article 102 of the Charter and it is considered unnecessary and undesirable to duplicate those provisions.
policy or a change of a government can ever be regarded as a fundamental change of circumstances.

In the view of Her Majesty’s Government, the security of treaties would be impaired if procedural steps in addition to those proposed in article 51 were not required. In connexion with the principle of rebus sic stantibus, the view is taken that a party alleging a fundamental change of circumstances is under an obligation, before it may invoke the change in any way, to propose negotiations to the other party and if the negotiations are not successful at least to offer arbitration of the issue. Her Majesty’s Government consider that this element of the principle should be retained.

Article 49

Article 4 draws a distinction in certain circumstances between authority to negotiate, draw up and authenticate a treaty, on the one hand, and authority to sign, on the other. It does not, however, use the word “conclude”, unlike article 49. It is not certain, therefore, whether the rule which is to apply in similar circumstances, to authority to denounce, etc., is that relating to authority to negotiate, draw up and authenticate or that relating to authority to sign.

Article 51

Her Majesty’s Government consider that the fundamental principle underlying the law of treaties is pacta sunt servanda. Paragraph 1 of this article is of great importance and value. With regard to paragraphs 3 and 4, however, Her Majesty’s Government consider that whilst the draft articles on the invalidity and termination of treaties, when in force, would mark an advance in the law of treaties, they would, paradoxically, constitute an impairment of the general security of numerous existing and future treaties unless there were provisions for independent international adjudication or arbitration, as appropriate. The possibilities of abuse, in the absence of proper safeguards, exist most plainly in relation to practically all the articles and, in particular, in relation to articles 36, 41, 42, 43 and 44. Articles such as these would be acceptable only if coupled with the protection of an ultimate appeal to an independent judicial tribunal. This accords with Article 36, paragraph 3 of the Charter by which legal disputes should as a general rule be referred by the parties to the International Court of Justice, and with the intent of resolution 171 (II) of the General Assembly. In general, Her Majesty’s Government suggest that the draft articles should be subject to interpretation and application by the International Court of Justice or, if such a provision is not generally acceptable, should only be capable of being invoked against a State which has accepted the compulsory jurisdiction of the Court if the State relying on the article is willing to submit the issue to the Court.

Article 52

The operation of article 52, paragraph 1(b) might be difficult in practice, especially if a treaty had been executed to a large extent or if formal legislative or other internal steps had been taken to give effect to it. It is not clear in what manner and by whom the parties may be required to restore the status quo ante.

Article 53

The article as drafted does not make provision with regard to the accrued obligations of a State under a treaty at the time of its denunciation by that State.

(a) They recall their comment upon the need to provide for independent adjudication of disputes in the operation of certain articles in part II, and in particular the comment on article 51. Certain articles in part III also demonstrate the need for independent adjudication; for example, the test of compatibility in articles 63(3) and 67(1)(b)(ii), the test contained in article 67(1)(b)(i), the provisions of article 68 and the articles in Section III on Interpretation.

(b) The articles in part III raise again the question of the extent to which the provisions of the draft articles would affect treaties in force before the conclusion of any instrument on the law of treaties. To the extent to which the articles state customary law, the effect of any convention on the law of treaties should be identical with that of customary law. However, difficult problems might arise with regard to any provisions in a convention on the law of treaties which amounted to progressive development of international law. In their revision of the draft articles, it is suggested that the Commission should consider the possible retroactive effects of their proposals and also their effect upon existing treaties.

(c) The United Kingdom Government regret the deletion of the article proposed by the Special Rapporteur on the application of treaties to individuals (A/CN.4/167, article 66). It is felt that contemporary international law supports the proposal of the Special Rapporteur, particularly having regard to the development of the law relating to human rights by the United Nations and other international organizations.

In addition, the United Kingdom Government have the following comments upon individual articles in part III:

Article 61. It is felt that the rule proposed might over-safeguard the position of the third State to the detriment of the States parties to the treaty. It is suggested that States parties should be permitted to amend a provision affecting a third State unless it appears from the treaty or the surrounding circumstances that the provision was intended not to be revocable or unless the third State is entitled to invoke the rule of “estoppel” or “preclusion” (which forms the basis of article 47) against the amendment.

Article 63. It is suggested that paragraph 2 should be drafted so as to avoid any appearance of referring to a specific earlier or later treaty, for example, by making it read “any earlier or later treaty”.

Article 64. It is considered that, if the exception in paragraph 2 is not carefully and narrowly defined, the rule in paragraph 1 of article 64 will be impaired. In paragraphs 3 and 4 of its commentary, the Commission recognizes that “cases of supervening impossibility of performance...may occur in consequence of the severance of diplomatic relations”. The question of supervening impossibility of performance is dealt with in article 43, but only as regards the disappearance of a provision of an earlier treaty. The severance of diplomatic relations affects not the subject-matter of the rights and obligations contained in the treaty”. The severance of diplomatic relations affects the severance of the rights and obligations, but rather “the means necessary for the application of the treaty”. In view of this difference, it is considered that the requirement of “impossibility of performance”, referred to by the Commission in the commentary on article 64 and set out in article 43, should be expressly included in the formulation of article 64 (2).

Treaty obligations concerning the peaceful settlement of disputes should not be capable of being suspended by reason only of the severance of diplomatic relations.

Article 68. The United Kingdom Government consider that the operation of paragraph (c) would not be satisfactory. The question of the exact point of time at which a new rule of customary law can be said to have emerged is an extremely difficult one. Moreover, treaties ought not to be modified without the consent of the parties. For these reasons article 68(c) should be deleted.

Article 69. The United Kingdom Government support the view favoured by the Commission that the text of a treaty must be presumed to be the authentic expression of the intentions of the
The concept of the "context" of a treaty is considered to be a useful one, not only with regard to interpretation but also with regard to other draft articles which contain expressions such as "unless the treaty otherwise provides", "unless the contrary appears from the treaty", and "unless it appears from the treaty that ...". As regards the definition of the "context" in paragraph 2, it is considered that the words "including its preamble and annexes" should be omitted on the ground that they constitute parts of a treaty.

The United Kingdom Government support the Commission's proposal in paragraph 1(6).

26. UNITED STATES OF AMERICA

PART I

Transmitted by a note verbale of 17 February 1964 from the Permanent Representative to the United Nations

[Original: English]

The Government of the United States of America commends the International Law Commission and expresses appreciation for the Commission's efforts and contributions in the development of the law of treaties.

The following comments are submitted by the United States Government on the group of draft articles (1-29) on the conclusion, entry into force and registration of treaties submitted by the Commission in its report to the General Assembly. These comments are submitted with the understanding that they do not express the final views of the United States Government regarding the articles involved.

Article 1

The only parts of this article about which any immediate suggestions are made are paragraph 1(b) and paragraph 2.

The provisions of paragraph 1(b), when considered in conjunction with the provisions of article 4, paragraph 4(b), give rise to the question whether the definition should be based upon and limited to form only. If paragraph 1(b) is retained as now drafted the result of the application of paragraph 4(b) of article 4 will be to require full powers in connexion with many informal agreements which at present are signed without any requirement of full powers. Many such informal agreements have the appearance of a formal treaty so far as form is concerned but are not subject to ratification or other subsequent approval. On the other hand, it would seem that agreements which require ratification or other subsequent acceptance, even though in one of the forms specified in the definition, should be excluded from the definition.

In view of the foregoing it is suggested that consideration be given to replacing the definition in paragraph 1(b) of article 1 by a definition reading somewhat as follows:

"(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."

The disclaimer in paragraph 2 seems to be satisfactory as far as it goes. The characterizations and classifications given in paragraph 1 are undoubtedly useful in international law but they may be misleading in that they might be understood by some as a part of international law that had the effect of modifying internal law. For example, the characterization, or designation, or even the form given an international agreement is often of little legal significance. In many instances the name given an agreement or the form in which it is cast is purely a matter of convenience rather than one of legal significance.

In view of this the suggestion is made that paragraph 2 be expanded to read as follows:

"2. 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."

Article 2

This article is useful in calling attention to the necessity of considering the articles in their context. It is also useful in avoiding a question whether the absence of a written text affects the legal force of an international agreement.

Article 3

Paragraph 1

It would appear that unless the provisions of the paragraph are given a broader meaning than that assigned it in the Commission's commentary, it would constitute a narrow limitation on areas emerging to independence. The reference to "other subjects of international law" is so general that it may be of little value. On the other hand, to limit its scope to international organizations, the Holy See, and cases such as an insurgent community is too limiting. 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 conclude a valid international agreement. Where the parent State has entrusted a colony or other subordinate jurisdiction with authority to conduct its foreign relations with respect to certain matters, or specifically authorized it to conclude a particular agreement, the new law of treaties should not preclude commitments entered into in such circumstances from constituting valid international agreements. So far as such 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 article 3, paragraph 1. It would be a cruel paradox if, in the face of the existing movement of new entities toward full independence, areas approaching independence could not be encouraged by the parent State giving them authority to conclude agreements in their own names.

Paragraph 2

No objection is perceived to this paragraph.

Paragraph 3

The use of the word "constitution" in this paragraph may be too limiting, especially in view of the use of the word "constitution" in an apparently different sense in paragraph 2 in connexion with a federal State and the statement in the Commission's commentary that "...the treaty-making capacity of an international organization does not depend exclusively on the terms of the constituent instrument of the organization but also on the decisions and rules of its competent organs. Comparatively few constituent treaties of international organizations contain provisions concerning the conclusion of treaties by the organization; nevertheless the great majority of organizations have considered themselves competent to enter into treaties for the purpose of furthering the aims of the organization."

The reference in the commentary to the dictum of the International Court of Justice in its opinion on "Reparation for Injuries Suffered in the Service of the United Nations" would seem to serve as a good measure of the authority of an international organization to conclude international agreements. The statement in the dictum, which refers to the Charter of the United Nations, reads:

"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."

The word "authority" would seem to be less likely to create confusion than the word "constitution" which is generally understood to be a written document.

Considerable further attention should be given to the wording of this paragraph so that its meaning would be clear without
reference to the commentary. It would be desirable, for example, to be more specific as to what "international organizations" are being referred to. It is assumed that the intention is to limit the phrase to organizations established by Governments, normally by some form of international agreement, and intended to constitute an international entity between the Governments as such rather than merely a forum for exchange of information or discussion by informal groups.

Article 4

Paragraph 1

The provisions of paragraph 1 seem to be highly desirable. So far as they apply to Heads of State and Heads of Government those provisions are fully consistent with long-established practice in relations between nations. The practice is not as fully developed and widespread so far as Foreign Ministers are concerned but no objection is seen to applying the provisions to them.

Paragraph 2

This paragraph reflects widespread practice and its inclusion should help to clarify those cases where some question may exist particularly in international organizations where treaties are formulated.

Paragraph 3

The requirement imposed by the phrase "shall be required" may be too strong in this provision. In some cases very high-level delegations are sent from one State to another to negotiate or draw up a treaty and the insistence upon any particular credentials may in certain circumstances be out of place and perhaps viewed as a discourtesy, particularly in view of the efficiency of modern communications which make it possible to check upon the authority of any given individual. In view of this it may be desirable to replace the phrase "shall be required" by "may be required".

Paragraph 4

Sub-paragraph (a)

This provision is simply declaratory of widespread practice and it may be helpful in resolving any questions that arise, even though such questions may seem unlikely.

Sub-paragraph (b)

This sub-paragraph, when applied in conjunction with paragraph 1(b) of article 1, could, as stated above in the comment on article 1, result in full powers being required for many informal agreements that are now signed without any requirement of documentary evidence of authority. Adoption of the revision of paragraph 1(b) of article 1 as suggested in the comment on article 1 would avoid such a result. If that revision is adopted the phrase "treaties in simplified form" in sub-paragraph (b) should be replaced by "informal treaties".

Paragraph 5

This paragraph may have the effect of encouraging the preparation in the field of many instruments of ratification, accession, approval or acceptance that have long been prepared in foreign ministries. Whether this would be desirable may be questionable because of the likelihood of considerably more mistakes being made in such documents when they are drawn up in the field than when they are prepared in a foreign ministry.

Paragraph 6(a)

The recognition in this provision of full powers of a general or "blanket" character may be very helpful in relieving the pressure imposed upon Heads of State and others by the issuance of numerous full powers. There may be instances, however, where because of the importance of a particular treaty, a State would wish to see a specific authorization. Such special cases could be handled by a request by the State desiring the evidence of specific authorization, a procedure that would not be precluded by paragraph 6(a).

Paragraph 6(b)

The word "shall" in the phrase "shall be provisionally accepted" should be replaced by "may". The acceptance of a letter or telegram pending the receipt of full powers is a relatively recent innovation based purely upon convenience and courtesy and should not be made a requirement of international law.

Article 5

This article is more in the nature of a statement of existing practices. It is purely informative rather than rule-making in its substance. No objection is perceived to the article other than that it may unnecessarily contribute to the length of the convention in which it is included.

Article 6

No objection is perceived to this article. It would seem to serve a useful purpose by stating general rules that may be helpful guidelines and controlling in the absence of agreement upon some other procedure as provided in paragraph (a).

Article 7

It seems questionable whether this article is at all necessary or useful. In its present wording the article is more confusing than helpful.

Placing the initialling as the first of the procedures for authentication seems to overemphasize that procedure far beyond the importance heretofore given it. In most instances the initialling procedure is not used at all. Placing the initialling procedure first would have the effect of adding an additional procedure that is usually dispensed with but which would be considered necessary in many more cases simply because it was included in a convention on treaties. Initialling a text does not always have the effect of making a given text the definitive text of a treaty. In some instances initialling merely constitutes agreement by the representatives negotiating the treaty that they have reached agreement upon a particular text to refer to their respective Governments for consideration. At the same time it may be understood that the governments concerned may decide whether that particular text shall be the definitive text of a treaty to be signed, whether it may be modified before it is signed, or whether any treaty will be concluded at all. In making a determination as to which alternative will be adopted, the governments may decide that further negotiations will be necessary before a definitive text can be agreed upon. (Paragraph 4 of the Commission's commentary on article 10 states, in part, "Initialling is employed for various purposes. One is to authenticate a text at a certain stage of the negotiations, pending further consideration by the Governments concerned.")

Article 8

Paragraph 1 of article 8 seems to contemplate that a general multilateral treaty would be open to all States even though it contained no provision for such—that the terms of the treaty or the established rules of an international organization would have to specifically preclude participation by other States.

Such a provision as that in paragraph 1 of article 8 may not come into play very often because most multilateral treaties as such permit additional States to become parties by signature, signature and ratification, or accession. However, the existing rule, and it is one of the fundamental rules of treaty law, is that in the absence of provision for additional parties to participate it is impossible for them to do so in the absence of agreement by the parties.

It is recognized, of course, that the emergence of many new States to independence requires attentive consideration to the matter of opening many existing treaties to their participation. It is believed, however, that such participation can be accomplished just as
Paragraph 2(a) of article 8 is equally unacceptable. The mere fact that a State participated in formulating and adopting a particular treaty may not necessarily entitle it to become a party. After a considerable period of years has elapsed following the entry into force of a given treaty the parties may find it necessary to make some adjustments with respect to States desiring to become parties. There may be circumstances justifying or requiring such adjustments and it would seem to be a backward step to preclude the parties from taking such action. It may not always be possible to anticipate what change in circumstances may justify a new look at a treaty in connexion with participation by a State that stood idly by for years while the parties, through their initiative, co-operation, and forbearance brought a particular organization or subject of international law to a fruitful state. Inclusion of such a provision as paragraph 2(a) in a general convention on treaties may have exactly the reverse effect of the apparent intention of the provision. It may result in States entering into certain new multilateral treaties including specific provisions limiting the States that may actually become parties. It may also result in some States approving the treaty with reservations to assure that it would have a voice in later participation by States that did not join in the actual development of the application of the treaty.

No objection is perceived to paragraph 2(b) since it merely states that the intention of the parties is to be given effect. Inclusion of such an obvious rule in a convention on the law of treaties could, however, have the effect of establishing a strong presumption that every possible international problem that could arise in connexion such an obvious rule in a convention on the law of treaties could, however, have the effect of establishing a strong presumption that every possible international problem that could arise in connexion would be rendered meaningless by the provisions of article 9, paragraph 2(c). Sub-paragraph (b) would, in effect, permit the amendment of treaties by international organizations. This new concept, rather than providing flexibility in the negotiation and application of treaties, might have the reverse effect of eliciting reservations by the members of the Organization of American States, the parties to the Antarctic treaty, or the parties to the North Atlantic Treaty a "small group" of States? If not, then the provisions of paragraph 1 of article 9 would not necessarily entitle it to become a party. After a considerable period of years has elapsed following the entry into force of a given treaty the parties may find it necessary to make some adjustments with respect to States desiring to become parties. It may not always be possible to anticipate what change in circumstances may justify a new look at a treaty in connexion with participation by a State that stood idly by for years while the parties, through their initiative, co-operation, and forbearance brought a particular organization or subject of international law to a fruitful state. Inclusion of such a provision as paragraph 2(a) in a general convention on treaties may have exactly the reverse effect of the apparent intention of the provision. It may result in States entering into certain new multilateral treaties including specific provisions limiting the States that may actually become parties. It may also result in some States approving the treaty with reservations to assure that it would have a voice in later participation by States that did not join in the actual development of the application of the treaty.

Paragraph 2(c) would be subject to all the comments made with respect to paragraph 2(b) above.

**Article 9**

The comments regarding paragraphs 1 and 2(a) of article 8 apply equally to paragraph 1 of article 9.

There are, however, additional objections to article 9, paragraph 1.

The use of the phrase "multilateral treaty" in paragraph 1 is too indefinite to serve as a descriptive term in any rule of law having such new and broad effects as those contemplated by that paragraph. Apparently the words "multilateral treaty" are intended to include "general multilateral treaty" as defined in article 1, paragraph 1(c) and any group of States other than "a small group of States". How small must a group be to constitute "a small group"? Are the members of the Organization of American States, the parties to the Antarctic treaty, or the parties to the North Atlantic Treaty a "small group" of States? If not, then the provisions of those treaties as to what States could participate would be rendered meaningless by the provisions of article 9, paragraph 1(b).

Sub-paragraphs (a) and (b) of paragraph 1 of article 9 would not only permit— even necessitate—the amendment of a treaty without concurrence of all the parties but would involve another new concept. Sub-paragraph (b) would, in effect, permit the amendment of treaties by international organizations. This new concept, rather than providing flexibility in the negotiation and application of treaties, might have the reverse effect of eliciting reservations by many States in approving a convention on the law of treaties and on other new treaties to be concluded, particularly States whose legislatures must approve treaties before they can become binding.

Paragraph 2 has the obvious defect of uncertainty as to what is meant by the phrase "a small group of States".

Paragraph 3 is consequential upon paragraphs 1 and 2 and procedural for the application of those earlier paragraphs, and could stand as written if the substantive paragraphs were adopted.

Paragraph 4 of article 9 assumes that all treaties are divisible as to parties and can be applied between some of the parties while certain other parties are not in treaty relations with each other. This is not the case in many instances, such as treaties establishing international organizations and treaties for defence. The Charter of the United Nations is a prime example of a treaty where all Members must be in treaty relations with each other.

**Article 10**

It is assumed that the provisions of paragraph 1 of this article are not intended to exclude the possibility of a treaty being adopted by an international body, authenticated by its officers and opened to ratification without any procedure or requirement for signature, such as the International Labour Organisation Conventions. However, even though the provisions of paragraph 1 are permissive, they might give rise in some instances to a question whether they exclude the procedure of bringing the treaty into force without signature. Such a question could be avoided by inserting the phrase "but with respect to which signature is contemplated", between the words "adopted", and "the States".

Sub-paragraph (c) of paragraph 2 of article 10 may cause some difficulty, particularly if signature alone can bring the treaty into force. A State may have to satisfy certain national requirements before it can agree to be bound by a particular treaty and it may find it undesirable or impossible to have its obligations date from the time of signature ad referendum rather than from the date when its national requirements are satisfied. This difficulty could be overcome by adding after the word "treaty" at the end of the present wording the phrase "unless the State concerned specifies a later date when it confirms its signature".

Paragraph 3(a) of article 10 may give rise to some question in connexion with certain documents, such as memorandums or minutes of interpretation that are intended to be binding solely on the basis of initialling. Such documents sometimes accompany a more formal document that is signed and brought into force by signature.

Although the article addresses itself to the procedures by which a State becomes a signatory to a treaty, it may be advisable to include a disclaimer in a fourth paragraph in the article reading somewhat as follows:

"4. 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 initialling completes the document without any signature."

**Article 11**

All of the provisions of this article appear to be in conformity with long and widely accepted practices and procedures on treaty making. The provisions serve a useful purpose in crystallizing principles that are now being followed.

**Article 12**

As the principal effect of this article is that treaties require ratification in the absence of certain circumstances, it may be more appropriate to list first the requirement for ratification than to begin by enumerating the exceptions. Furthermore, the phrase in paragraph 3(b) reading "other circumstances evidencing such intention" might well 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. It is suggested, accordingly, that the second and third paragraphs of article 12 be rearranged and revised to read somewhat as follows:

"2. Ratification of a treaty is necessary where:

(a) The treaty itself expressly contemplates that it shall be subject to ratification by the signatory States;
“(b) The intention that the treaty shall be subject to ratification clearly appears from statements made in the course of negotiations or from other circumstances evidencing such an intention, including, but not limited to the practice of either or both of the States concerned to ratify similar treaties previously concluded between them or concluded by one of them with a third State;

“(c) The representative of the State in question has expressly signed ‘subject to ratification’ or his credentials, full powers or other instruments duly exhibited by him to the representatives of the other negotiating States expressly limit the authority conferred upon him to signing ‘subject to ratification’.;

“3. A treaty shall be presumed not to be subject to ratification by a signatory State where:

“(a) The treaty itself provides that it shall come into force on signature and the treaty does not fall under any of the cases provided for in paragraph 1 above;

“(b) The credentials, full powers, or other instruments issued to the representative of the State in question authorize him by his signature alone to establish the consent of the State to be bound by the treaty, without ratification;

“(c) The intention to dispense with ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention, including in the case of a bilateral treaty, but not limited to, the practice of either or both States concerned to conclude similar treaties previously concluded between them, or with third States, without ratification;

“(d) The treaty is informal.”

**Article 13**

The final determination on the wording and acceptability of this article is dependent upon the acceptability of articles 8 and 9 to which it refers. A question may arise under the provisions of article 13 as now written whether article 11 would permit the admission of new States to membership in the United Nations contrary to the provisions of the Charter, particularly under the provisions of article 9 which may be somewhat broader than, and possibly in conflict in some respects with, article 8. Article 8 appears to be fully in conformity with the Charter of the United Nations. The first paragraph of that article appears to make participation subject to the terms of the Charter. However, paragraph 1(a) of article 9 seems to permit the admission of additional States to participation in a multilateral treaty without regard to the provisions of that treaty. The two-thirds rule in paragraph 1(a) would appear to be in conflict with the provisions of Article 4 of the Charter of the United Nations.

**Article 14**

The acceptability of this article, like article 13, is dependent upon the acceptability of articles 8 and 9 to which it refers. Like article 13, it is completely silent as to the requirements of the particular treaty involved and makes the rules to be established in a convention on the law of treaties paramount.

**Article 15**

This article as a whole is a very desirable one that would clarify and crystallize international practices and procedures to a great extent but a few changes seem necessary for achieving that objective.

*Paragraph 1(a)*

The phrase “a written instrument” in paragraph 1(a) of article 15 should be expanded to read “a signed written instrument” or “a written instrument signed by an appropriate authority”. The phrase as written would seem to condone an infrequent practice of submitting a written instrument that merely bears a stamped seal. Such instruments do not appear to be sufficient evidence of a State’s intention to become bound by an international agreement that requires an instrument of ratification, acceptance or approval.

Paragraph 3 omits any reference to the date of deposit, a detail sometimes omitted in a depositary’s notification to other Governments, and would seem to impose an unnecessary burden on a depositary by the phrase “and the terms of the instrument”. Although the phrase “shall be notified promptly...of the fact of such deposit” might well be understood by many as necessarily including the date, the failure of some depositaries to mention the date of deposit and the importance of the date justifies a specific reference to the date in the requirement on notification.

The requirement that the depositary shall notify “the terms of the instrument” would seem to require that the depositary transmit to each of the many States concerned a copy of the instrument received or at least a statement of its terms. Such a requirement would seem not only unnecessary but could become quite burdensome to the depositary and delay transmission of the notification.

The practice that appears to be most generally followed by depositaries at the present time is to give the States concerned a notification that a given State deposited its instrument of ratification or accession on a certain date. The text of any reservation or understanding included in or accompanying the instrument when it is deposited is included in the notification. Such a notification seems to be acceptable to most States and no need for any change is perceived.

It is suggested, accordingly, that the final clause of paragraph 3 of article 15 be revised to read somewhat as follows: “shall be notified promptly both of the fact and of the date of such deposit”.

**Article 16**

This provision is declaratory of existing international practices and understandings. It appears to be fully in keeping with the requirements of orderly treaty making. It appears, however, that the reference to “article 13” should be replaced by a reference to “article 15”.

**Article 17**

This appears to be a highly desirable provision. So far as it pertains to action following signature or deposit of an instrument of ratification, accession or approval, it reflects generally accepted norms of international law. Moving the obligation back to cover the period of negotiation and drawing up to the time of adoption appears to be an addition not generally considered. Such additional coverage would, however, seem to be an improvement that would permit the States participating in a given negotiation or drawing up to proceed with confidence that their efforts would not be frustrated without some advance warning.

**Article 18**

Section III at the outset should specify that it applies to multilateral treaties. The introduction to the commentary on articles 18, 19 and 20 shows clearly that the articles are intended for application only with respect to multilateral treaties. Articles 21 and 22 are equally limited to multilateral treaties. However, if let stand in the general terms in which it is written, it may be misleading and become a source of confusion so far as bilateral treaties are concerned. Accordingly, section III should be entitled not merely “Reservations” but “Reservations to multilateral treaties”.

The use of the word “formulate” in the introductory clause in paragraph 1 of article 18 is not clear. The word “formulate” normally means, according to the Webster’s New International Dictionary, “To reduce to, or express in or as in a formula; to put in a systematized statement or expression”. However, from the provisions that follow the initial clause in article 18 the word “formulate” in paragraph 1 seems to be intended to permit a State to propose a reservation and to become a party to a treaty with that reservation. This meaning is supported especially by the four exceptions, (a)-(d), enumerated in paragraph 1. Viewed in this sense article 18 is intended to specify that a State has the right to become a party to any multilateral treaty with a reservation provided none of the
first three of the exceptions in paragraph 1 apply. Paragraph 1(d), the fourth of the exceptions, appears from the commentary to be completely subject to the provisions of article 20. The last sentence of paragraph (15) of the commentary in the Commission's report reads:

"Paragraph 1(d) has to be read in conjunction with article 20 which deals with the effect of a reservation formulated in cases where the treaty contains no provisions concerning reservations."

Under such a construction any State could become a party to a multilateral treaty under the provisions of article 20, paragraphs 2(a) and 2(b), if any State party to that treaty accepts the reservation, regardless of objection by other parties and regardless of the "object and purpose of the treaty". Under such provisions many States could have become parties to the Charter of the United Nations with reservations that could have seriously weakened its structure and created chaos on matters of voting, planning, and similar matters requiring co-operative action based upon each Member being in treaty relations with all the other Members.

The provisions of paragraph 1(d) do not seem to take into account the nature or character of a multilateral treaty which in itself would preclude ratification with a reservation that was not accepted by all or at least a large majority of the parties.

Consideration should be given to the inclusion in article 18, paragraph 1(d) of a reference to the character of the treaty involved. This could be accomplished by revising paragraph 1(d) to read somewhat as follows:

"(d) 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

The provisions of paragraph 3 of article 19 regarding tacit acceptance of reservations is of considerable merit so far as concerns admission to a treaty of States making reservations to the treaty. It is questionable, however, whether a State should be presumed to be bound by a new treaty relation that it never expressly approves. At most the State failing to object should be precluded from preventing participation in the treaty by the reserving State but should not be presumed to be in treaty relations with the reserving State unless the specific treaty involved contains provisions on which such an assumption could be based.

Article 20

The provisions of paragraph 1(a) do not clearly take into account the provisions in some treaties that specifically permit reservations and require acceptance by a given number or fraction of the parties. Perhaps the provisions assume that the requirements of the terms of the treaty are to be fulfilled. It would seem desirable to make the provisions more specific by adding to paragraph 1(a) the phrase "unless required by the terms of the treaty".

Paragraph 2

In paragraph (15) of the Commission's commentary on article 18 the following statement is made:

"Paragraph 1(d) has to be read in conjunction with article 20 which deals with the effect of a reservation formulated in cases where the treaty contains no provisions concerning reservations."

Under such a construction the provisions of paragraph 1(d) of article 18 could be rendered almost meaningless. For example, if such a rule had been in force when the Charter of the United Nations was being ratified, any State ratifying with a reservation would have become a Member of the United Nations with that reservation if at least one party had accepted that reservation.

In connexion consideration could be given to the relation of such a rule to the ratification of amendments to the Charter of the United Nations adopted under Article 108 thereof.

Sub-paragraph (a)

The phrase "any State to which it is open to become a party to the treaty" would include a State which, although having the right to become a party, never becomes a party. In such circumstances, acceptance of a reservation by a non-contracting State could not bring the treaty into force between that State and the reserving State. Perhaps the phrase "as soon as the treaty is in force" may have been intended to mean when the treaty is in force between the two States referred to as well as the normal connotation that the treaty has become a binding instrument with respect to any two or more States. In its present wording, however, the intended effect of the provision is not clear.

Sub-paragraph (b)

These provisions 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". Such an implication could lead to endless disagreement and confusion. For example, the reserving State might insist that its reservation was compatible with the object and purpose of the treaty and the objecting State would insist that it was not so. The "incompatibility" criteria might well be employed in connexion with determinations whether a State may be considered a party to a treaty with a given reservation but it seems to be an unnecessarily limited basis for objecting to treaty relations with the reserving State. A State may feel that, because of the type of treaty and the circumstances, a given reservation by another State would render relations under the treaty between the two States inequitable. If each State were not free to decide which reservations it will accept and which reservations it will reject, on such bases as it considers appropriate in its national interest, it would have to accept all reservations except those "incompatible...with the treaty". If the criteria for objecting to a reservation is limited to "incompatibility" the treaty rights expected by a State under a multilateral treaty it ratified with respect to other ratifying States could be changed considerably by reservations without that State's consent. It is doubted that the authors of the provision intend any such result. Such a result would be in serious conflict with the statement in paragraph (4) of the introduction to the Commission's commentary on articles 18, 19 and 20, quoting from the opinion of the International Court of Justice concerning the Genocide Convention, and reading "...no reservation can be effective against any State without its agreement thereto".

Paragraph 4

The phrase "the effect of the reservation" is not clear. It is assumed that the phrase, as well as the paragraph as a whole, is intended to refer to the bearing of the reservation upon the question whether or not the State involved shall be considered as a contracting party to the constituent instrument of the international organization and a member and not to relations between the reserving State and States which object to the reservation.

If it is intended that the paragraph shall mean that the organization shall decide all legal aspects of the reservation and determine what legal relationships shall be established, it would be in conflict with the above-quoted phrase that "...no reservation can be effective against any State without its agreement thereto". When paragraph 4 is read in conjunction with article 21 it would be clear that the rights of the objecting State would be preserved but difficulties may arise and it would be well to avoid them by casting paragraph 4 in more precise terms.

Even if the intention of paragraph 4 were limited to admitting the reserving State to membership in the organization it could create difficulties and confusion. States which objected to the reservation may feel that they should in no manner be bound nor their interests affected by the vote of the reserving State in the making of decisions by the organization.

The example, given in paragraph (25) of the Commission's commentary to article 20, of the handling of the "alleged reser-
Article 21

The acceptability of this article is dependent, at least in part, on the acceptability of the provisions of article 20 to which it refers.

On the assumption that a satisfactory text can be agreed upon for article 20 and articles 18 and 19 to which article 20 is closely related, the following comments are offered on article 21:

Paragraph 1(a)

Sub-paragraph (a) reflects a long recognized and widely accepted principle of international law. In this connexion an interesting question would exist wherever, in the case of a bilateral treaty, one of the parties, giving the approval required by the treaty does so with a condition or reservation that is not expressly accepted or rejected by the other party. The two parties proceed with the application of the treaty but one subsequently asserts that the condition or reservation is of no effect. Should such a condition or reservation be considered as having been accepted by implication? If the entire group of articles under section III is limited to multilateral treaties such a case would not need to be taken into account in articles 19 and 20. However, if section III is not limited to multilateral treaties, consideration should be given to the question of what, if anything, should be provided in articles 19 and 20 with respect to implications arising from acts taken by the parties other than a specific statement of acceptance or objection.

Paragraph 1(b)

The phrase “to claim” in the context of paragraph 1(b) is ambiguous. It is assumed that the phrase “to claim” is intended to permit any State to apply “the same modification...in its relations with the reserving State”. However, without the Commission’s commentary, the phrase may be understood as implying that the first State must notify the reserving State of an intention to invoke the reservation before the former could take advantage of the reservation in its relations with the reserving State. The Commission’s commentary to article 21 states that “a reservation operates reciprocally between the reserving State and any other party, so that it modifies the application of the treaty for both of them in their mutual relations...”.

In view of the lack of clarity in the phrase “to claim” and the purpose of the provision as stated in the commentary, the article would be made clearer and more acceptable if the phrase “to apply” were substituted in place of “to claim”.

Paragraph 2

In some instances States have objected to or refused to accept a reservation but have nevertheless considered themselves in treaty relations with the reserving State. Such a situation is unusual but the present wording of paragraph 2 not only makes no allowance for but appears to preclude such a situation. Perhaps such a situation could be more properly referred to as one in which the provisions to which the reservation applies are rendered ineffectual between the reserving State and the State objecting to the reservations but nevertheless accepting treaty relations. This could be provided for by a third paragraph to article 21 reading somewhat as follows:

3. 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.

Article 22

This article has considerable merit. It may have the effect of encouraging the withdrawal of reservations and thereby contribute to uniformity in treaty relations among the parties. Its principal merit is the clarification afforded by the provision that “Such withdrawal takes effect when notice of it has been received by the other States concerned”. As indicated in the Commission’s commentary on the article, a State should not be held responsible for a breach of a term of a treaty, to which the reservation relates, committed in ignorance of the withdrawal of the reservation.

Article 23

This article as a whole is clearly worded and its merit should be self-evident. As indicated in the Commission’s commentary, the provisions reflect accepted present-day practices that are recognized as desirable.

Article 24

The provisions of this article are in accord with present-day requirements and practices. Provisional entry into force is required in various circumstances where the urgency of a situation makes it desirable to provide for giving effect to the treaty prior to completion of all the requirements for its definitive entry into force.

It may be questioned, however, whether such a provision in a convention on treaties is necessary.

Article 25

A question might well be raised whether the provisions of this article are appropriate for inclusion in the draft articles or whether it should be left to the United Nations. Under Article 102 of the Charter, Members of the United Nations have the obligation to register their treaties with the Secretariat and the Secretariat is responsible for publishing the treaties registered.

Paragraph 1 of article 25 merely reiterates the obligations imposed on Members of the United Nations and upon the United Nations Secretariat by Article 102 of the Charter. That paragraph would not impose any new obligations upon Members or any obligations upon non-members.

Paragraph 2 would not only impose a new obligation upon non-member States but also a new obligation upon the United Nations Secretariat. It is recognized that it would be highly desirable to have all treaties registered with the United Nations and published by it. However, although the present United Nations regulations on registration permit the “filing and recording” of treaties submitted by States not members of the United Nations,
it is questionable whether the draft articles should seek to impose that function upon the Secretariat as an obligation without some recognition that the United Nations consent is necessary. Perhaps before the texts of the draft articles are finally agreed upon arrangements could be made for a resolution by the General Assembly inviting all non-member States to register their treaties and providing for their publication.

More direct recognition of the United Nations role in the adoption of the regulations on registration could be given by replacing the words “in force” in paragraph 3 by the words “adopted by the General Assembly of the United Nations”.

Article 26

This article would serve as a useful guide on procedures for correcting errors in texts. There are a few minor changes in the wording that may be helpful, namely:

Paragraph 1

Although the various procedures outlined would seem to cover all methods that have been followed in the correction of errors, States may wish to follow some other procedure or may not wish to take any action because of the insignificance of the errors involved. In view of this, consideration might well be given to replacing the word “shall” in the phrase “shall by mutual agreement” by the word “may”, making the matter of correcting errors and the procedure permissive rather than mandatory.

Paragraph 1(b)

The word “of” in the phrase “notes of similar instrument” should be replaced by the word “or”.

Paragraph 4

Since Article 102 of the Charter of the United Nations and the regulations on registration do not provide for registration of a treaty until after it has entered into force, the communication to the Secretariat of corrections to texts should not be required before the treaty is registered. As the paragraph stands, States may feel obliged to communicate the corrections to the Secretariat even though the treaty has not entered into force and has not been registered or may never enter into force and never be registered.

In view of these circumstances, consideration should be given to the revision of paragraph 4 along the following lines:

“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.”

It is assumed that a correction embodied in a text at the time the text is registered would require no special mention or separate communication.

Article 27

These provisions would serve as a useful guide in the correction of errors in multilateral treaties for which there is a depositary.

Paragraph 6, article 27, as in the case of paragraph 4 of article 26, may result in notifications of corrections being communicated to the Secretariat prior to registration of the treaty. In view of this, consideration might well be given to the revision of paragraph 6 of article 27 along the lines of the suggested revision of paragraph 4 of article 26 above.

Article 28

This article is declarative of well-accepted practice and its inclusion in the draft articles would serve as a useful guide.

Article 29

This article as a whole should serve as a useful guide with respect to the functions of a depositary. There are, however, several provisions of the article that are questionable.

The provisions of paragraph 3(a) requiring the preparation of any further texts in an additional language as may be required “under...the rules in force in an international organization” may result in an unusual burden being placed upon the depositary if the organization involved should adopt a new rule that the text of a treaty should be prepared in many additional languages. Accordingly, rather than impose an obligation that might be vague in scope, it is suggested that the following phrase be added between the word “organization” and the semicolon: “at the time the depositary is designated”.

The provisions of paragraph 3(b) may impose an unnecessary burden upon the depositary if they are construed as meaning that the depositary is required to transmit certified copies to all States to which a treaty “is open to become parties” regardless of the interest in the treaty on the part of such States. Such a provision may result in certified copies of a treaty being sent to States that not only had no interest in the treaty but would become offended and protest the communication of the copies. In view of this it may be advisable to revise the provision to read:

“(b) 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;”

The revised provision would not prevent a depositary from transmitting certified copies to any State or group of States but it may avoid unnecessarily burdening the depositary and possibly also embarrassment in some instances.

Paragraph 3(c) gives rise to two questions, namely:

(1) The relationship between these provisions and the provisions of paragraphs 4, 5 and 6 of article 29 is not clear. It may be assumed that paragraphs 4, 5 and 6 would be applied before the signature takes place, particularly if it is with a reservation, or before an instrument of ratification is considered as deposited. This relationship is not clear, however, and serious differences and confusion might arise with respect to the precedence to be given the provisions involved. If, for example, an instrument contains a serious error, the submitting Government would expect the depositary to give it an opportunity to correct the error before the instrument is deposited. There may also be reservations which should be considered by the other States concerned before the deposit is considered as completed.

In view of the foregoing, it is suggested that sub-paragraph (c) of paragraph 3 be amended by revising the first part thereof to read:

“(c) Subject to the provisions of paragraphs 4, 5 and 6 of this article, to receive in deposit...”

(2) The phrase “and to execute a procès-verbal of any signature of the treaty or of the deposit of any instrument relating to the treaty” seems to require a formality that is unnecessary and perhaps in many cases would serve no useful purpose. For example, where a treaty remains open for signature and each signatory writes in the date of signature, the treaty itself is sufficient evidence of the action without the execution of any further formal document.

The execution of a procès-verbal of the deposit of instruments would also appear to be an unnecessary requirement. In many instances this requirement would be understood as requiring the execution of a document by both the depositary and the State submitting the instrument, imposing on each a requirement that they felt unnecessary. The United States has served, and continues to serve, as depositary for many important multilateral treaties with respect to which the formality of procès-verbaux in connexion with deposits has been dispensed with and no problems or complaints appear to have arisen from this practice.

The provisions of paragraph 3(d) would appear to be adequate and make the requirement of a procès-verbal unnecessary in all cases unless the State depositing felt otherwise. Such cases could be taken care of as they arise.
In view of the apparent lack of any real need for *procès-verbaux* in such cases it is recommended that the words “and to execute a *procès-verbal* of any instrument relating to the treaty” be deleted from paragraph 3(e).

Paragraph 3(d) reflects the procedures followed with respect to multilateral treaties in general and is a helpful guide and clarification.

The remaining provisions of article 29 appear to be declaratory of existing practices and procedures that are widely accepted and effective. Those provisions constitute useful guides on the matters they cover.

**[Part II]**

*Transmitted by a note verbale of 11 February 1965 from the Permanent Representative to the United Nations*

[Original: English]

The Government of the United States of America commends the International Law Commission and expresses appreciation for the Commission’s efforts and major contributions in the development of the law of treaties.

The following comments are submitted by the United States Government on the group of draft articles (30-54) on the invalidity and termination of treaties submitted by the Commission in its report to the General Assembly. These comments are submitted with the understanding that they do not express the final views of the United States Government regarding the articles involved.

**Article 30**

This article states a conclusion that is normally self-evident, namely, that a treaty concluded and brought into force shall be considered as being in force and in operation with regard to any State that has become a party to the treaty in accordance with its terms, unless the rules spelled out in later articles concerning nullity, termination, suspension, or withdrawal apply. Article 30 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. On the other hand, article 30, by stating what is readily assumed, 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. Article 30 might well be omitted if the convention, or conventions, could be simplified to state only those aspects of the law of treaties which require statement.

**Article 31**

The provisions of article 31, when considered along with the commentary thereon, should prove to be self-enforcing in the course of time. Those provisions should encourage States to take account of the need for precision in meeting the requirements of their internal law. On the other hand, a State which invokes such a provision to withdraw, on the ground that the violation of its internal law was manifest, may very likely—as a political matter—find that in subsequent negotiations, even with different States, it will be required to give assurances that all necessary municipal requirements have been fulfilled.

**Article 32**

Paragraphs 1 and 2 of article 4 of the Commission’s text on the law of treaties provides that Heads of State, Heads of Government, Foreign Ministers, Heads of a diplomatic mission and Heads of a permanent mission to an international organization are not required to furnish evidence of their authority to negotiate or sign a treaty on behalf of their State. Paragraph 3 of that article provides that any other representative shall be required to furnish written credentials of his authority to negotiate. In considering this provision of article 4, we have pointed out that the word “shall” in paragraph 3 could well be replaced by “may”. In many instances, the appointment of a representative to negotiate and draw up a text is preceded by an agreement at high levels on substance. Also, the surrounding circumstances may make clear that a given individual or mission is fully authorized. For these reasons, we do not think that article 4, paragraph 3, should use mandatory terminology.

Also, the reference in article 32 to article 4 is somewhat ambiguous in that 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.

Accordingly, we would suggest the following revision of article 32:

1. 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 afterward confirmed, either expressly or impliedly, by his State.

Paragraph 2 of article 32 deals with the situation in which a State places restrictions upon the authority of its representative. The Commission quite properly provides that a treaty shall not become invalid by reason of failure of the representative to observe those restrictions “unless the restrictions upon his authority had been brought to the notice of the other contracting States”. The only reasonable meaning of this exception to the rule is that effect shall be given to such notice only if it is received before his unauthorized consent to the treaty in the name of his State has been given. The words “prior to his expressing the consent” thus might well be added at the end of paragraph 2.

**Article 33**

Article 33, which deals with the relationship between fraudulent conduct and invalidity, could be a source of controversy and disagreement. It might very well create more problems than it would solve. One of the difficulties which the Commission faced in preparing these articles on invalidity and termination was the paucity of State practice in this area. The absence of State practice is reflected in article 33. A serious question arises as to when an injured State is required to assert the existence of the fraud or of any other disabling factor in order to take advantage of it. Suppose, for example, a State becomes aware of a fraud with regard to a given treaty but waits two, or ten years before asserting it. Should that State have the benefit of this provision? It seems extremely doubtful that it should. If article 33 is retained it might be well to add a clause at the end of paragraph 1 reading somewhat as follows, “provided that the other contracting States are notified within months after discovery of the fraud”. We also believe it would be highly desirable to include in the article a requirement that the fraud be determined judicially.

**Article 34**

The point about limit of time is relevant also to article 34, which deals with error. Some limitation as to the time within which the error must be asserted after its discovery, or after ample time to discover the error, should be included in this provision. Also, as in the case of article 33, provision should be made for judicial determination.

**Article 35**

Paragraph 1 perhaps goes too far in providing that an expression of consent attained by means of coercion “shall be without any legal effect”. It would seem that it would be better to provide that “such expression of consent may be treated by the State whose representatives were coerced as being without any legal effect”. This revision would accomplish three things. First, it would prevent the State which applied the coercion from asserting that coercion as a basis for considering the treaty invalid; we do not think that the coercing State would have this right. Second, the State against which coercion was applied should not be required to take the view that the treaty is “without any legal effect”; the coerced State conceivably may wish to avail itself of the option of ignoring the
coercion if its interest in maintaining the security of the treaty is dominant. Third, a revision along the lines suggested would tend to prevent third States from attempting to meddle in a situation where the parties immediately involved were satisfied to continue with the treaty.

Article 36

Article 36 states that a treaty whose conclusion is procured by the threat or use of force in violation of the principles of the United Nations Charter shall be void. This article, if agreed upon, with certain safeguards, would constitute an important advance in the rule of law among nations. One can agree with the Commission that this rule should be restricted to the threat or use of physical force; it is this threat or use of force which is prohibited by Article 2, paragraph 4, of the Charter. But the Commission should deal in its commentary on the important question of the application of this provision in terms of time. As the Commission points out, the traditional doctrine prior to the League Covenant was that the validity of a treaty was not affected by the fact that it had been entered into under the threat or use of force. With the Covenant and the Pact of Paris, this traditional doctrine came under attack. With the Charter, this traditional doctrine was overturned. It was thus only with the coming into effect of the Charter that the concept of the illegitimacy of threats or uses of force in violation of the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations, was accepted. It is accordingly doubtful whether invalidity due to an illegitimate threat or use of force should be retroactively applied. If it were, the validity of a large number of treaties, notably peace treaties, would be thrown into question. There is even a question whether such a provision should have effect from 1945 or, alternatively, from the conclusion of a convention on the law of treaties incorporating this rule. Retroactivity of the article would create too many legal uncertainties.

Article 37

The concept embodied in these provisions would, if properly applied, substantially further the rule of law in international relations. The provisions should be supported if it can be made certain that they will not conduce to abuse and create undesirable disruption in treaty relations.

The examples given in paragraph (3), points (a), (b) and (c), of the commentary on article 37 are readily acceptable. However, even the application of those examples, if applied retroactively, might possibly result in injustice to one or more of the parties concerned and disrupt beneficial relations on the basis of clearly acceptable treaty provisions included among others that have long been recognized by the parties as obsolete and inapplicable but which, under the concept stated in article 37, would render the entire treaty void.

Without derogating from the merit of the concept embodied in article 37, it is suggested that the Commission reconsider the provisions of that article and all aspects of the manner in which it might be applied, particularly the question as to who would decide when the facts justify application of the rule.

Article 38

The rules spelled out in article 38 seem self-evident and axiomatic. It would appear that this article could well be omitted if the convention on the law of treaties were to be simplified. However, if it should be the consensus that an article of this character is desirable, its terms as written appear to be satisfactory.

Article 39

Article 39 has the distinct merit of overcoming the alleged presumption that a treaty may be denounced unilaterally where there is no provision for denunciation. However, the intention of the parties to permit denunciation or withdrawal should be a clear intention and this should be emphasized by including the word "clearly" before the word "appears".

Article 40

The provisions of paragraph 1 of article 40 are declaratory of existing principles of international law. The requirement that the agreement for termination be by all the parties emphasizes the cardinal principle that a State cannot be deprived of its legitimate treaty rights without its consent.

On the other hand, paragraph 2 embodies a new concept. It provides that the parties to a multilateral treaty can, by unanimous agreement among themselves, terminate the treaty only if at least two thirds of all the States which drew up the treaty consent to termination if that termination is to be effected before the expiration of a stated number of years. This provision would permit parties to a multilateral treaty to terminate it by agreement, without regard to any of the provisions in the treaty regarding termination, if—after the expiration of the given period of years—they were to find it not feasible to continue applying the treaty because of the failure of other States to join or for other reasons. There might be great difficulty in reaching agreement upon the number of years which would be practical with respect to all treaties. (Such a figure is to be inserted in paragraph 2.) Therefore, it is suggested that consideration be given to amending the final clause in the following manner: "...or, after the expiration of such a period as the treaty may provide, the agreement only of the States parties to the treaty shall be necessary".

Article 41

Article 41 concerns the termination of an earlier treaty which is implied from entering into a subsequent treaty. The provision is sound in principle. Although its concept is self-evident, it would be helpful in resolving apparent questions in this area.

Article 42

Paragraph 1 of article 42 states that a material breach of a bilateral treaty by one party entitles the other party to invoke that breach as a ground for terminating the treaty or suspending its operation in whole or in part. This concept is widely supported, but apparently seldom invoked. It should be crystalized as a rule of conventional law. To do so would go far toward eliminating much controversy in this area.

Paragraph 2 of article 42 likewise has merit in that it would discourage treaty violators but it requires some clarification. The paragraph seems to a certain extent to ignore the differing varieties of multilateral treaties. Paragraph 2 would well be applied to law-making treaties on such matters as disarmament, where observance by all parties is essential to the treaty's effectiveness. But we question whether a multilateral treaty such as the Vienna Convention on Consular Relations—which is essentially bilateral in its application—should be subjected to the provisions of paragraph 2 as it is now worded. Let us take an example. If part A refuses to accord to part B the rights set forth in the Consular Convention, should parties X, Y, and Z—in addition to party B (the wronged party)—have the right to treat the convention as suspended or no longer in force between themselves and party A? Another example: an international convention for the exchange of publications. Assume that a first party violates the convention in its relations with a second party. Should a third party have the right to suspend or terminate the convention in its relations with the first party? We think that these examples show that certain of the provisions of article 42 could have an undesirable effect.

Termination or suspension in the case of a multilateral treaty should follow the rule applicable to bilateral treaties. That is, an injured party should not be required to continue to accord rights illegally denied to it by the offending party. This could be accomplished by revising paragraph 2(a) to provide that a material breach of a multilateral treaty by one party entitles: "Any other party,
whose rights or obligations are adversely affected by the breach, to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State”. Similarly, we would suggest revising paragraph 2(b) to read: “The other parties whose rights or obligations are adversely affected by the breach, either...”, and so forth.

It is hoped that Governments and the Commission will review this matter with care.

Article 43

Article 43 concerns supervening impossibility of performance. Although this provision may be highly desirable as far as it goes, a question exists as to what rules should govern in a case in which certain provisions of the treaty have been executed, while others remain executory. For example, suppose that State A makes a cession of land to State B on the condition that State B will forever maintain and permit the use of a navigable channel in the river. Now if the river dries up, or its course is seriously altered by a flood, rendering the river permanently useless for the purposes of the agreed navigation, should State B continue to enjoy the benefits of the cession while State A is deprived of its rights under the treaty or does the cession simply become revoked? This question leads to the suggestion that article 43 might contain a new, a fourth, paragraph, somewhat along the following lines:

4. The State invoking the impossibility of performance as a ground for terminating the treaty or suspending the operation of a treaty may be required to compensate the other State or States concerned for benefits received under executed provisions.

Article 44

The concept of rebus sic stantibus embodied in article 44 has long been of so controversial a character and recognized as being so liable to the abuse of subjective interpretation that the United States has reservations about its incorporation in the draft, at any rate in its present form. In the absence of accepted law, it seems highly questionable whether this concept is capable of codification. Moreover, we doubt whether its incorporation, at least in its present form, would be a progressive development of international law. The doctrine of rebus sic stantibus would have unquestionable utility if it were adequately qualified and circumscribed so as to guard against the abuses of subjective interpretation to which it lends itself. If it is applied with the agreement of the parties to the treaty, so as to give rise to a novation of the treaty, it would certainly be acceptable. If, failing that, an international court or arbitral body were entrusted with making a binding, third-party determination of the applicability of the doctrine to the particular treaty, that, too, would be acceptable. But, while there is opportunity to consider the question further, particularly in the light of comments of other Governments, the United States desires at this juncture to place on record its opposition to article 44 as it is now drafted.

Article 45

Article 45 provides that a treaty becomes void and terminates when a new peremptory norm of general international law is established in conflict with the treaty. The Commission’s commentary notes that this is a logical corollary of the jus cogens rule of article 37. But considerable further study is needed to decide whether this “logical corollary” is workable as well as to decide whether, as suggested in the comments on article 37, the jus cogens rule as presently embodied in the draft is workable. The determination as to just when a new rule of international law has become sufficiently established to be a peremptory rule is likely to be extremely difficult.

Furthermore, it appears that under the provisions of article 37 peremptory norms developed after the conclusion of many early treaties may void the provisions of those treaties if, as appears to be the case, the provisions of that article apply retroactively. It appears that the article could not be accepted unless agreement is reached as to who is to define a new peremptory norm and determine how it is to be established.

Article 46

The provisions of article 46 would seem useful in clarifying, to some extent, the manner in which the articles to which it refers are to be applied. However, the expressions “33 to 35” and “42 to 45” may be somewhat misleading, even though their meaning can be ascertained by a study of the text of the articles to which they refer. It would seem that in order to clearly express the intention of the drafters, expressions such as “33 through 35” and “42 through 45” would be more appropriate.

It also is believed that, if the general concept of article 37 is to be retained, it will be found after some consideration of its implications that a second paragraph like that in article 45 should be added, and that article 37 should be among the articles referred to in article 46.

Article 47

Provisions along the lines of article 47 are essential to prevent abuses of the rights set forth in the articles to which it refers. It cannot prevent all abuses which may arise, but it does help to support the principle that a party is not permitted to benefit from its own inconsistencies.

There are two matters of drafting in connexion with article 47. First, it would seem that the references involved would be clearer if the articles were referred to as “articles 32 through 35” and “articles 42 through 44”.

Second, it would seem advisable to (a) either place article 47 ahead of the other articles to which it refers or (b) include in each of those articles a reference to article 47 in order to avoid those articles being considered out of context.

Article 48

The United Nations, as a party in interest, will recognize that article 48 of the draft has particular importance. The text concerns the very special case of treaties which are the constituent instruments of international organizations or which have been drawn up by international organizations. The text recognizes that an international organization must proceed in accordance with its established rules in reaching decisions and taking action. The United States emphatically agrees with this principle. But considerable study is apparently necessary to determine whether, and to what extent, a general convention on the law of treaties can easily include a provision such as article 48. The phrase “subject to the established rules of the organization” might, for example, be construed as meaning that the organization was completely free to ignore the provisions covered in section III if it chose to do so on the basis of some established rule of the organization.

Article 49

Article 49 constitutes a useful clarification. It should have the effect of removing any uncertainty or doubt concerning the authorization, or evidence of authorization, for taking the actions mentioned in the article.

Article 50

Paragraph 1 of article 50 provides that notice of termination of a treaty under a right expressly or impliedly provided for in that treaty must be communicated, through the diplomatic or other official channel, to every other party to the treaty, either directly or through the depositary. This provision is sound. It correctly states the procedures and principles normally applied. Paragraph 2 of article 50 states that notice to terminate, for example, may be revoked at any time before the date on which it takes effect unless the treaty otherwise provides. It should be pointed out that the reason for specifying a given period of time before a notice of termination becomes effective is to allow the other party or parties to adjust to the new situation created by the termination.
Accordingly, the State receiving the notice in the case of a bilateral treaty is entitled to proceed on the basis that the notice will stand and will prepare to make such readjustments as may be necessary. Perhaps the other party to the bilateral treaty would have given a notice of termination if the first party had not done so.

In the latter circumstances a party to a bilateral treaty might prevent the giving of a notice of termination by the other party by giving such notice itself and then withdrawing the notice with a view to prolonging the treaty beyond the period contemplated by the other party. Such a situation should not be encouraged.

The most reasonable rule would appear to be that, where notice of the termination would bring the treaty to an end with respect to all other parties, the withdrawal of the notice must be concurred in by at least a majority of the other parties to the treaty. For this reason, it is suggested that paragraph 2 of article 50 be revised to read: "Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect, except in a case in which the notice would have caused the treaty to terminate with respect to all parties." We would then add a new sentence to paragraph 2, namely: "Where the notice would cause the treaty to terminate with respect to all parties, the notice of withdrawal will not be effective if objected to by the other party in the case of a bilateral treaty, or if objected to by more than one third of the other parties in the case of a multilateral treaty."

Article 51

The International Law Commission considers in its commentary that this is a key article. It points out that a number of the members of the Commission thought that some of the grounds under which treaties could be considered invalid or terminated could involve real danger for the security of treaties if allowed to be arbitrarily asserted in face of objection by other parties. It is regretted that the Commission did not find it possible to incorporate a rule subjecting the application of these articles to compulsory judicial settlement by the International Court of Justice. It would appear that the rule of law—particularly in an area such as the law of treaties—argues most strongly for compulsory reference to the Court. The Commission did not dispute "the value of recourse to the International Court of Justice as a means of settling disputes arising under the present articles". As it is, it is not certain that the provisions of article 51 will supply the safeguards that may be required in connexion with some of the articles to which they apply. A requirement of compulsory arbitration or judicial settlement in the absence of settlement of differences by other means seems necessary. It is hoped that further consideration will be given to this matter.

Article 52

The provisions of article 52 would appear to be a useful clarification of the consequences resulting from the nullity of a treaty.

Article 53

The provisions of article 53, like those of article 52, would appear to be a useful clarification of the consequences of the termination of a treaty.

Article 54

There may be a question whether article 54 is intended to apply as broadly as it appears. For example, if one party to a multilateral treaty suspends the application of the treaty with respect to one other party, only the latter party should be relieved of the obligation to apply the treaty unless the nature of the treaty were such that the suspension affected the immediate interests of all parties. In view of this, it is recommended that consideration be given to the wording of paragraph 1(a) along the following lines:

"(a) Shall relieve the parties affected from the obligation to apply the treaty during the period of the suspension."

[PART III]

Transmitted by a note verbale of 10 January 1966 from the Permanent Mission to the United Nations

Original: English

The following comments are submitted by the United States Government on the group of draft articles, numbers 55-73, on the application, effects, modification and interpretation of treaties submitted by the International Law Commission in its report to the General Assembly. These comments are submitted with the understanding that they do not express the final views of the United States Government regarding the articles involved.

Section I. The application and effects of treaties

Article 55

Pacta sunt servanda

The United States is in full agreement with the Commission's comment that the rule that treaties are binding on the parties and must be performed in good faith is the fundamental principle of the law of treaties. This rule is the foundation stone upon which any treaty structure must be based. Without this rule and its faithful observance by parties to treaties the remaining rules would be of little value. It is the keystone that supports the towering arch of confidence among States. We feel that this cardinal rule is clearly and forcefully defined in article 55.

Article 56

Application of a treaty in point of time

Article 56, which deals with the application of a treaty in point of time, is helpful in clarifying a rule that should be obvious but which, history has shown, is not always followed. The first paragraph of the article will not only be helpful to governments in the correct consideration of treaty rights and obligations in point of time but will also remind the drafters of new treaties that a retroactive effect can be accomplished by a provision specifically designed or clearly intended for that purpose.

Paragraph 2 of article 56, like the provisions of article 53 in part II, seems to state a self-evident rule. However, the Commission points out in paragraph (7) of its commentary regarding article 56 that "In re-examining article 53 in connexion with the drafting of the present article, the Commission noted that its wording might need some adjustment in order to take account of acquired rights resulting from the illegality of acts done while the treaty was in force". There is a further need for adjustment which arises with respect to acquired rights resulting from the operation of the treaty. For example, a treaty right to property received by inheritance, together with the right to sell the property within three years and withdraw the proceeds, should not be defeated by the termination of a treaty if the right to the property was acquired prior to such termination. Part of this adjustment might be accomplished by replacing the phrase "unless the treaty provides otherwise" as used at the end of paragraph 2, by the phrase "unless the contrary appears from the treaty".

Article 57

The territorial scope of a treaty

The definition of the scope of application of a treaty as extending to the entire territory of each party unless the contrary appears from the treaty seems to be a rule that is self-evident.

An important question raised by the wording of the provision is the effect of such a provision upon treaties recognizing rights and imposing obligations with respect to such areas as the high seas. And although it is clear from the Commission's commentary that the application of a treaty is not necessarily confined to the territory of a party, the provision standing alone may imply that such is the intention. It would seem that this question would be resolved by wording the article as follows:
“1. A treaty applies throughout the entire territory of each party unless the contrary appears from the treaty.

“2. A treaty also applies beyond the territory of each party whenever such wider application is clearly intended.”

Article 58
General rule limiting the effect of treaties to the parties
The general rule stated in article 58 limiting the effects of treaties to the parties is, as stated in the Commission’s commentary, the fundamental rule governing the effect of a treaty upon States not parties. The existence of a difference of views among the learned members of the Commission on the matter of a treaty of its own force conferring rights upon third parties is evidence of the need for a precise provision on the subject.

Article 59
Treaties providing for obligations for third States
Article 59 regarding treaties providing obligations for third States wisely includes the important proviso that a State in question has expressly agreed to be bound. A question might exist, however, as to whether the concept embodied in paragraph 3 of the Commission’s comment on article 59 is apparent in the text of that article, namely, that treaty provisions imposed upon an aggressor State would fall outside the principle laid down in that article. The commentary makes the intended scope of article 59 clear in this respect but, without the commentary, the present text of the article may be somewhat misleading. There exists also an open problem as to the time at which assent by the third party must be indicated.

Article 60
Treaties providing for rights for third States
The provisions of the first paragraph of article 60 as presently worded might be understood as preventing two or more States from dedicating, by a treaty, a right to all States in general without such dedication being subject to the condition that each State wishing to exercise the right has first assented thereto. In view of this possible implication, it is suggested that consideration be given to rewording the first paragraph of article 60 somewhat along the following lines:

1. A right may arise for a State from a provision of a treaty to which it is not a party if the parties intend to accord that right either (a) to the State in question or to a group of States to which it belongs and the State expressly or impliedly assents thereto, or (b) to States generally.

Paragraph 2, requiring that a third State exercise a right in accordance with the conditions for its exercise provided in the treaty or established in conformity with the treaty, expresses a self-evident rule. The inclusion of such a rule as part of the provisions would seem highly desirable as a useful guide both in the formulation of treaties and in their application. However, further consideration of the over-all effect of the article is required.

Article 61
Revocation or amendment of provisions regarding obligations or rights of third States
Such a rule may give rise to more problems than it would resolve. It may, for example, seriously hamper efforts of original parties to revise or even terminate a treaty in its entirety. Changes in circumstances may result in the principal benefits flowing almost wholly or completely to the third State. The parties primarily concerned should not be impeded in their desire to reach a new agreement between themselves, especially if the third State has undertaken few, if any, reciprocal obligations under the treaty. A question arises as to what the situation would be if one of the parties to the treaty gives a notice of termination of the treaty in accordance with its provisions. Would the provision in the treaty permitting termination be evidence of the revocability of the provision regarding an obligation or a right for a State not a party? Considerably more study of this rule is required.

Article 62
Rules in a treaty becoming generally binding through international custom
The disclaimer in article 62 that the rules in articles 58-60 do not preclude rules in a treaty from becoming generally binding through international custom seems desirable. Articles 58 through 60 standing alone might be looked upon as a digression from the well-established practice of recognizing that rules contained in a treaty sometimes extend beyond the contracting States. Such recognition is in no manner in conflict with the concepts embodied in articles 58 through 60 because, as stated in the Commission’s commentary, the rule embodied in a given treaty may come to be generally accepted as enunciating rules of customary law. Once the rules have been generally accepted they extend beyond the parties to the treaty and are no longer subject to the requirements of treaty law.

Article 63
Application of treaties having incompatible provisions
This article as a whole enunciates rules long and widely accepted in the application of incompatible treaties and is a valuable clarification. Paragraph 5 is especially important in calling attention to the fact that by entering into a later treaty a State cannot divest itself of treaty obligations under an earlier treaty with a State that does not become a party to the later treaty. Although a multilateral treaty may provide that it replaces and terminates an earlier multilateral treaty as between States parties to the later treaty, it cannot justify those parties taking action with respect to each other that is incompatible with their obligations to parties to the earlier treaty which have not become parties to the later treaty.

Article 64
The effect of severance of diplomatic relations on the application of treaties
Paragraph 1 of article 64 states a rule that is of long standing and widely accepted but is sometimes overlooked. It is a valuable clarification and reminder of a necessary rule for the effective maintenance of the obligations and rights embodied in treaties.

The rule enunciated in paragraph 2 requires careful study. Although the normal means necessary for the application of the treaty may be lacking in a case where diplomatic relations are severed, there may be other avenues for satisfying, in part at least, the requirements of the treaty. In paragraph 3 of the commentary on the article, the expression “supervening impossibility of performance” is used. It is questionable whether that concept is clearly reflected in either paragraph 2 or in paragraph 3 of the article. A further paragraph reading as follows may more fully reflect the intention of the Commission as set forth in its commentary and serve to avoid abuse of the provisions of paragraphs 2 and 3:

“4. The suspension may be invoked only for the period of time that application is impossible.”

It is questionable, however, whether this addition would avoid the abuses that might occur under paragraphs 2 and 3. The better solution would be to retain only the paragraph numbered 1, leaving the subject matter of the remaining paragraphs to be governed by other provisions of the draft articles, such as paragraphs 2 and 3 of article 43. However, further consideration of the over-all effect of the rules in paragraphs 2 and 3 is required.
Section II. Modification of treaties

Article 65

Procedure for amending treaties

The first sentence of this article expresses a rule that seems self-evident but should serve as a useful guide in reminding those considering the amendment of a treaty that the amending process involves the same substantive principles as the making of a new treaty, namely, agreement between the parties.

The second sentence applies the rules set out in part I to a written agreement between States, intended to amend a treaty between them, with two exceptions: (1) if the treaty provides otherwise and (2) if the established rules of an international organization provide otherwise. Where the treaty "provides otherwise" the parties to it have made express provision concerning the amendment of the treaty and it follows that their intent in this respect should govern. The element of agreement with respect to amendment is fully satisfied because in the treaty itself the parties have agreed upon the manner in which amendment may be effected. The reasons for the inclusion of the second exception is not, however, apparent from the text of the provision nor from the commentary.

Questions may arise whether the first or the second of the two exceptions shall prevail where a treaty concluded under the auspices of an international organization contains express provisions regarding the manner of amendment and the rules of the international organization subsequently provide for some other manner of amendment.

It is recognized that, where the constituent instrument of an international organization embodies rules regarding the amendment of that instrument or of treaties concluded under the auspices of that organization, those rules represent agreement of the parties upon the manner in which such instrument or treaties shall be amended. New treaties drawn up under the auspices of international organizations or any other new treaties may contain express provisions with regard to their amendment which, under the exception with respect to the provisions of a treaty, would properly govern amendment of those treaties. The substance of those provisions may be based, at least in part, upon the established rules of one or more international organizations. It may also be agreed that, by reference in a treaty to the rules of an international organization, certain rules shall govern the amendment of the treaty. In all such cases the crucial requirement is the agreement of the parties that certain rules shall govern amendment of the treaty.

Difficulty may arise, however, in the case of treaties that have been concluded outside an international organization and are to be amended by agreements concluded under the auspices of an international organization, and in the case of treaties which contain no provision for amendment and are concluded under the auspices of an international organization which subsequently develops rules that would permit amendment without agreement of all the parties. A question arises whether the provisions of article 65 with respect to international organizations would prevail over the provisions of article 67 regarding agreements to modify multilateral treaties between certain of the parties only.

Under the provisions of article 65 it might be contended that, because of the inclusion of the reference therein to "the established rules of an international organization", an amendment of a treaty, under the auspices of an international organization, could deprive some of the parties to that treaty of rights under it and relieve States that became parties to the amendment from obligations to parties to the treaty that did not approve the amendment. Although it is not believed that any such result is intended, the inclusion of the reference to international organizations seems to imply that a separate body of treaty law has been and can continue to be formulated and applied by those organizations, not only with respect to the amendment of treaties concluded under the auspices of those organizations but other treaties as well.

In view of the foregoing comments regarding the inclusion of the reference to international organizations in the second sentence of article 65, the Government of the United States must reserve its position with respect to that sentence.

Article 66

Amendment of multilateral treaties

The provisions of article 66 as a whole may serve as a useful guide in the consideration of the formulation of amendments to a multilateral treaty.

The proviso in paragraph 1 reading "subject to the provisions of the treaty or the established rules of an international organization" is appropriate so far as it applies to treaties but the same comments apply with respect to the inclusion of the phrase "established rules of an international organization" in article 66 as are mentioned in connexion with its inclusion in article 65 above. The same applies to the use of the phrase in paragraph 2. The Government of the United States must, accordingly, reserve its position with respect to the inclusion of that phrase in paragraphs 1 and 2 of article 66.

The provision in paragraph 3 that a State which signs an amendment is precluded from protesting against the application of the amendment may be too severe. At the end of paragraph (13) in the Commission's commentary on paragraph 3, the statement is made, with reference to a State signing but not ratifying an amendment, that "It is precluded only from contesting the right of other parties to bring the amendment into force as between themselves". Paragraph 3 seems to go much further. It addresses itself to the "application of an amending agreement", "Application" would include the giving of effect to provisions in the amending agreement that derogate from or are otherwise incompatible with the rights of parties under the earlier agreement. Under such circumstances the rule would have the effect of discouraging States from signing the amendment if they were not certain that they could ratify it. In some instances the application of the rule may lead States to consider it necessary to go through their entire treaty-making procedures, including approval by a legislature or parliament, before proceeding to sign. Signature, under such a rule, would constitute a waiver of treaty rights, a matter that normally requires considerably more time and study than is involved in signing subject to or followed by ratification.

Article 67

Agreements to modify multilateral treaties between certain of the parties only

This article appears to serve the useful purpose of further developing the principle that two or more parties to a multilateral treaty cannot, by a separate treaty, derogate from their existing obligations to the other parties to the multilateral one. It is a useful rule that should serve as a guide to parties contemplating a special treaty as well as a guide to other parties who are interested in protecting their rights under an existing multilateral treaty.

Article 68

Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law

Both paragraphs (a) and (b) of this article reflect long-standing and widely accepted practice. Paragraph (c), although literally accurate and in keeping with the long-recognized principle that treaties are to be applied in the context of international law and in accordance with the evolution of that law, may lead to serious differences of opinion because of differing views on what constitutes customary law. In view of this it may be advisable to omit paragraph (c), leaving the principle to be applied under the norms of international law in general rather than to have it included as a specific provision in a convention on treaty law.
Section III. Interpretation of treaties

**Articles 69-71**

The provisions of articles 69 through 71 regarding the interpretation of treaties would seem to serve a useful purpose. There are, however, a number of questions that arise from the consideration of those articles. There is, for example, a question whether the provisions should be stated as guidelines rather than as rules. There is the question whether the provisions should enumerate other means of interpretation in addition to those mentioned. It is assumed that the order in which the means of interpretation are stated in those articles has no significance respecting the relative weight to be given to each of those means.

However, as presently drafted the ordinary meaning rule apparently is given primacy, even though there may be, for example, an agreement between the parties regarding interpretation which requires that terms be given some special or technical meaning. This possible conflict could be avoided by listing in paragraph 1 six rules of interpretation *seriatim*: (a) ordinary meaning; (b) context; (c) objects and purposes; (d) rules of international law; (e) agreement regarding interpretation; (f) subsequent practice in application. This would eliminate paragraph 3. If context is to be defined, it is suggested that the present paragraph 2 could be improved. It is unclear, for example, whether a unilateral document is included in the phrase one on which several but not all of the parties to a multilateral instrument have agreed.

With respect to the formulation of the six rules, the present texts, mutatis mutandis, appear satisfactory except that use of the term “general” before “international law” could add an element of confusion and should be eliminated. The comment refers to “the general rules of international law” which may or may not be the same concept. The use of the word “all” in the phrase in paragraph 3(b) reading “establishes the understanding of all the parties regarding its interpretation” could be construed as requiring some affirmative action by each and every party. A course of action by one party which is not objected to by other parties would appear worthy of consideration as a substantial guide to interpretation.

Article 70 may be unduly restrictive with respect to recourse to preparatory work and other means of interpretation. A treaty provision may seem clear on its face but, if a dispute has arisen with respect to its meaning, recourse to other means of interpretation should not be made dependent upon the existence of the conditions specified in (a) and (d) of that article. It is suggested that in the event of a dispute on interpretation of a treaty provision, recourse to further means of interpretation should be permissible if the rules set forth in article 69 are not sufficient to establish the correct interpretation.

The use of the word “conclusively” in the provisions of article 71 may be unnecessary. The word “established” standing alone is definite and precise. Adding the word “conclusively” may cause confusion in many cases.

A general comment with respect to the articles on interpretation is that further study should be given to the relationship of these articles with certain other draft articles which, while they may not technically be rules of interpretation, nevertheless have, at the least, interpretive overtones. These articles include 43 on supervening impossibility of performance, 44 on fundamental change of circumstances, and 68 on modification of a treaty by a subsequent treaty, by subsequent practice or by customary law.

**Article 72**

*Treaties drawn up in two or more languages*

Paragraph 1 of this article states a widely accepted rule that has proved effective. Clause (b) of paragraph 2 may be of questionable utility. When the negotiators have an opportunity to examine and concisium, or disagree with, a version which they personally authenticate, there is a basis for considering them as having accepted it as accurate. However, a provision that a version drawn up separately, and with respect to which the negotiators have no opportunity to make suggestions shall also be authoritative, would introduce a new factor that should not be crystallized as a part of the law of treaties. If any such non-authenticated version is to have authenticity it should be made so by the provisions of the treaty to which that version applies or by a supplementary agreement between the parties.

Because of these considerations, it is recommended that the whole of sub-paragraph (b) regarding “the established rules of an international organization”, be deleted.

**Article 73**

*Interpretation of treaties having two or more texts*

Although the use of the word “texts” is becoming more frequent in the wording of treaties written in two or more languages, it is questionable whether that word aptly describes the parts involved. A treaty as such is more properly conceived of as a unit, consisting of one text. Where that text is expressed in two or more different languages, the several versions are an integral part of and constitute a single text. The use of the word “texts” seems, on the contrary, to derogate from the unity of the treaty as a single document.

It is suggested accordingly that the heading for article 73 be replaced by one based upon the heading of article 72 and reading somewhat as follows:

“Interpretation of treaties drawn up in two or more languages.”

In line with the foregoing, it is suggested that paragraph 1 of article 73 be revised to read as follows:

“1. Each of the language versions in which the text of a treaty is authenticated is equally authoritative, unless the treaty itself provides that, in the event of divergence, a particular language version shall prevail.”

This rewording avoids the use of the word “texts” in referring to the various language versions in which a treaty is done and avoids the use of the word “different” when the emphasis should be upon similarity and equality.

Similarly, it is suggested that paragraph 2 of article 73 be revised to read as follows:

“2. The terms of a treaty are presumed to have the same meaning in each of the languages in which the text is authenticated. Except in the case referred to in paragraph 1, when a comparison between two or more language versions discloses a difference in the expression of a term or concept and any resulting ambiguity or obscurity is not removed by the application of articles 69-72, a meaning which so far as possible reconciles the two or more language versions shall be adopted.”

**27. YUGOSLAVIA**

*[PARTS I AND II]*

*Transmitted by a letter of 31 December 1965 from the Chief Legal Adviser of the Ministry of Foreign Affairs*

*[Original: French]*

**[Part I] Article 0**

In view of the importance and scope of international agreements concluded by international organizations, which were taken duly into account in part I of the draft convention as adopted in 1962, the Government of the Socialist Federal Republic of Yugoslavia considers it desirable that the future convention on the law of treaties should not be confined exclusively to treaties concluded between States, but should cover also agreements concluded by other subjects of international law, such as international organizations.
As is well known, States and international organizations are linked by more than 1,000 treaties; these, therefore, are of great significance, particularly having regard to the fact that it is realistic to expect such a large number of contractual relationships to give rise to problems and difficulties which will have to be resolved within a reasonable period of time.

Finally, the Commission itself, recognizing the importance of treaties concluded by international organizations, deals in its article 2 with the legal force of treaties concluded between international organizations and other subjects of international law.

Article 1

The Yugoslav Government considers that it would be advisable to broaden the definition of the term “treaty” so that it would specifically include also the cases covered by article I(b) of the earlier draft, namely treaties in simplified form.

The provisions regarding the definition should perhaps be re-examined.

Articles 8 and 9

With regard to the participation of States in general multilateral treaties, the Yugoslav Government considers that such treaties should be open to signature by all States, since this is in the interests not only of the international community but also of the States parties to the treaty.

The exclusion of various States from participation in general multilateral treaties is not only contrary to the generally recognized principle of the sovereign equality of States but would also constitute discrimination inconsistent with the principles and purposes of the United Nations Charter.

Article 12

The Yugoslav Government considers that the ratification of treaties is based on democratic principles and that it would be desirable to provide for ratification as a residuary rule in the convention on the law of treaties.

It would, indeed, be desirable that the principle that ratification is unnecessary should only be applied in exceptional cases, where the particular treaties contain an express provision to that effect or if such was the intention of the signatory States.

However, if the treaty contains no special provisions concerning ratification, it should be considered that ratification is necessary; article 12 of the draft should therefore be supplemented accordingly.

[Part II]

The substance of the provisions concerning defects in the consent given by contracting parties, provisions which appear in articles 33, 34 and 35 of the draft and seek to ensure that the genuine will of the contracting parties is expressed under the conditions of normal negotiations, is in conformity with the present-day needs of the international community.

Articles 37 and 45

In the Yugoslav Government's view, the International Law Commission was right to proceed from the hypothesis that there exist peremptory norms of international law (jus cogens).

The two articles mentioned above underline the fact that there exist peremptory norms of international law which must be respected by States when they conclude treaties.

Nevertheless, as members of the international community, States participate in the creation of the international legal order, which changes, evolves and progresses, as do the peremptory norms.

Within the framework of a given international order, treaties which are incompatible with this order should be regarded as contrary to law, and in the same way treaties which are incompatible with a new peremptory norm of general international law, within the meaning of article 45 of the draft, should be void.

Article 39

It would be desirable for the provisions of this article relating to treaties containing no denunciation clause to be worded more precisely.

It is difficult to imagine that in the circumstances of the world today, there could be treaties extending in perpetuity. It would therefore be appropriate not only to provide for the possibility of denouncing treaties of this kind but also to lay down the procedure for their denunciation, in view of the historical experience connected with contractual relationships of a perpetual nature.

[Part III]

Transmitted by a letter of 9 April 1966 from the Chief Legal Adviser of the Ministry of Foreign Affairs

[Original: French]

Article 55

The Government of the Socialist Federal Republic of Yugoslavia considers that the text of article 55 of the draft convention on the law of treaties which embodies one of the fundamental principles of international law—pacta sunt servanda—is satisfactory.

However, the commentary on this article should include more detailed explanations concerning the substance and effects of the pacta sunt servanda principle in relation to other fundamental principles of international law laid down in the United Nations Charter and other international instruments, particularly where jus cogens is concerned.

Application of the pacta sunt servanda principle would not in fact suffice to ensure observance of an international treaty in a case where peremptory norms of international law or other accepted general rules of international law were not observed: e.g., in case of nullity, absence of mutual agreement of the contracting parties, etc. Accordingly, the conscious performance of international treaties means the application of international treaties that are concluded in conformity with the Charter of the United Nations and the other general principles of international law.

It would be desirable also to determine the relationship between the universal jus cogens and a regional jus cogens.

Article 56

The wording of this article should be clearer concerning the non-retroactive effect of international treaties.

The Government of the Socialist Federal Republic of Yugoslavia considers that, in order to avoid uncertainty as to the intention of the contracting parties, the same verb should be used in both paragraphs of the article, and that that verb should be “provide” rather than “appear”.

Article 57

In the view of the Government of the Socialist Federal Republic of Yugoslavia, this article is incomplete.

The contracting parties have rights and obligations under a treaty even outside the national territory in the narrow sense of the word, e.g., in the case of the high seas, the epicontinental zone, outer space, international administrations, etc.

Hence it would be desirable to complete this article in the sense indicated, on the assumption that the scope of application of an international treaty extends to the entire territory of each contracting party, wherever the territory is linked to, and subject to the State, unless the contrary appears from the international treaty.

Articles 58, 59 and 60

The Government of the Socialist Federal Republic of Yugoslavia considers that these three articles could be combined in one article which would be drafted in more precise and consistent terms.
The commentary should perhaps distinguish between the establishment by an international treaty of rights and obligations for a particular State or generally for several States, and, for example, the creation of a new rule by means of an international convention.

If these three articles are still deemed necessary, however, it would be advisable to delete in article 58 the words “without its consent” and to insert “subject to the rights and obligations referred to in articles 59 and 60”.

Articles 63, 66 and 67

In the final draft of these articles relating to the modification of multilateral treaties either in relation to all the parties or in relation to certain of the parties only, a single, comprehensive and clearer solution should be provided.

Indeed, it would be desirable, in so far as possible, to place on an equal footing the consequences that may arise under article 63, paragraph 5, and article 67, paragraphs (a) and (b), in connexion with the modification of a treaty.

Article 68

The expressions used for international customary law in the French and English texts of this article must be made consistent.

Articles 69, 70, 71, 72 and 73

In the opinion of the Government of the Socialist Federal Republic of Yugoslavia, the provisions concerning the interpretation of treaties should also be expanded.

There should be a special provision excluding the possibility of depriving a treaty of its real force and effect through a process of interpretation.

Moreover, in the case of accession to multilateral treaties, States ordinarily have in mind the actual text of the treaty and not the preparatory work which preceded the adoption of the text. That point also should be covered.

The solution whereby the preparatory work may be used as further means of interpretation of international treaties only in the cases specified in article 70 is acceptable. Indeed, it is only proper to specify explicitly that, when the text of a treaty is clear and unambiguous, there can be no reference to provisional understandings in the course of negotiations during which exclusive positions were necessarily taken by the contracting parties and compromise solutions followed. In other words, the contracting parties are authorized in such cases to refer in good faith only to the compromise solution finally adopted.

Consideration must also be given to the case where an international instrument is the work of several States having different legal systems and conceptions and where the interpretation of a solution must be in conformity with the juridical conceptions of all the contracting parties.