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Comments and observations of Governments and principal international organizations on articles 1 to 60 of the draft articles on treaties concluded between States and international organizations, or between international organizations, adopted by the Commission

Topic:

Treaties concluded between States and international organizations or between two or more international organizations

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ANNEX II

Comments and observations of Governments and principal international organizations on articles 1 to 60 of the draft articles on treaties concluded between States and international organizations or between international organizations adopted by the International Law Commission at its twenty-sixth, twenty-seventh, twenty-ninth, thirtieth and thirty-first sessions*

CONTENTS

		Page
A.	COMMENTS AND OBSERVATIONS OF GOVERNMENTS	182
	1. Bulgaria	182
	2. Byelorussian Soviet Socialist Republic	182
	3. Canada	182
	4. Czechoslovakia	183
	5. France	184
	6. German Democratic Republic	184
	7. Germany, Federal Republic of	185
	8. Hungary	187
	9. Madagascar	188
	10. Romania	188
	11. Sweden	189
	12. Ukrainian Soviet Socialist Republic	190
	13. Union of Soviet Socialist Republics	190
	14. United Kingdom of Great Britain and Northern Ireland	190
	15. Yugoslavia	195
B.	COMMENTS AND OBSERVATIONS OF THE UNITED NATIONS AND SPECIALIZED AGENCIES	196
	1. United Nations	196
	2. International Labour Organisation	198
	3. Food and Agriculture Organization of the United Nations	201
C.	COMMENTS AND OBSERVATIONS OF OTHER INTERNATIONAL ORGANIZATIONS	201
	1. Council for Mutual Economic Assistance	201
	2. European Economic Community	201

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NOTE

For the text of the draft articles on treaties concluded between States and international organizations or between international organizations adopted by the Commission on first reading, see *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.*, para. 58.

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Conventions referred to in this annex

	Source
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) Hereinafter called "1969 Vienna Convention" or "Vienna Convention"	*Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) Hereinafter called "1975 Vienna Convention"	*Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), p. 207.

* Originally distributed under the symbol A/CN.4/339 and Add.1-8.

A. Comments and observations of Governments

1. Bulgaria

[*Original: English*]
[*April 1981*]

1. The Government of the People's Republic of Bulgaria is pleased to note the progress made on the question of treaties concluded between States and international organizations or between two or more international organizations. The fruitful work of the International Law Commission in this field has largely bridged the gap in international law of treaties, and thus represents a major contribution to the codification and progressive development of contemporary international law.

The Bulgarian Government welcomes, as a whole, the texts of articles 1 to 60 adopted on first reading. Generally, these draft articles follow the customary law in this field and the general structure of the 1969 Vienna Convention and reflect the established practice, as well as the specifics, of the international organizations whose legal capacity, including the legal capacity to conclude treaties, is confined within the limits of their functions under the relevant constitutive documents (charter, statute, etc.).

2. It is essential, nevertheless, to point out that not in all cases do the provisions adopted by the Commission on first reading reflect in a sufficient degree the differences between the international legal capacity of States, which stems from their sovereignty, and the legal capacity of international organizations which is always secondary to and derivative from the concerted will of the States parties to the constitutive instrument of a particular international organization.

On this score, the view of the Bulgarian Government is that some draft articles adopted on first reading need further consideration.

3. For example, in addressing the problem of reservations (articles 19 to 23) one has to take due account of the fact that the right of States to formulate objections when signing, ratifying, approving or acceding to international treaties, is founded on their sovereignty and therefore it cannot be applied automatically to international organizations, whose competence is, as a rule, limited. Not only do relative limits to the right of international organizations to formulate reservations correspond more fully to their specific nature as subjects of international law, but, moreover, they largely reduce the chances for contradictions in the interpretation of the particular provisions.

4. The Bulgarian Government is also of the opinion that the question of the validity of treaties to which an international organization is a party with respect to States members of that organization should be studied in more detail, with a view to avoiding in a more assertive manner the possibility that such a treaty could be in any way constitutive of rights and obligations for the States members to an international organization without their express prior consent.

5. With respect to this, it is the view of the Bulgarian Government that the present text of draft article 36 *bis*, paragraph (*a*), is completely at variance with the general rule of article 34, which provides that treaties between one or more States and one or more international organizations do not create either obligations or rights for a third party State or a third organization without the consent of that State or that organization; therefore, in its present form, it would not be a generally acceptable and viable solution to the problem.

2. Byelorussian Soviet Socialist Republic

[*Original: Russian*]
[*6 February 1981*]

1. Articles 1 to 60 of the draft articles formulated by the International Law Commission concerning treaties concluded between States and international organizations or between international organizations are, in principle, satisfactory. Basically they reflect current practice with regard to treaties involving the participation of international organizations and may be taken as a basis for the drafting of an international convention.

At the same time, the draft articles contain some provisions which are unacceptable and need to be further elaborated and clarified.

2. In particular, doubts may be entertained about the wording of articles 20 and 20 *bis*, which permit the tacit acceptance by international organizations of reservations made by other parties to a treaty. The Byelorussian SSR believes that the draft should stipulate that the competent organ of an international organization which is party to a treaty has an obligation to take action to express its position on such reservations clearly and unequivocally.

3. Article 36 *bis*, which also regulates questions regarding treaties concluded by organizations of supranational character, conflicts with the provision in the draft to the effect that participation of an international organization in a treaty has legal implications only for the organization itself and not for States which are members of it. In order to eliminate this inconsistency article 36 *bis* should be deleted from the draft.

Part V of the draft should include a provision to the effect that an international organization may not conclude treaties which conflict with its basic instruments, such as its charter, and it would therefore seem advisable to amend the wording of articles 45 and 46 accordingly.

3. Canada

[*Original: English*]
[*25 April 1980*]

Introduction

1. The Canadian authorities welcome the opportunity to offer some preliminary comments on the draft articles as they now stand.

International organizations—capacity to conclude treaties

2. The basic problem which the Commission has encountered in these draft articles is that while all States are equal before international law, international organizations vary in legal form, functions, powers and structure and in their competence to conclude treaties, and the extent to which all of these characteristics may be accepted by others.

3. Because of the great variety of international organization, it is not sufficient to define an *international* organization as meaning simply an *intergovernmental* organization, as is done in subparagraph 1 (*i*) of draft article 2.

4. A definition of this kind begs the question, since many intergovernmental organizations do not now, and probably never will, possess the power to enter into treaties with one or more States or with international organizations such as the United Nations. The question is not simply of academic interest since, at last count, some 170 intergovernmental organizations were listed with the Union of International Associations in Brussels. Are all of these to be included within the scope of the proposed definition? In the Canadian view, the draft articles should be concerned only with intergovernmental organizations possessing the capacity to assume rights and obligations under international law and thus to enter into treaties. The Commission should endeavour to find language which would clearly reflect the fact that an international organization within the meaning of the draft articles means an intergovernmental organization which has the capacity to assume rights and incur obligations on the plane of international law.

5. Article 6 provides that "The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization". Here it is important to note that "rules" have been defined in article 2, subparagraph 1 (*j*), to include the constituent instruments, relevant decisions and resolutions, and established practice of the organization. For example, the treaty-making powers of the European Economic Community (EEC) are not confined to matters covered by express provisions of the Treaty of Rome, but embrace, in addition, the power to conclude treaties whenever the Com-

munity has laid down common rules to give effect to common policies. In fact it has been argued that it is not possible, once and for all, to make a list of the areas in which EEC has or does not have the capacity to conclude treaties with third States. There will also be situations where rights and obligations are to some extent divided between the Community and its member States, as in the case of treaties to which EEC is a party, together with its nine member States. In these cases the organization and its member States may be given different rights under the treaty but these rights may be exercised concurrently. Hence, one must look not only at the rules of the organization, but also at their evolution as reflected in actual practice; and certainty may not always be the rule in this matter.

6. On this latter point, it would be helpful if the Commission, in its commentaries on the draft articles, could provide some concrete examples of the manner in which the capacity of international organizations to conclude treaties, in accordance with the relevant rules of the organization, has been exercised in practice. We are dealing here with an evolving body of international practice, and details of that practice should be documented. It would also be useful to have available information on any problems which may have arisen as to the capacity of international organizations to discharge their international treaty obligations, since this question may have some relevance to their capacity to enter into treaties in the first place.

Who represents an international organization?

7. The Commission proposes in article 7 that the representative of an international organization must produce "appropriate powers" for the purpose of communicating the consent of that organization to be bound by a treaty, unless "it appears from practice or from other circumstances" that he or she is "considered as representing the organization for that purpose without having to produce powers". This wording is vague and leaves room for a considerable amount of doubt as to who may claim to represent an international organization. Clarification is needed, and for this purpose it might be helpful to specify that the executive head of an international organization, in virtue of his functions and without having to produce powers, is considered as representing that organization for the purpose of performing all acts relating to the conclusion of a treaty, on the analogy of article 7, subparagraph 2 (*a*), of the 1969 Vienna Convention.

Reservations and objections to reservations by international organizations

8. Among the more complex and difficult questions with regard to treaties involving international organizations is the formulation of reservations (and objections to reservations) by such organizations, especially in the case of a multilateral treaty open to participation by all States and by one or more international organizations on a footing similar to that of States. The Commission appears to be on the right track in proposing a rather more restrictive rule for reservations and objections by international organizations in these cases. It is to be hoped, however, that the Commission will be able to formulate some alternative wording to express this approach, in order to avoid possible controversy where the participation of an international organization is not essential to the object and purpose of the treaty (arts. 19 *bis* and 19 *ter*).

Treaties creating rights or obligations for "third States" members of an international organization

9. Article 36 *bis* deals with the effects of a treaty to which an international organization is party with respect to third States members of that organization. The question is, what duty is owed by States in relation to treaty obligations falling upon international organizations of which they are members? States members of international organizations, even though they are "third States" in relation to treaties between the organization and other States, must observe the obligations and may exercise rights which arise for them under those treaties. If the rules of the organization provide that member States are bound by treaties concluded by it, or if all the parties concerned acknowledge that the treaty in question necessarily entails such effects, then the obligations and rights thereunder will devolve on member States of the organization. This is the core of article 36 *bis*.

10. Both logic and practice, at first glance, seem to argue in favour of the approach set out in this article. The question, however, is not free of complexity or controversy and will require further examination. Here again, developing practice could be instructive.

Termination and suspension of treaties—the position of international organizations

11. In the case of article 45, the question is whether an international organization can be bound by conduct. It is here and in article 46 that the structural difference between States and international organizations in respect to treaty-making becomes particularly apparent. The solution adopted by the Commission is to provide that an international organization may not invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty if, after becoming aware of the facts, "it must by reason of its conduct be considered as having renounced the right to invoke that ground", (i.e. for invalidating, terminating, withdrawing from or suspending the operation of a treaty).

12. In other words, rather than suggesting that conduct be considered (as in the case of a State) evidence of *acquiescence* in the validity of the treaty, the Commission proposes that conduct, in the case of an international organization, be considered as *renunciation* by the organization of the right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. Without going into semantics, the result would appear to amount to much the same thing, placing international organizations on a footing similar to that of States in so far as conduct is concerned.

13. In the case of article 46, the Commission has opted for the test of a "manifest" violation of the rules of the organization, dispensing with the condition laid down for States, namely, that of a violation of a rule of fundamental importance.

14. Here the difficulty is simply how one judges whether there has been a "manifest" departure from the rules of the organization regarding competence to conclude treaties, since, in this regard, there is no "normal practice" for international organizations and the organs or agents responsible for their external relations differ from one organization to the other. Admitting these problems, the solution adopted by the Commission in article 46 would appear to be a reasonable one.

15. In pursuing its work on the draft articles on treaties involving international organizations the Commission might consider the utility of adopting simpler solutions to some of its drafting problems. As one example, it does not seem to be essential to distinguish, in each and every instance, between treaties to which both States and international organizations are parties and those to which only international organizations are parties. As another illustration, articles 47, 54 and 57 are examples of unnecessarily complicated drafting, in which a rather simple principle becomes buried in the obscurities of defining the cases to which it applies. Subparagraph (*b*) of both articles 54 and 57 could simply refer to "consultation with the other contracting States or organizations, as the case may be", rather than employing the present tedious wording.

16. The Canadian authorities may have further comments to offer in due course on these draft articles.

4. Czechoslovakia

[Original: English]
[8 April 1981]

1. The Czechoslovak Socialist Republic welcomes the progress made by the International Law Commission in the preparation of draft articles on treaties concluded between States and international organizations or between international organizations. In its work the Commission proceeded from the provisions of the 1969 Vienna Convention. The Czechoslovak Socialist Republic agrees with this method of work on the condition that the Commission pays regards to the different scope of the subjectivity of States and international organizations. After the examination of the first 60 draft articles, it can be stated that the above-mentioned difference in the subjectivity has not always been sufficiently reflected. In spite of the fact that in the last decades international organizations have grown not only in number but also in im-

portance, it is not possible to overlook the fact that a sovereign State is the sole original subject of the international public law. The Czechoslovak Socialist Republic is therefore of the opinion that the Commission should, on the second reading of the draft articles, proceed from this fact more consistently than it has done so far.

2. In the opinion of the Czechoslovak Socialist Republic, the Commission should reconsider from this point of view, first of all, the regulation of reservations to international treaties.

3. For the Czechoslovak Socialist Republic, draft article 36 *bis*, which envisages the possibility of the rise of international law obligations for member States of the organization from treaties concluded by that organization without requiring their separate acceptance by the States concerned, continues to be unacceptable. The regulation determined in article 36 *bis* is in contradiction with the spirit of the whole draft in all cases where it deals with the relation of third States to treaties, particularly article 34. Article 36 *bis* also contradicts the concept of section 4 of Part III (particularly arts. 34-37) of the 1969 Vienna Convention, from which the Commission should have proceeded in its work.

4. Article 36 *bis*, moreover, unnecessarily introduces yet another category of "third States", i.e. those which are members of the organization which is a party to a treaty. The draft articles thus become more complicated and less clear.

5. The overwhelming majority of international organizations are based on relations of co-ordination and co-operation between member States and the organization and between the member States themselves. The Czechoslovak Socialist Republic therefore regards it as completely inappropriate to generalize, in the codification under preparation, the practice of a single organization which—as far as the conclusion of treaties of certain categories is concerned—has towards its members a position of superior authority.

6. For the same reasons, the Czechoslovak Socialist Republic also proposes to delete from the draft all references to article 36 *bis* contained in it so far—in particular, the references in the introduction of the first paragraphs of articles 35 and 36. While article 36 *bis* by itself is aimed, seemingly, only at the member States of the organization, the references mentioned in articles 35 and 36 inadmissibly limit the contractual freedom even of those contracting States which are not members of the organization.

7. A situation might arise in which a contracting State wants to be bound by a specific treaty only in relation to the organization and not in relation to one or to all of its member States. In that case it would be necessary explicitly to exclude such effects in the treaty itself, which would be very complicated. If, however, the contracting parties intend to also bind directly by the treaty the member States of the organization (which should be a rare case in practice), it is more natural and easier to use the general regulation under articles 35 and 36.

5. France

[Original: French]
[14 April 1981]

1. The French Government has examined with the greatest interest the report of the International Law Commission on the question of treaties concluded between States and international organizations or between two or more international organizations. It thinks that the report is certain to prove a valuable contribution to the progressive elaboration of a customary international law applicable to international organizations.

2. The French Government reserves the right to submit, at a later stage, detailed comments on the draft articles as a whole. It believes that it should, however, make the following general comments now.

3. The French Government endorses the approach taken by the Commission is seeking to make the draft articles a complete and autonomous whole. It thinks that such a method is preferable in the interest of clarity and for the sake of broad agreement on the norms envisaged.

4. This Government would not object if the draft generally followed the structure of the 1969 Vienna Convention. It wishes to point out, however, that the reservations and objections which certain provisions of that Convention prompt it to formulate, and which it voiced at the United Nations Conference on the Law of Treaties, hold true in respect of treaties concluded by international organizations.

5. As far as the form is concerned, the French Government thinks that the Commision could make a useful attempt to simplify the wording of the draft articles, so as to make them more easily understood by any future users.

6. Finally, with respect to the follow-up to the work of the Commission in this area, the French Government believes that consideration could be given to the adoption by the United Nations General Assembly of the articles not in the form of an international convention, but as recommended norms of reference.

Such an approach would obviate the difficulties of organizing a diplomatic conference, with regard to, *inter alia*, the role which international organizations would have in such a conference, and would make the progressive development of customary law possible.

Should a majority be in favour of elaborating a treaty, the French Government would, however, take the view that such a task should be entrusted to a diplomatic conference.

6. German Democratic Republic

[Original: English]
[26 May 1981]

1. The German Democratic Republic considers the draft articles submitted by the International Law Commission on "Treaties concluded between States and international organizations or between international organizations" in their wording of July 1980 a sound basis for the second reading by the Commission. In this connection, the German Democratic Republic also would like to commend the outstanding merits of the Special Rapporteur, Mr. Paul Reuter. His work was essential in creating the prerequisites for the constructive results reached in this area.

2. It has proved helpful in the preparation of the draft articles to use the 1969 Vienna Convention as the basis and general frame. At the same time it was necessary, at all stages of work, to take account of the actually existing substantial differences between States and international organizations: only States have sovereignty. States are original subjects of international law, while international organizations only derive that quality from them. According to the generally recognized principles of international law, the capacity of States to conclude treaties is of a comprehensive nature while that of international organizations is established and limited by their constituent instruments and other rules created on the basis of the constituent instruments.

It is to be noted that in the provisions of the present draft articles these differences between States and international organizations have largely been taken into account. However, some draft articles should be reviewed, in particular from that angle.

3. Article 2, subparagraph 1 (*j*), defines the "rules of the organization". This definition draws on the constituent instruments, relevant decisions and resolutions, and also on the "established practice of the organization".

The German Democratic Republic proposes to further qualify the notion of practice and to conceive of the "rules of the organization" as the constituent instruments, relevant decisions and resolutions, and the organization's practice established in accordance with the constituent instruments.

Moreover, the German Democratic Republic regards it as necessary to delete in subparagraph 1 (*j*) of draft article 2 the words "in particular", because otherwise there would be too much room for interpretation of the term "rules of the organization".

4. As regards draft article 27, paragraph 2, the German Democratic Republic believes that in the interest of protecting the sovereignty of member States of an international organization it should be made quite clear and unambiguous that the rules of an organization have precedence over all treaties to which the international organization is a party. While this position is unambiguously taken in the

Commission's commentary,[a] it does not appear in the text of article 27. Its present wording, which formulates the above-mentioned principle as an exception, contradicts itself. The question arises as to what cases paragraph 2 of draft article 27 is expected to cover if the rule is to be that an organization cannot invoke its own rules if the performance of the treaty is outside the scope of its functions and powers.

5. As regards draft article 45, paragraph 2; the German Democratic Republic proposes to delete the reference made therein to article 46, as it precludes an international organization from confirming, expressly or by its conduct, the validity of a treaty it has concluded in violation of its rules regarding the competence to conclude treaties.

6. In the interest of giving greater protection to the organization and its member States, the German Democratic Republic considers it necessary that article 46, paragraph 3, should provide that an organization may in any case invoke the violation of its rules as a ground for invalidating its consent to be bound by a treaty if the rules violated were of fundamental importance. Such rules are, in the opinion of the German Democratic Republic, the constituent instruments and other relevant instruments of that kind. As regards other rules, the "manifestness" of a violation could be maintained as the criterion for the possibility of invoking a violation.

7. The German Democratic Republic regards its observations on subparagraph 1 (*j*) of article 2, paragraph 2 of article 27, paragraph 2 of article 45, and paragraph 3 of article 46 as a necessary conclusion from the fact that international organizations only derive the quality of subjects of international law from States and that their capacity to conclude treaties is established and limited by the rules their member States agree on in terms of international law. Unlawful action by an organization should not be allowed to entail the establishment of valid norms of international law. The German Democratic Republic would like to see an exception to this principle confined to the case referred to in paragraph 6 above, concerning article 46, paragraph 3. The resultant effects on the law of international treaties to which international organizations are parties, and on the relevant treaty practice, corroborate, in the opinion of the German Democratic Republic, the view held in the Commission that international organizations cannot be regarded as having a status equal to that of States and cannot, consequently, be considered equal participants in international relations.

8. With regard to draft article 3, the German Democratic Republic wishes to voice doubts about the phrase "international agreements to which one or more international organizations and one or more entities other than States or international organizations are [parties]". International agreements can only be concluded between subjects of international law. Therefore, the term "entities" should be replaced by the previously used term "subjects of international law".

9. The German Democratic Republic considers it appropriate that, when finalizing the provisions on reservations, the possibility of a tacit acceptance of reservations by international organizations be precluded.

10. The German Democratic Republic proposes to delete draft article 36 *bis*. It deviates from the general rule set forth in draft article 34 under which obligations or rights for a third State or a third organization cannot be established without the consent of that State or that organization.

7. Federal Republic of Germany

[*Original: English*]
[*10 March 1981*]

During the recent deliberations in the Sixth Committee of the General Assembly, the Government of the Federal Republic of Germany welcomed the completion of the first reading of the draft articles[b] by the International Law Commission and herewith submits the following comments on articles 1 to 60 of the draft.

[a] *Yearbook ... 1977*, vol. II (Part Two), p. 119, para. (5) of the commentary to article 27.

[b] *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 45th meeting, para. 6, and *ibid., Sessional fascicle*, corrigendum.

I. General

1. *General approach*

The weight carried by international organizations has grown, which in turn has repercussions on treaty law.

The Government of the Federal Republic of Germany supports the efforts to amplify the codification of international treaty law and to add to the existing codification which was successfully initiated with the 1969 Vienna Convention a comprehensive set of rules on the increasingly important sphere of treaties concluded by international organizations. There are various ways and methods of approaching this undertaking, but the work of the Commission is now so far advanced that the merits of alternative solutions (e.g., an additional protocol to the Vienna Convention or an adjunct supplement limited to textual divergencies) will no longer be discussed here. The approach chosen by the Commission, namely, the preparation of a companion instrument which is to enter into effect independently as a sequel to the Vienna Convention, should now be pursued further. Hence, in continuing its work, the Commission should adhere to its approach of not revising but adopting the rules of the Vienna Convention by merely adapting its provisions to the requirements of the subject-matter under consideration.

2. *Equal treatment*

International organizations correspond to the need for international co-operation. Their development signifies progress towards an "international law of co-operation". International organizations are composed of sovereign States; it follows from their composition that when they conclude treaties with other States, endowed by their member States with powers to do so, they should receive the same treatment as States as far as this is feasible. This principle—equality of all contracting parties—ought to form the basis of the draft articles.

According to its own explanations, the Commission has endeavoured to set international organizations and States on an equal footing when they conclude treaties with one another in so far as this appeared expedient in view of existing differences *de facto* or *de jure* between States and international organizations. Essentially, the regime of the Vienna Convention has been applied, directly or *mutatis mutandis*, to international organizations for conclusion, implementation and termination of treaties. Strict adherence to this underlying principle is to be welcomed; deviations from the Vienna Convention regime should be made only exceptionally and if necessary.

3. *Scope of the draft articles*

A question of great concern is how to decide which international organizations will be covered by the draft articles. The Commission has wisely avoided redefining the term "international organization" more precisely for the purpose of the application of the draft articles. Instead, it adopted the definition of the 1969 Vienna Convention in article 2, subparagraph 1 (*i*), which, supplemented by article 2, subparagraph 1 (*j*) and article 6 of the present draft articles, must and does suffice, since international organizations vary to a great extent in legal form, structure, functions and powers, ranging from scarcely institutionalized, loosely organized associations to close-knit supranational entities such as the European Communities. It is therefore entirely appropriate, with regard to the capacity of an international organization, to conclude treaties to refer to the relevant rules of the organization (cf. art. 6 and art. 2, subpara. 1 (*j*) of the present draft articles).

4. *Identity of substance between the 1969 Vienna Convention and the draft articles*

The codified substantive law of treaties should be uniform, regardless of whether treaties are concluded by States or by international organizations. The draft articles, therefore, rightly follow the provisions of the Vienna Convention, which is already in force. Uniformity is so important that it must take priority even over partial improvements to the Convention that could be made. Deviations from the Vienna Convention are justified only where they are unavoidable and are dictated by the particular structure and functions of international organizations. It seems doubtful, and worthy of reconsideration during the second reading, whether all the deviations from the Vienna Convention deemed desirable by the Commission correspond

to the aforementioned requirements and are in fact absolutely necessary.

5. *Differences in drafting between the 1969 Vienna Convention and the draft articles*

The Commission has adhered quite closely to the wording of the Vienna Convention, which it has repeated throughout except for the changes that have been deemed necessary in view of the participation of international organizations. No other deviations from the wording of the Vienna Convention have been made in order to maintain uniformity in the application of law. This is to be welcomed. However, the Commission's draft of a new parallel convention has certain shortcomings where the requisite adaptations are too cumbersome and perfectionistic in drafting. The intelligibility and transparency of numerous articles suffer as a result (see arts. 1, 3, 10 to 25 *bis*, 47, para. 2, 54 and 57). The Commission should examine whether the extensive subdivision of rules and terms relating to the peculiarities of international organizations could not be avoided. This could partly be done by comprehensive definitions given once and for all in article 2, with shorter designations for later use throughout the subsequent articles of the draft. For example: the cumbersome enumeration "treaty between States and one or more international organizations or between international organizations and one or more States" (see arts. 19 *bis*, paras. 2 and 3) could be replaced by the abbreviation "treaty with participation of international organizations" (or "treaty of international organizations").

The selective introduction of new terms relating to the peculiarities of international organizations does not seem completely satisfactory either, as, for example, "powers" in article 2, subparagraph 1 (*c bis*) and article 7; "act of formal confirmation" in article 2, subparagraph 1 (*b bis*) and in articles 11, 14 and 16; and the verbs "express" and "establish" in article 15. This new terminology does not rely on practice. Since the conventional terms of treaty law can be applied to international organizations as well, the innovations do not seem justified.

6. *Different treatment of States and of international organizations*

In a limited number of articles, it is certainly necessary to distinguish between the legal position of international organizations and that of States under international law, as the Commission has done in article 6 (capacity to conclude treaties). It is also appropriate, and in some cases even necessary, in view of the wide variety of international organizations, to refer to their rules and established practice, as has been done at several points throughout the draft.

In some cases (see art. 7 and art. 27, para. 2), the Commission has envisaged analogous legal treatment for international organizations and States in spite of *de facto* differences. This is to be welcomed; *de facto* divergencies in the practice of States and international organizations do not always have to result in different legal consequences.

Equal treatment of international organizations and States ought to be foreseen by the Commission where there is need for complete equality, in particular where unequal treatment would amount to discrimination against international organizations.

7. *Unresolved questions*

It seems wise that in the Commission's draft a number of questions have not been dealt with, since the present attempt at codification can hardly embrace the whole subject-matter, which still is in the process of evolution. The complex of questions that have not been dealt with or are still partially unresolved includes, in particular, the relationship between international organizations as parties to a treaty and member States which may not be, or even may be, party to the same treaty. It is true that problems arising in this field are situated rather in the internal structure of the international organization. It is also true that treaty law can in principle take no more account of the internal structure of international organizations than of the national (constitutional) law of States (see arts. 27 and 46 of the 1969 Vienna Convention). Direct reference to the internal composition of international organizations is generally out of the question. However, the juxtaposition of States in their dual position as parties or non-parties to a treaty and, simultaneously, as members of a contracting international organization, does, with regard to conclusion and performance of treaties, bring about situations which go beyond the internal structure of international organizations. This type of situation has been addressed by the Commission in section 4 of Part III solely from the—restricted— viewpoint of the effects that treaties have with respect to third parties. Member States of international organizations can, however, not properly be considered as "third" States in relation to the organization. Adhering too closely to the Vienna Convention system could mean not paying sufficient attention to the specific relationship between international organizations and their member States. The peculiar situation resulting from the close interrelation between an international organization and its member States plays a role not only under the heading "obligations and rights of third States", but is of significance also for the subject-matter covered by the reservation provisions and by articles 18, 26, 29 and 60 to 62 of the draft. These problems must be recognized and taken into consideration so that the provisions of the new convention are generally acceptable and do not inhibit or hamper further developments of international law.

The Commission has left open the essential question, to be settled in the final clauses, as to how treaty-making international organizations will participate in the conclusion of the convention if the present draft evolves into a full-fledged convention. If one starts from the principle of equality between States and international organizations under treaty law, there is no valid reason why international organizations should be accorded different treatment in this matter. A convention on treaty law in respect of international organizations will be a master convention of all conventions in which international organizations participate. Consequently, those international organizations should be entitled to take part in a plenipotentiary conference on the elaboration of the new convention parallel to the Vienna Convention on the basis of the Commission's draft articles, on a par with negotiating States, as well as to sign and ratify the master convention.

II. Comments on individual provisions of the draft

Article 1

1. It does not appear necessary to subdivide treaties into categories (*a*) and (*b*) as this subdivision makes subsequent articles cumbersome (see art. 2, subpara. 1 (*a*), and arts. 10, 13, 17, 24).

Article 2, para. 1

2. The new definitions in subparagraphs (*b bis*), (*b ter*) and (*c bis*) seem to be superfluous (for reasons, see comments in sect. I, para. 5 above, on arts. 11, 14 and 7).

Article 7

3. The term "powers", to be used specifically in connection with international organizations (in German there is the same translation for "full powers" and "powers" alike), should be omitted since it does not appear necessary to introduce terminological innovations of this kind.

4. In paragraph 4, the verb "communicate" seems not to be quite apposite if a representative of an international organization signs a treaty with the effect that the organization is definitively bound by the treaty; he is thereby not communicating a declaration but making the declaration itself. It should be examined whether "communicating" could be replaced by "declaring".

5. Paragraphs 3 and 4 of this article could be combined.

Article 9

6. Paragraph 2 can be supported on the understanding that it is not intended to limit unnecessarily the powers of international organizations, in particular their faculty to participate in international conferences.

Article 11

7. Admittedly, the term "ratification" is not really suited to international organizations (see art. 16 as well: "instrument of formal confirmation"); it is suggested to overcome this difficulty by inserting the term "act of formal confirmation" into the otherwise unchanged transposition of the 1969 Vienna Convention to read as follows:

"The consent of a State or an international organization to be bound by a treaty between one or more States and one or more in-

ternational organizations or between international organizations is established by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or any other act of formal confirmation, accession or by any other means if so agreed".

As it is, the peculiarities of international organizations are covered anyway by the phrase "by any other means, if so agreed".

Articles on reservations

8. The Commission has envisaged that, in principle, the liberal reservations provisions of the 1969 Vienna Convention shall cover international organizations too, as contracting parties with equal rights. This rule is to be welcomed. However, the exceptions from this rule are important and far-reaching. The deviations from the Vienna Convention in articles 19 *bis* (2) and 19 *ter* (3) have been drafted in involved and rather vague terms that might lend themselves to difficulties of interpretation. In particular, the use of the term "object and purpose" in articles 19 *bis*, para. 2, and 19 *ter*, para. 3 (*b*), does not seem felicitous, since this term is employed with not quite the same meaning elsewhere in the Vienna Convention and the draft (see art. 18 and art. 19, para. (*c*)) in order to describe the actual essence of a treaty. It is suggested, by the way, that the formula "object and purpose" in article 19 *bis*, para. 3 (*c*), might in itself suffice to cover adequately the cases envisaged in article 19 *bis*, para. 2.

9. Moreover, as a question of principle it seems open to doubt whether special provisions for international organizations limiting their options to enter reservations and to object to reservations, should be envisaged at all. In view of the almost complete lack of precedents, it is suggested that the adoption of the Vienna Convention provisions would produce equally adequate results, thereby drastically shortening the draft. The necessity for equal treatment between international organizations and States, as stressed throughout the present observations, points in this direction.

Articles 24 and 24 bis *(and articles 25 and 25* bis*)*

10. It does not seem necessary to divide the subject-matter into two articles (the same applies to articles 25 and 25 *bis*); combining the articles would improve the draft.

Article 27, para. 2

11. Equal treatment of international organizations and States must mean that international organizations are in principle no more entitled than States to invoke their internal rules to justify the failure to perform a treaty. This is in keeping with the organizations' responsibility for their actions when concluding and implementing treaties (art. 26).

12. The necessary exceptions regarding the competence to conclude treaties are dealt with satisfactorily in article 46 for international organizations as well.

13. Article 27, para. 2 contains another special exception for certain types of treaty: "unless performance of treaty ... is subject to the exercise of the functions and powers of the organization"; this provision appears conceptually sound and should be retained.

Treaties and third States (Part III, sect. 4 of the draft)

The provisions of this section must deal, *inter alia*, with the relationship between international organizations and their member States, which should not be called "third States" in this context but, as proposed by the Special Rapporteur, "non-parties". Some kind of provision, as envisaged in article 36 *bis*, is indispensable if the rules of advanced international organizations bind the organizations' member States by the provisions of the treaties concluded by the organizations (see art. 228 of the Treaty of Rome).[c] The rule formulated in article 36 *bis* serves to safeguard the rights of third States who enter into treaty relations with an international organization whose member States are internally bound to contribute to the fulfilment of the treaty. The Government of the Federal Republic of Germany has on former occasions, both verbally and in written form, expressed the view that article 36 *bis* is indispensable. It endorses the written comments of the European Economic Community on Part III, section 4, of the draft articles[d] and hopes that the Commission will, during the second reading, definitively arrive at a solution which does justice to the requirements of third parties (in the true sense) to treaties concluded with advanced international organizations, as well as to their member States.

8. Hungary

[*Original: English*]
[*20 March 1981*]

1. The Government of the Hungarian People's Republic has, on several occasions, expressed its appreciation to the United Nations and the International Law Commission for the highly important work of codification undertaken by them in pursuance of Article 13 of the United Nations Charter. A significant stage in this undertaking is the initiative to work out draft articles on treaties concluded between States and international organizations or between international organizations. The regulation of this area combines the requirements of topicality and utility in view of the growing role which international organizations do and can play in the shaping and development of international relations.

2. The Hungarian Government has followed with interest the work done by the Commission and has studied with attention the draft articles elaborated thus far. It agrees with the principles of codification applied and, on the whole, endorses the methods followed in the elaboration of the draft articles; namely, it finds it appropriate and practicable for the Commission to have adopted the structure and principal solutions of the 1969 Vienna Convention in its formulation of the draft articles.

3. This approach has of necessity raised the difficulties being encountered by the codification effort with respect partly to the difference existing between States and international organizations in their condition as subjects of international law and in their legal capacity, and partly to the relative paucity and oftentimes contradictory nature of practical experience available for legal generalization in the field of treaties concluded by international organizations. The Commission has made great and successful efforts to overcome such difficulties, although the formulation of some of the draft articles, revealing as it does a high degree of complexity and compromise, points to the continuing existence of unresolved or not fully resolved problems and hence to the need for further improvement in wording.

4. In the view of the Hungarian Government, full application of the principle of the sovereignty of States requires that the Commission be still more explicit and consequent in distinguishing between States and international organizations, with due regard for the fact that the condition of international organizations as subjects of international law, and hence their legal capacity, are of a limited scope and of a derivative nature.

Such distinction is necessary especially in the case of articles 19 to 23, which fail to give a clear definition of the different legal status of States and international organizations concerning reservations and objections thereto.

5. The provisions of draft articles 20 and 20 *bis* spell out the possibility for tacit acceptance of reservations by international organizations. The Hungarian Government believes it would be more logical and appropriate to make acceptance by international organizations of reservations subject exclusively to express declaration to that effect.

6. The Hungarian Government sees no ground for the solution adopted in paragraph 2 of article 45. Proceeding from the limited nature of the condition of international organizations as subjects of international law, the Commission has, in articles 27 and 47, devised a suitable solution for the problem relating to the observance of treaties and to invalidity. However, the said limitative principle is broken by paragraph 2 of article 45, which allows subsequent recognition by international organizations of the validity of legal acts that entail invalidity under article 46. Therefore, the Hungarian Government sug-

[c] Treaty establishing the European Economic Community (United Nations, *Treaty Series*, vol. 298, p. 90.

[d] See sect. C of the present annex, below.

gests that the reference to article 46 should be omitted from paragraph 2 of article 45.

7. Finally, mention is deserved by draft article 36 *bis*, the provisions of which are known to have been objected to by representatives of several States, both in the Commission and in the Sixth Committee of the General Assembly. In the judgement of the Hungarian Government, the provisions of this article are not consistent with the generally accepted rule of international law that a treaty cannot be constitutive of rights and obligations with respect to third States except with the consent thereof. This rule is otherwise stated in draft articles 34 and 35.

The Hungarian Government believes it ill-advised for the problems involved in the conclusion of treaties by such international organizations as are affected by article 36 *bis* to be regulated by the draft articles now in the process of elaboration.

9. Madagascar

[*Original: French*]
[*22 August 1980*]

1. The contents of the draft articles are the outcome of many years of study and of exchanges of views between States, and the statements made by the Malagasy delegation during the discussions held on the subject or have contributed in no small measure to their elaboration. The Malagasy delegation felt, in any case, that the text drawn up by the International Law Commission was, on the whole, clear and specific enough to serve as a valid basis for discussion and that the main points of the rules that should govern future treaties had been duly taken into account.

In short, conscientious work has been done on the draft articles by highly qualified international legal specialists and diplomats, on the lines contemplated in the Charter of the United Nations for the codification of international law.

2. As regards the actual substance of the draft articles, it should be noted that while articles 45 and 46 on the invalidity of treaties gave rise to some disagreement, the principles accepted are identical whether the grounds for invalidity are invoked by States or by international organizations. Inclusion of the latter entities is in any case a new subject-matter since the conclusion of the 1969 Vienna Convention, which has covered only treaties between States. The term must itself be taken in a very broad sense, and it would be difficult in practice, if not impossible, to confine the scope of the future convention exclusively to a few international organizations, as proposed by some Governments.

3. As regards articles 52 and 53, dealing with coercion, the threat or use of force and the conclusion of treaties conflicting with a peremptory norm of general international law, and particularly as regards the latter, the proposed wording could stand, particularly since an actual definition of "peremptory norms" has been included in the article dealing with them.

The thinking behind these articles is certainly in the jurisprudential tradition of the Vienna Convention.

10. Romania

[*Original: French*]
[*2 June 1981*]

I. Romania's competent bodies have followed with great interest the process of codification of legal norms relating to treaties concluded between States and international organizations or between the latter. Following the codification—through the 1975 Vienna Convention—of rules on the representation of States in their relations with international organizations of a universal character, the draft articles which the International Law Commission has prepared in the field of treaties, which reflect the ever increasing role of the international organizations in our day, constitute a major new achievement, an outstanding result of the efforts made within the United Nations to develop norms designed to promote in the conduct of States observance of the lofty principles enshrined in the Charter and consequently to help, by making more effective the contribution of the international organizations, to translate into reality the Purposes of the United Nations inscribed in the Charter, in particular to maintain international peace and security and to develop friendly relations and fruitful co-operation among all nations.

II. To serve their legal and political purpose, rules designed to govern the future contractual relations between States and international organizations or between two or more international organizations must, in our opinion, meet the following requirements, which we consider essential for the codification of such rules:

1. The new set of norms must be in harmony with the principles forming the basis of the law of treaties, as reflected in the 1969 Vienna Convention. There must be complete concordance between the norms to be codified and the fundamental principles of international law, as well as between those norms and the principles peculiar to the field of international treaties (the principle of free consent, the principle of good faith, and the rule of *pacta sunt servanda*).

2. To ensure that the instrument in which the codified norms are to be incorporated can secure the widest possible acceptance by States and international organizations, the codification process as a whole must rely on existing international practice, seeking out the highest common denominator.

3. The norms which are to govern treaties concluded between States and international organizations must reflect as faithfully as possible the specific characteristics of the factors involved; in particular, they must take into account the essential *de facto* and *de jure* differences existing between States and international organizations as subjects of international law and international relations.

In this connection, Romania's competent authorities consider that it is essential, in preparing the new body of rules, for particular account to be taken of (*a*): the functional nature of the international organizations as compared to the full legal status of States, sovereign entities, which continue to be the fundamental elements of the international community; (*b*) the great diversity of the international organizations; (*c*) the decisive fact that it is the States which create international organizations by endowing them with certain rights and duties that constitute their legal capacity, limited to their specific field of activity; (*d*) the principle that the competences of the international organizations are laid down in their constitutive instruments, the interpretation of which is restrictive (principle of specificity); (*e*) the fact that the international organizations, despite their position as entities distinct from the States that founded them, cannot be entirely dissociated from their member States; their interests are not different from or alien to the interests of the member States and their desires must be in accord with those of all their member States; (*f*) the essential role of the international organizations—that of offering institutional frameworks for multilateral inter-State co-operation which, if it is to contribute effectively to the achievement of the Purposes of the Charter, must promote, in the fields entrusted to them, the interests of *all* the member States and hence must be guided in their activities by the precepts of consensus.

III. An examination of the draft articles on treaties concluded between States and international organizations or between two or more international organizations shows clearly that the Commission has very largely observed the imperatives of proper codification of the subject-matter. By using the procedure of adapting the rules codified by the 1969 Vienna Convention to a related field, the Commission chose what is, in principle, a judicious method. Romania's competent bodies share the idea that the new rules should be embodied in an instrument independent of the above-mentioned Vienna Convention. In their opinion, the preparation of new rules cannot be reduced to the dimension of an "application" of the Vienna Convention. In that context, the Romanian side considers that the new codification instrument could take the form of an international convention provided that the Commission is able to formulate norms that could gain the widest acceptance by States.

IV. In light of the above considerations and, while reserving the right to express their views at a later stage concerning the final version of the draft articles, the competent Romanian bodies wish at this juncture to make the following comments and observations on certain provisions of the draft.

1. *Article 2, subparagraph 1* (i), concerning the meaning of the term "international organization": The proposed wording reproduces exactly the corresponding provision of article 2, paragraph 1 (*i*), of the 1969 Vienna Convention. In the opinion of Romania's competent bodies, such an abstract and general definition does not provide an adequate basis for determining the specific legal personality of international organizations, a cardinal question on whose solution will depend the development of other legal concepts and constructions of the system to be established by the new codifying instrument. The definition of "international organization" proposed during the Commission's work on the question of the representation of States in their relations with the international organizations[e] would perhaps provide a more secure point of departure.

2. *Article 2, paragraph 1* (j): In the opinion of the Romanian authorities, the definition of the term "rules of the organization" is too broad and goes beyond certain limits of the general practice in relations between States and the international organizations, which show that the internal rules of the organizations are established in their constitutions, decisions or resolutions accepted by all their member States. Furthermore, the words "established practice of the organization" are rather vague and can give rise to great difficulties. Lastly, in view of the frequent references in the draft to the "relevant rules of the organization", we consider that these concepts should be thoroughly examined. Romania's competent bodies believe that, for the purposes of the draft, the "rules of the organization" should mean those which are laid down in the organization's constitutive instrument or in other instruments of a treaty, accepted by all the member States.

3. *Article 6:* The capacity of international organizations to conclude treaties with States or with other international organizations would be governed, under draft article 6, by the "relevant rules" of the organizations concerned. In that connection, we would point out, first, that draft article 2 does not contain a definition of the term "relevant rules" of the organization. Secondly, if this concept is interpreted in the light of the definition in article 2, subparagraph 1 (*j*), which we have just commented on in paragraph 2 above, it is difficult to accept the conclusion reached, namely that the "relevant rules" in question in article 6 (and in other draft articles) could also be determined by the "established practice" of the organization.

In our opinion, in the absence of elements in article 2, subparagraph 1 (*i*), determining the character of an international organization, its capacity to conclude international treaties should be that laid down in its constitutive instrument or in other instruments of a treaty that have been accepted by all its member States and have established the competences of the organization in its specific field of activity.

4. *Article 9, paragraph 2*, concerning adoption of the text of a treaty: The proposed provision is derived from article 9, paragraph 2, of the 1969 Vienna Convention. However, in the case of the adoption of the text of a treaty in an international conference with the participation of international organizations, the application of the two-thirds majority rule might lead to situations in which one and the same State would find itself in contradictory positions: on the one hand, as a State participating *nomine propio*, and, on the other, as a member State participating through the intermediary of the international organization. In the light of these considerations, it seems necessary to re-examine article 9, paragraph 2, so as always to ensure concordance between the position of the organization and that of its member States.

5. *Article 19* bis, *paragraph 2:* One of the first questions that arises with regard to the above paragraph is: to what extent are its provisions based on existing practice? Secondly, the hypothesis mentioned in the draft ("When the participation of an international organization is essential to the object and purpose of a treaty...") can give rise to very serious disputes. Thirdly, we would point out that situations of the kind envisaged in the paragraph constitute exceptions which are in the domain of special regulation by the treaty in question. It therefore seems that, inasmuch as such procedures do not as yet appear to have been confirmed by practice, it would be preferable to abandon them.

6. *Article 19* ter, *paragraph 3:* The observations made in the preceding paragraph are also valid for article 19 *ter*, paragraph 3. In addition, there is the question of how it will be determined that the participation of the organization in the treaty "is not essential to the object and purpose of the treaty" (subpara. (*b*)).

We consider that, given existing practice, the aspects dealt with in the paragraph should also be reserved for special regulation by the treaty in question. We further believe that in the case mentioned in subparagraph 3 (*a*), the possibility for an organization to object to a reservation made by a State should be expressly recognized by the treaty, since such a possibility cannot be derived, by way of interpretation, from "the tasks assigned to the international organization by the treaty".

7. *Article 36* bis: This article raises a whole series of questions both from the standpoint of principle and from that of practice. Under the relevant principles, a State cannot be held to be bound by an international treaty unless it has freely manifested its consent (principle of free consent referred to in the preamble to the 1969 Vienna Convention).

Under those principles, States members of an international organization can be bound by a treaty concluded by it only to the extent that the respective States had agreed to the conclusion of the treaty. The "relevant rules of the organization applicable at the moment of the conclusion of the treaty" (article 36 *bis* (a)) could produce effects only to the extent that those "rules" were not contrary to the wishes of the member States or of some of them.

It is not sufficiently clear whether the international practice alluded to during the work of codification has served to elucidate the complex problems that would result from the machinery envisaged in article 36 *bis*, not only as regards relations between the organization and its foreign partners but also as regards all the relations between member States and non-member States. It therefore seems necessary to examine whether, at the current stage, we find international practice really sufficiently crystallized to make it possible to formulate rules of international law. As things stand at present, the special competences entrusted to an international organization by its member States in any case derive from constitutive instruments and as they are not general, they should not take the form of a general rule of international law.

V. Romania's competent bodies consider that the draft articles require further drafting improvements. It will be necessary, in particular, to avoid repetitions such as those which appear in article 7, paragraph 1, and articles 3, 11, 12, 13 and 14, paragraphs 1 and 2, *inter alia*, which only overburden the draft and make the wording less concise.

11. Sweden

[Original: English]
[25 February 1981]

1. The Swedish Government has already on a previous occasion expressed some doubts as to the necessity of drafting a separate legal instrument dealing with treaties to which international organizations are parties. An analogous application of the 1969 Vienna Convention would presumably be a satisfactory way of solving many of the legal problems that may arise in connection with such treaties. Many of the draft articles prepared by the International Law Commission are in fact almost identical to the corresponding provisions of the Vienna Convention.

2. The question may be asked, however, when studying the draft articles, whether the Commission has paid sufficient attention to the differences that exist between international organizations and States in so far as the conclusion of treaties is concerned.

3. In particular, it is noticeable that no distinction has been made in the draft articles between "internal" treaties, i.e. treaties between an international organization and one or more of its member States, and "external" treaties, i.e. treaties between an international organization and one or more non-member States. In some respects, however, these two kinds of treaties should not be treated alike. In particular, it seems difficult to apply rules such as those contained in article 27, paragraph 2, and article 46, paragraph 3, of the draft articles to treaties between an organization and its member States. When apply-

[e] See *Yearbook ... 1968*, vol. II, p. 124, document A/CN.4/203 and Add.1-5, art. 1, para. (*a*).

ing to treaties between an organization and its member States, it is important to have regard to the fact that the rules of the organization have been adopted by the member States themselves and cannot therefore be compared to provisions of the internal law of another State.

4. In cases where an international organization concludes treaties with a non-member State, the organization is often of the customs union type. The treaties which such an organization concludes on customs duties or connected matters should normally also be binding on the member States of the organization. These member States are therefore not to be regarded as third States in the normal sense of that term. In order to take this situation into account, it seems necessary to include a provision along the lines of the proposed article 36 *bis*.

12. Ukrainian Soviet Socialist Republic

[*Original: Russian*]
[*25 February 1981*]

1. In the contemporary situation, increasing urgency attaches to the improvement of the existing means of regulation in the field of international law and the development of new ones. An important factor in this process is the new stage reached in the codification of the law of treaties, namely, the preparation of draft articles on treaties concluded between States and international organizations or between international organizations. In principle, therefore, the Ukrainian SSR takes a positive view of the work done by the International Law Commission in this area, and considers that draft articles 1 to 60, adopted by the Commission on first reading, provide an acceptable basis for the drafting of an international convention on the subject in that, in general, they properly reflect the practice which has developed with regard to contractual relations involving international organizations.

Some of the provisions of the draft articles, however, are open to objection and, in fact, require clarification, amendment or deletion.

2. This is especially the case with the wording of articles 20 and 20 *bis*, which permit the tacit acceptance by international organizations of reservations without their express acceptance of a particular reservation entered by another party to the treaty concerned. Since, unlike States, international organizations have limited status as subjects of international law, it would be wrong if the draft articles merely reiterated the relevant provisions of the 1969 Vienna Convention. Such an approach cannot be substantiated by reference to practice or, still less, be justified by considerations of a theoretical nature.

The entering of a reservation on the acceptance of or objection to reservations by an international organization, obviously requires a decision by the competent body of that organization and clear and unequivocal action by that body.

3. The Ukrainian SSR considers that article 36 *bis*, which refers to treaties concluded between organizations of a supranational character, should be deleted from the draft articles under consideration. A treaty to which an international organization is a party creates rights and obligations only for the international organization as such, and does not have legal implications for the member States of that organization.

4. Since an international organization cannot conclude treaties which conflict with its basic instrument, that is, its statute, the wording of article 45 of the draft articles should be amended accordingly.

13. Union of Soviet Socialist Republics

[*Original: Russian*]
[*5 February 1981*]

The draft articles on treaties concluded between States and international organizations or between international organizations formulated by the International Law Commission on the whole accurately reflect established practice as regards contractual relations involving international organizations and could serve as a good basis for the drafting of an international convention on the subject. Articles 1 to 60 of the draft, adopted on first reading by the Commission at its thirty-first session, seem to be satisfactory in principle.

At the same time, a number of provisions in the draft give rise to objections and therefore need to be improved.

1. Generally speaking the draft is rightly based on the premise that the fact that an international organization is a party to a treaty creates rights and obligations, flowing from the treaty, for that international organization alone and does not create such rights and obligations for the States members of that organization. In the light of the foregoing, article 36 *bis* dealing with treaties concluded by organizations of supranational character, should be deleted from the draft, since it goes beyond the scope of the questions covered by the draft.

2. The provisions contained in articles 20 and 20 *bis* give cause for misgivings. These provisions allow the tacit acceptance by international organizations of reservations without their clearly expressed consent to a particular reservation made by a party to a treaty to which the organization is a party. It would seem that any actions by an international organization relating to a treaty to which it is a party must be clearly and unequivocally reflected in the actions of its competent body.

3. The work on article 45 of the draft clearly needs to be continued, since an international organization surely cannot conclude treaties which conflict with the relevant rules of that organization, for example, its constituent act.

14. United Kingdom of Great Britain and Northern Ireland

[*Original: English*]
[*July 1981*]

1. The United Kingdom is particularly glad to be able to comment on articles 1-60 of the draft articles with the benefit of having had sight of the draft articles as a whole, as adopted by the Commission on first reading. The difficulties of commenting on draft articles piecemeal are well known, and the United Kingdom has drawn attention to them in debates in the Sixth Committee of the General Assembly. The value of having an overview of the entire draft is particularly great in a case, such as the present, in which questions of methodology remain to be settled. At an early stage of its consideration of the present topic, the Commission decided to proceed by way of careful examination, article by article, of the provisions of the 1969 Vienna Convention. This seemed to the Commission at the time to be the most practical working method and has received the general approval of Member States participating in the discussions in the Sixth Committee. Moreover, the process of meticulous analysis of the provisions of the Vienna Convention in order to discover, in the context of specific draft provisions, how the solutions they embody could and should be applied to similar problems arising in the case of treaties concluded by international organizations has, at one and the same time, been a valuable intellectual exercise for the Commission and has proved most useful to the Member States in providing a clear picture of which provisions of the Vienna Convention can be applied to international organizations as they stand; which provisions, on the other hand, are applicable with only the necessary changes in nomenclature; and, finally, which provisions, in the view of the Commission, call for the application of a somewhat different rule to international organizations.

2. The United Kingdom is convinced that the Commission, having completed the first reading of the draft articles in this way, should not regard this working framework as immutable and should not accordingly limit itself on second reading to reviewing draft articles 1-60 within the existing framework. Even though the Commission will not have been in possession at its thirty-third session of comments and observations on draft articles 61 *et seq*, the United Kingdom nevertheless believes that it is incumbent on the Commission in the course of the second reading to review *ab initio* the organization and structure of its draft articles on this topic. In emphasizing this point, which is already implicit in the Commission's own "General Remarks" in the report for 1974,[f] the United Kingdom has two principal points in mind.

[f] *Yearbook ... 1974*, vol. II (Part One), pp. 292-294, document A/9610/Rev.1, paras. 136-145.

Firstly, while not wishing to reopen the question of the exclusion from the scope of the Vienna Convention of treaties to which international organizations are parties, the United Kingdom nevertheless observes that the present topic is by way of being a supplement, in a relatively restricted area, to the rules codified in the Vienna Convention. This being so, it would clearly be unnecessary, as well as undesirable, for any instrument which might be adopted as the result of the present study to rival in size and complexity the Vienna Convention itself, still less to exceed the Vienna Convention both in size and in complexity.

Secondly, the United Kingdom would be strongly opposed to any proceeding in the present context which might damage the status or authority of the Vienna Convention itself or undermine the effectiveness of any of its provisions; this would be doubly regrettable now that the Vienna Convention has recently entered into force and is steadily gaining in authority. The Commission has shown itself, in its reports, to be fully sensitive to the delicacy of the interrelationships between the Vienna Convention and any new legal instrument that might emerge from the present draft, and conscious of the dangers attendant on straying beyond the limits of such variations or modifications of the provisions contained in the Vienna Convention as may be strictly necessary to take account of the special features of international organizations. In principle, the United Kingdom approves the decision taken by the Commission at the outset of its drafting work in 1974 rigorously to eschew any thought of modifications or refinements that might also be applicable to treaties between States.[g] But, in the opinion of the United Kingdom, a similar danger (although perhaps not so extensive) resides in the introduction of any variations in wording as between the two texts, however minor, and however laudable the reason might be for suggesting formulations slightly different from those contained in the Vienna Convention. In particular, the Commission should resist any temptation to revise or redraft articles adopted by the Vienna Conference even where the proposal in question emerged at the Conference itself and was not, accordingly, based in detail upon careful preparatory work by the Commission. Nevertheless, there remains a serious question as to whether the whole approach of reproducing the Vienna Convention, article by article, subject to modifications to take account of the particular subject matter, might not make it difficult, if not impossible, to avoid unintended side effects on the integrity of the Vienna Convention itself. The Commission will only be able to give a final answer to this question once it is in a position to look at the draft as a whole at the close of the second reading.

3. The points mentioned above may be illustrated briefly by examples from the present text (even though there is not necessarily any significant point of substance involved). The first danger is well illustrated by articles 19, 19 *bis* and 19 *ter*, and articles 20 and 20 *bis*, corresponding to articles 19 and 20 of the Vienna Convention. The concise terms of article 19 of the Vienna Convention receive their counterpart in the present text in two substantial articles in which the criteria appearing in article 19 are reproduced in three separate places. Similarly, article 20 of the Vienna Convention finds its reflection in three lengthy articles: in particular, the scheme followed requires article 20 *bis*, subparagraph 3 (*b*) to distinguish between no less than four different cases even in the process of applying an identical rule to all four. It must be said that, from the viewpoint of legal technique, such a result appears *prima facie* both inelegant and inefficient.

4. The United Kingdom is fully conscious of the reasons why the Commission has proceeded hitherto by way of placing into separate categories treaties concluded between States and one or more international organizations and treaties concluded between international organizations only. This distinction has clearly been valuable to the Commission as an analytical tool. That said, it remains doubtful whether the distinction should be elevated into a point of cardinal principle. On the one hand, it is clear that the maintenance of the fundamental distinction leads to a considerable overloading of the draft articles, despite the fact that there appear to be, amongst draft articles 1-60, relatively few cases in which the Commission has in fact felt it necessary to recommend a difference of treatment according to whether the treaty envisages both States and international organizations amongst its parties or not. On the other hand, the United Kingdom has noted, with some concern, the remarks made by the Special Rapporteur (and adopted by the Commission in its commentaries to certain draft articles) about consensuality as the basis for treaty relations, inasmuch as these have been cast in a form which implies that true consensuality can only exist between parties of exactly equal status. Without wishing in any way to pronounce upon the question how the status in international law of international organizations differs from that of States, the United Kingdom wishes to point out that consensuality is the fundamental basis underlying the whole of the international law of treaties; it provides the basis for the fundamental norm *pacta sunt servanda*, and thus ultimately for all the principles and rules contained in the Vienna Convention. In this sense, consensuality must continue to be the essential foundation of any new instrument regulating treaties to which international organizations are parties. It would be unacceptable in principle, and carry far-reaching implications, for this basic principle of consensuality to be regarded as in some sense inoperative by virtue of the different character of some treaty parties as compared with others. The United Kingdom wishes to repeat in this context what it has already had occasion to point out in the Sixth Committee,[h] namely that, whatever the difference between States and international organizations *qua* parties to treaties, these differences relate principally to the capacity to enter into treaty relations and the incidents associated therewith; once, however, two entities having international personality are validly in treaty relations with one another, the presumption must be that their rights as contracting partners are equal, and this presumption must stand unless there are clear reasons, in a particular set of circumstances, for drawing distinctions based upon the character or status of the parties.

5. In making the above general comments, the United Kingdom is conscious of the difficulties faced by the Commission in the present state of development of international relations. It might even be said that the present state of international practice as regards treaties concluded by international organizations does not easily admit of codification, given the great increase in the number of international organizations in recent years and the great variety between them, both as to the competence they exercise, as well as in their internal relations with member States and their external relations with third States. This is not, of course, an argument against the Commission's present endeavours, but it serves nevertheless as a further reminder that the element of progressive development involved in the Commission's studies must genuinely be progressive; no purpose would be served by the production of proposals which were ultimately rejected for fear that they might have the effect of stultifying developments which are currently taking place in international practice.

6. Against that background, the United Kingdom wishes to comment in greater detail on draft articles 2, subpara. 1 (*j*), 19-23 *bis*, 27, 36 *bis*, 37 and 46.

Article 2, subpara. 1 (j)

7. This provision serves to define the expression "rules of the organization". This expression is a key term in the draft, inasmuch as the operation of articles 6, 27 and 46 and of other significant provisions in the draft turns on it. The United Kingdom supports the intention of the Commission to provide a definition, and is content with the terms of the definition put forward by the Commission. Without a definition at all, considerable ambiguity might have been engendered as to what elements should be regarded as constituting part of the "rules" of the organization for the purposes of articles such as those referred to above. It is self-evident that in such crucial matters ambiguity should be avoided so far as possible. The particular definition put forward by the Commission follows precedent and is sufficiently supple to allow for the developing practice of international organizations, while avoiding trespassing on the internal arrangements of particular international organizations, which must remain a matter for the member States and for the competent organs of the organization in question.

Articles 19 to 23 bis

8. This set of nine articles regulates the formulation of reservations, their acceptance, objections to reservations, their legal effect, and

[g] *Ibid.*, para. 140.

[h] See *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 47th meeting, para. 14, and *ibid.*, *Sessional fascicle*, corrigendum.

related questions of procedure. It would be unfortunate if the extensive treatment given to this topic gave the impression that it constitutes a major element in the present area of study. Whereas it was certainly true that, in the period leading up to the United Nations Conference on the Law of Treaties, the legal regime of reservations to multilateral conventions was a topic of major controversy in international law, the same can hardly be said of reservations in the context of treaty-making by international organizations. Indeed, inasmuch as it is not clear that cases of difficulty have in fact arisen in this context, it would be unfortunate if the Commission and, subsequently, the international community as a whole, devoted disproportionate attention to this question, ultimately adopting new rules of such additional complexity as to lay the ground for greater difficulties in the future than there have been in the past.

9. As regards the right to formulate reservations, the United Kingdom well understands why the Commission approached this matter with caution. The Commission was necessarily conscious of the fact that the earlier controversy on the matter centred in part on an alleged right of States to formulate reservations at will, which was claimed to be an aspect of State sovereignty; inevitably, looked at in this perspective, the case of international organizations would appear significantly different from that of States. Nevertheless, the modern law on the question, as codified in articles 19 and 20 of the Vienna Convention, does not incorporate a generalized right to enter into treaty obligations subject to reservations of the State's choosing; on the contrary, the general tenor of the Vienna regime is strongly to encourage contracting parties to multilateral treaties to regulate the matter of reservations by express provision in the treaty. Moreover, in modern treaty practice an express regulation of the question of reservations is becoming increasingly common. It would be highly desirable to take account of this fact in any project which, like the Commission's draft articles, is designed for the future (cf. draft article 4). Accordingly, while the United Kingdom does not specifically object to the approach adopted in articles 19 and 19 *bis*, the United Kingdom remains to be persuaded that it is objectively necessary to apply separate rules to the rights of States, on the one hand, and international organizations on the other, to formulate reservations. In particular, the United Kingdom has doubts about the concept, enunciated in paragraph 2 of article 19 *bis*, that the *participation* of an international organization may be "*essential to** the object and purpose" of a treaty. The concept that a *reservation* may be "*incompatible with** the object and purpose" of the treaty is well known in international law, having been enunciated by the International Court of Justice in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*;[1] nevertheless it cannot be said that, in the absence of a generalized system for solving disputed questions connected with reservations to multilateral conventions, the international community has yet arrived at sufficiently well developed criteria for deciding the questions of compatibility with the object and purpose of the treaty. This being so, it would seem unwise to further burden treaty law by the introduction of a new, and subtly different concept of the sort put forward in the Commission's draft. It seems to the United Kingdom that, in the generality of the cases foreseen by the Commission in its commentary on article 19 *bis*, a reservation formulated by the international organization would in any event fail to satisfy the established test of compatibility with the object and purpose of the treaty. Conversely, it is by no means difficult to think of circumstances in which the participation of an international organization might be essential to the *efficacy* of a treaty, but only in very much the same way as the participation of one or more contracting States might also be necessary for the treaty to have its intended effect. In such circumstances, the criterion of the participation of the organization as essential to the object and purpose of the treaty would be too ambiguous and uncertain in its operation. Moreover, some account has to be taken in this connection of the possibility that an international organization may, in terms of its constituent instrument and other rules, be exercising some of the competences of the member States which have been transferred to it. It is far from clear that, in such circumstances, the system proposed by the Commission would preserve the necessary balance as between the parties to the treaty.

[1] *I.C.J. Reports 1951*, p. 15.

10. The major concern of the United Kingdom relates, however, not to the right to formulate reservations, but to those of the Commission's draft articles dealing with the acceptance of, and objection to, reservations. In this context, draft articles 20 and 20 *bis* are broadly equivalent to article 20 of the Vienna Convention. Draft article 19 *ter*, entitled "Objection to reservations", is entirely new. The necessity for this new provision arises solely out of the structure which the Commission has decided to adopt for articles 19, 19 *bis* and 19 *ter*, and in particular follows from the differentiation between the position of States and international organizations, under a treaty to which both are parties, as exemplified by paragraph 3 of draft article 19 *ter*—a differentiation about which the United Kingdom has some fundamental doubts, as indicated below. Therefore, the United Kingdom must place a general reserve on article 19 *ter*, simply by virtue of the fact that it has no counterpart in the Vienna Convention itself. Without prejudice to that and before proceeding to consider paragraph 3 of article 19 *ter* in more detail, the United Kingdom would wish to draw attention to a discrepancy between the drafting of paragraphs 1 and 2, in that the latter contains a specific cross-reference to article 19 *bis*, paragraphs 1 and 3, whereas the former contains no equivalent cross-reference to article 19. The reason for this difference of terminology is not apparent from the Commission's commentary and (subject to any more fundamental considerations arising out of the comments below), the United Kingdom questions whether the maintenance of this difference would be desirable. It could lead to difficulties of interpretation, which might in the end only serve to cloud the meaning given to the specific legal concept of an "objection" both in the Vienna Convention itself and in the Commission's draft articles. That is to say, it may lead to a confusion between the right of one contracting party to exclude the opposability to itself of an entirely permissible reservation formulated by another contracting party, and the possibility that one or more contracting parties may contest *in limine* the very admissibility of a purported reservation in accordance with the criteria specified in article 19 of the Vienna Convention and reproduced in draft article 19 and draft article 19 *bis*, paragraphs 1 and 3, of the present articles (express or implied exclusion and incompatibility with the object and purpose).

11. The United Kingdom's difficulties with the substance of paragraph 3 of draft article 19 *ter* are of an altogether more fundamental character. The rationale behind the Commission's draft is that the right of a party to formulate reservations to a treaty finds its balance and counterpart in the extent to which that party has a right (or "possibility") of raising objections to reservations formulated by other parties. The United Kingdom does not believe this governing principle to be sound. It seems to the United Kingdom, in the light of the whole development of the institution of reservations to multilateral conventions, that the true counterpart to the right of one party to formulate a reservation is in fact the inherent right of the other parties to object (in the technical sense used above) to that same reservation. Any other principle (i.e. any system under which the possibility of making a reservation was not balanced by the possibility of its being objected to) would destroy the crucial balance between contracting parties in respect of their mutual rights and obligations, inasmuch as it would allow one party to impose its reservation upon others and thus, in effect, to write its own treaty. Such a proposition was decisively rejected by the Conference on the Law of Treaties. Nor is the principle in any way affected by the special provision made for a reservation expressly authorized by a treaty, since such a reservation has been specifically agreed to by the contracting States in advance.

12. Nevertheless, the Commission has, perhaps inadvertently, created in its draft articles a situation of precisely this kind. This has arisen as a result of the Commission's preference for regarding the right of an international organization to object to a reservation not as being inherent in the very possibility that a reservation may be formulated by another party, but as being a right which requires to be specifically conferred by the draft articles. The ultimate result could, in many cases, be diametrically opposed to the Commission's essential objective in postulating the category of treaties where the participation of an international organization is essential to the object and purpose. For, under the provisions of article 19 *bis*, paragraph 1, taken together with 19 *ter*, paragraph 3, it might be possible for a State party to such a treaty to impose its reservation upon the international organization, even though the latter might conclude that the application of the treaty, subject to the reservation, was not compatible with

the public function which the international organization was called upon to perform under the treaty. Such a situation would be clearly undesirable in the public interest, and might furthermore lead to extraordinary legal results if other *States*, parties to the treaty, chose to exercise their right to object to the reservation (while not precluding the entry into force of the treaty as between them and the reserving State). The solution appears to the United Kingdom to be, not to regard a "right to object" as being in some sense a manifestation of State sovereignty; but rather, on the basis of the fundamental principle of the greatest possible equality between parties to a treaty, to regard the possibility of an objection as the inherent and automatic corollary of the formulation of the reservation itself. If, as is strongly urged, the Commission accepts the validity of this argument, it would be left with the choice *either* of maintaining the special category of treaties foreseen in article 19 *bis*, paragraph 2—in which case the limitation on the right to make reservations would have to be applied equally to States parties and to international organizations parties; *or* to subject to critical examination the restrictive provisions laid down in paragraph 3 of draft article 19 *ter*. If, in the course of this examination, the Commission were to have second thoughts about the legal justification for paragraph 3, the question would arise whether draft article 19 *ter* (which, as explained above, is an addition to the scheme contained in the Vienna Convention itself) should be maintained at all. By reason of the view it takes of the essential nature of the right to object to a reservation, the United Kingdom would see considerable merit in the suppression of draft article 19 *ter* entirely.

Article 27

13. No comment is called for on paragraphs 1 and 3 of this draft article, but the United Kingdom is conscious of the difficulties with which the Commission had to grapple in producing, in paragraph 2, a counterpart to the rule laid down for States in article 27 of the Vienna Convention. The United Kingdom agrees with the Commission's conclusion that the rules of an international organization are not on the same plane as the internal law of the State. The United Kingdom therefore agrees in principle that the Commission's draft articles should contain a provision along the lines of paragraph 2. A point of concern in this context is the same as that which troubles the Commission, namely, whether it is appropriate to give a greater status to the internal operations of the organization than to the internal law of a State, as in the proviso contained in the Commission's draft: "unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization". It is pertinent to observe in this context that arrangements of the sort foreseen in this proviso are also not unknown in treaties between States. For example, it is common form in treaties concluded by the United Kingdom providing for the expenditure of money (if the treaty enters into force on signature) for the treaty to be drafted in such a way that its operation is contingent on the voting of the necessary monies by Parliament. Nevertheless, neither the Commission nor the Conference on the Law of Treaties felt it necessary to include a similar proviso in the Vienna Convention itself; the underlying reason was no doubt that the matter was ultimately felt to have been regulated as a question of the *interpretation* of the treaty, in accordance with its terms (a similar point having been made by certain members of the Commission in the discussion of draft article 27). Conversely, if the operation of a duly authorized treaty concluded by an international organization became impossible as a result of the subsequent failure by the competent organs of the organization to take the necessary decisions for implementation of the treaty, the matter might become one to be dealt with under the draft article on supervening impossibility of performance, contained in the latter part of the Commission's draft articles, and questions of international responsibility might ultimately arise. All in all, therefore, the Commission should be encouraged to reconsider whether it is in fact necessary for draft article 27, paragraph 2, expressly to provide for the very rare case in which an argument may be raised as to the subordination of treaty obligations to the internal workings of an international organization party to it, where no specific provision has been included in the treaty to regulate the question. It must be borne in mind in this connection that the functions and powers of international organizations are normally entrusted to organs composed of representatives of sovereign States, the decisions of which may in practice be taken on grounds not limited to the organization's treaty obligations, including the situation in which there is controversy within the organ itself or as between member States as to the lawfulness of certain actions in terms of the organization's governing instrument. Reference may be made in this context to the International Court of Justice's Advisory Opinion of 20 December 1980 on *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt.*[j]

Article 36 bis

14. The United Kingdom and various other member States have commented at length in favour of the inclusion of draft article 36 *bis* since it was first put forward by the Commission in its report for 1978. In particular, the United Kingdom wishes to refer to and endorse the comments on this question submitted on behalf of the European Economic Community, so far as that organization is concerned. Nevertheless, the question has a wider aspect, to which the United Kingdom wishes to draw attention in the present comment. In broad terms, draft articles 35 and 36 reproduce for present purposes the rules adopted in the Vienna Convention, subject only to particular considerations bearing on the assent of a third international organization to rights conferred upon it by a treaty stipulation to which it is not party (on which subject the United Kingdom does not propose to comment at the present time). In general, a translation of those rules from the area of treaties between States to that of treaties between States and international organizations is both necessary and appropriate. However, when one begins to examine the matter more closely, it becomes apparent that a mere translation, without more, of the Vienna Convention articles to international organizations begs a number of crucial questions as to the identification of "third States" in these circumstances. It is evident from the origins of the rule *pacta tertiis nec nocent nec prosunt*, and from the discussions in the Commission on the proposals which eventually became articles 35 and 36 of the Vienna Convention, that a "third State" was regarded as being, by definition, a State that was outside the treaty-making process entirely and was therefore a stranger to the creation of the treaty right or obligation. While not expressed with quite this clarity in the definition of "third State" contained in article 2, this is nevertheless the essential thought behind the definition. Clearly, however, this simple model does not fit in every respect the case of the member States of an international organization which becomes party to a treaty. This is so for two reasons. The first reason is that, through their representatives on the competent organ or organs of the organization, the member States will have been associated with the conclusion of the treaty by the organization, especially so in the case where (as is becoming increasingly common) the international organization itself participates in the treaty negotiations and has received for this purpose a specific mandate from the competent organ. Indeed, if for any reason the international organization does not itself participate in the negotiations, but these are nonetheless conducted by the member States with a view to the ultimate participation of the organization of which they are members, then it may hardly be said that the member States are strangers to the negotiation.

15. The second reason is that, irrespective of the particular division of competences that may arise in a particular organization, it is very frequently the case that one or more member States will themselves become parties to the treaty along with the organization itself. It is hardly to be presumed that the complexities of this situation should produce a result quite as simple and straightforward as that embodied in articles 35 and 36 of the Vienna Convention; nor is it to be presumed that any of the participants in the negotiations could fail to be aware of this.

16. For the above reasons, it seems abundantly clear to the United Kingdom that the member States of an international organization cannot automatically be regarded as "third States", within the meaning of the rules laid down (as between States alone) in articles 2, 35 and 36 of the Vienna Convention, in relation to treaty rights and obligations assumed in due form by the organization. It follows from this both that the Commission was entirely right in attempting to formulate an additional provision to deal with this state of affairs and that the purpose of such additional provision is not to create a new rule of international law but rather to correct the unwarranted inference that might otherwise arise from the simple translation of articles 35 and 36 of the Vienna Convention into the present draft articles. The United

[j] *I.C.J. Reports 1980*, p. 73.

Kingdom has taken due note of the comment made, in the course of the debates in the Sixth Committee, that the Commission's draft article 36 *bis* conflicted with a generally accepted rule of international law that treaties could not create rights or obligations for any third State without its consent; the United Kingdom regards this objection however as being clearly without substance in the present circumstances. By definition, it is impossible to regard the member State which has subscribed to the rules of the organization in becoming a member as not consenting to the substance and effect of those rules. Indeed, the question may even be posed whether the rules of the organization do not, in effect, constitute a form of consent sufficient to satisfy the principle underlying the rule contained in article 34. The essential feature of that consent is, of course, that it is given in general terms in advance of the conclusion of the particular treaty, from which it follows that it is simply the procedural aspects of the more detailed amplification, in articles 35 and 36, of the general rule laid down in article 34, which is at fault in failing to cater for this particular case. At the same time, the United Kingdom acknowledges the difficulty and delicacy of the Commission's task in attempting to formulate the necessary additional elements, but believes that the Commission deserves strong encouragement in its attempts further to refine the ideas contained in draft article 36 *bis* (together with the necessary consequential elements in draft article 37) which constitute an essential requirement for this portion of the draft articles.

Article 46

17. Paragraphs 1 and 2 of this draft article deal with the position of contracting States, and are identical in substance with the equivalent provisions in the Vienna Convention. Paragraphs 3 and 4, on the other hand, deal with the case of contracting international organizations, but show certain differences by comparison with paragraphs 1 and 2: in particular, paragraph 3 omits the additional qualification that the rule violated must be one of "fundamental importance", and paragraph 4 incorporates a totally different definition of when a violation is "manifest". The United Kingdom has studied the text closely in the light of the Commission's commentary, but remains unpersuaded of the need to distinguish between the circumstances in which a State and the circumstances in which an international organization may invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law (or of its rules, as the case may be). The Commission's commentary rightly points out that article 46 of the Vienna Convention was inspired by general principles of good faith and responsibility and that the present draft article has the same inspiration. Nevertheless, in the view of the United Kingdom, no case has been made out for translating the same general principle into different rules for States and for international organizations: if the basic rule is to be the same, then the qualifications should be, so far as is possible, identical, and there is a strong presumption accordingly that in the drafting the same wording should be used, so far as possible, in both cases. The commentary gives no indication that it was the Commission's intention to draft rules with substantively different effects, but the use of widely different formulæ could give rise precisely to the misleading impression that there are more substantive distinctions between the two cases than is in fact intended. The United Kingdom therefore recommends that the Commission revert to a simpler draft article based more closely on article 46 of the Vienna Convention. This would give the Commission the opportunity at the same time to harmonize the title of the present draft article more closely with the title of article 46: the present title lays unnecessary and misleading emphasis on the notion of "violation" of the internal rule, whereas the principal concern of the provision in question is of course the external effect on the treaty. The Commission might likewise resolve the discrepancy between paragraphs 2 and 4, in that the former is (wrongly) limited to the impression in the mind of a contracting State, whereas the latter deals (rightly) with both contracting States and contracting organizations.

18. There follow a number of comments of an essentially drafting character on certain of the draft articles 1-60 which have not been dealt with above.

Article 2

19. Subparagraph 1 (*d*) contains, in square brackets, the phrase "by any agreed means" as qualification of the notion of consenting to be bound by a treaty. In its 1974 report, the Commission indicated that it intended to review the phrase in the light of usage elsewhere in the draft.[k] One may now compare this subparagraph with article 11, in particular, and with the immediately following articles, from which it will be seen that in dealing generally and in particular with the various recognized means of establishing consent to be bound, the Commission, following the pattern of the Vienna Convention, supplements the listing by the addition of "or by any other means if so agreed", to cover less orthodox cases which are not readily foreseeable in advance. It follows that there is no need to deal with the point in the context of particular definitions in article 2. Accordingly, it is recommended that the phrase in square brackets should be deleted.

Article 4

20. The concluding phrase of this draft article reveals some slight differences from the equivalent phrase in article 4 of the Vienna Convention. Whereas the latter refers to "treaties which are concluded by States after the entry into force of the present Convention with regard to such States", the present draft article refers to "such treaties after the [entry into force] of the said articles as regards those States and those international organizations". It may be that some of these variations arise simply out of the process of translation, and that conformity with the usage in the Vienna Convention can be restored as a purely editorial matter. To the extent that this is not so, the United Kingdom can nevertheless see no good reason for diverging from the Vienna Convention text. In particular, the United Kingdom draws attention to the omission of the word "concluded" which, in the Vienna Convention, serves to complete the temporal clause "after the entry into force"; it is clear to the United Kingdom that the omission of the concept of "conclusion" in that context in the present draft creates a substantial, and highly undesirable, area of ambiguity.

Article 6

21. This draft article refers to the capacity of an international organization to conclude treaties as being governed by the "relevant rules" of the organization. A similar usage appears in articles 35, para. 3, 36, para. 3 and 36 *bis*, para. (*a*). The United Kingdom questions whether, from a drafting point of view, the qualification "relevant" is necessary. Article 2, subpara. 1 (*j*), contains the definition of "rules of the organization", and this definition has been commented on with approval above. Whereas it is questionable whether the addition of the word "relevant" adds anything to the articles in question (since it embodies an idea which is self-evident); its very inclusion could nevertheless lead in practice to disputes as to whether formal distinctions ought to be made between certain rules of the organization and others, which the definition in article 2, subpara. 1 (*j*), is precisely designed to avoid. The United Kingdom therefore suggests that the word "relevant" should be deleted.

Article 7

22. Subparagraph (*b*) of paragraphs 1, 3 and 4 again shows slight variations from the equivalent phrases in the Vienna Convention, inasmuch as the present draft omits the phrase referring to the intention of the parties. The effect is to take something which is dependent upon the will of the parties in the particular case and turn it into an apparently general and abstract concept; this creates, once again, a new area of ambiguity. The United Kingdom can see no real value in the change and recommends the reinstatement of the Vienna Convention text.

Article 12

23. This article, together with various others, such as article 15, uses the phrase "the participants in the negotiation". While the broad intention behind this phrase is clear enough, the phrase does not correspond to the definitions included in article 2, subparagraph 1 (*e*). To the extent that "participants" is a word which fails to make entirely clear whether it signifies the potential parties to the treaty themselves (whether States or international organizations) or merely their authorized delegates, it seems that the more precise phrases defined in article 2 are to be preferred. It may also be pointed out that the present drafting of article 12, subpara. 3 (*a*), omits the phrase "of the treaty" and the present text of article 15, subpara. 1 (*b*), omits the phrase "*it*

[k] *Yearbook ... 1974*, vol. II (Part One), p. 294, document A/9610/Rev.1, footnote 629.

is otherwise established that", for no apparent reason in either case. It is recommended, once again, that the exact terminology of the Vienna Convention be adhered to.

Article 39

24. Paragraph 1 of this article diverges in two respects from the text of article 39 of the Vienna Convention, for reasons which are explained in the Commission's commentary. The United Kingdom reserves its judgement for the time being as to whether these variations are necessary.

15. Yugoslavia

[*Original: French*]
[*1 April 1981*]

In reply to the letter from Mr. E. Suy, Legal Counsel of the United Nations, of 6 October 1980, the Permanent Mission of the Socialist Federal Republic of Yugoslavia to the United Nations has the honour to communicate the comments and observations of the Government of Yugoslavia concerning the draft articles on treaties concluded between States and international organizations or between international organizations. The Government of Yugoslavia has in mind in this regard the articles which the International Law Commission adopted at its sessions up to the thirty-first session and which it decided, in accordance with articles 16 and 21 of its Statute, to communicate to Governments for comments and observations through the Secretary-General.[l] In this context, the Commission, at its thirty-second session, requested States to communicate their comments and observations regarding this question by 1 February 1981 at the latest.[m]

In this regard, the Yugoslav Government welcomes, first of all, the excellent work carried out by the Commission, and in particular by its Special Rapporteur, Mr. Paul Reuter. The Yugoslav Government also wishes to express its desire that the Commission should undertake without too much delay the second reading of the draft articles and successfully conclude its work on this important question.

In formulating its observations and comments on the draft articles, at a time when the study of this subject is nearing its end, the Yugoslav Government wishes to stress that it has supported from the outset the work of the Commission on this matter. It did so as early as the time when the draft articles on the law of treaties had been in preparation. At that time, in its reply to the Secretary-General of the United Nations, the Yugoslav Government pointed out that it considered 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**".[n] In accordance with this position, Yugoslavia included in article 2, paragraph 1, of its "Law on the Conclusion and Execution of International Treaties" the following provision: "The expression 'international treaty' means any treaty concluded in writing by the Socialist Federal Republic of Yugoslavia with one or more States or with *one or more international organizations** and governed by international law."[o]

Mindful that the task of preparing an international instrument capable of governing this field is currently before the international community, the Yugoslav Government, noting that the preparation of the draft articles is nearing its end, takes this opportunity to express its opinion. It wishes to state its observations and suggestions with a view to helping to clarify the provisions of the draft. The remarks presented below in no way prejudge the position which the Government of Yugoslavia may take at a later stage of the work. The purpose is to arrive without too much delay at the adoption of a convention on treaties concluded between States and international organizations or between international organizations.

1. First of all, the Yugoslav Government fully supports the approach taken and the work carried out by the Commission on this subject. As in the case of the other tasks undertaken over the past ten years by the Commission, it welcomes the fact that the form used for the codification is that of draft articles, capable of constituting, at an opportune time, the substance of a convention.

2. In the opinion of the Yugoslav Government, despite opposing concepts, the Commission has, to the very end of its work, remained true to the provisions of the 1969 Vienna Convention. This correct approach has enabled it to apply, wherever possible, solutions taken from the above-mentioned Convention, even though that procedure sometimes created difficulties because some provisions of the draft articles relate to treaties between international organizations, which, in a number of respects, represent specific subjects of international law entirely different from States. Proceeding from this fact, the Yugoslav Government wishes to emphasize that it is important to obtain comments on the draft articles from international organizations as well, in order to gain a better understanding of the main problems and to eliminate some of the weaknesses of the draft articles.

3. The best course the Commission could find was to study one by one the text of each of the articles of the Vienna Convention and determine what modification of wording or substance would be required for the drafting of a similar article dealing with the same problem in the case of treaties concluded between States and international organizations or between international organizations. Of course, the Commission also had to prepare new articles whenever that proved necessary. For that reason, it is understandable that, in addition to difficulties of wording and to sometimes delicate adaptations of the text of the Vienna Convention, the work occasionally raises some novel and essential problems.

4. With regard to its specific comments on the draft articles, the Yugoslav Government considers Part I and articles 6 to 18 of Part II of the draft, as adopted by the Commission, to be acceptable in principle; it feels that their final adoption should give rise to no particular difficulties.

5. In the context of Part II, section 2, of the draft articles, the Yugoslav Government attaches particular importance to *articles 19* (Formulation of reservations in the case of treaties between several international organizations), *19 bis* (Formulation of reservation by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States), and *19 ter* (Objection to reservations), since the provisions in those articles deal with a matter of the highest importance to the draft articles as a whole. The wording of those articles is in the nature of a compromise and authorizes in a general way the formulation of reservations by States in every case (art. 19 *bis*, para. 1) and by international organizations in certain cases if the treaty has been concluded solely between international organizations (art. 19) or when the participation of an international organization is not essential to the object and purpose of a treaty between States and international organizations (art. 19 *bis*, para. 3). Where the participation of an international organization in the latter type of treaty is essential to the object and purpose of the treaty, a more restrictive formulation has been adopted in the draft articles, which permits the formulation of reservations only if the treaty itself expressly authorizes them or if it is otherwise agreed that the reservation is authorized (art. 19 *bis*, para. 2). The Commission has stipulated the same conditions in the case of the formulation of objections to reservations (art. 19 *ter*). The provisions cited above lead one to conclude that the Commission has decided to impose stricter conditions on international organizations than on States. It is true that there are differences between States and international organizations in respect of certain features that might justify the different treatment and the conditions imposed on the formulation of reservations. However, their unequal treatment, which derives from the solutions provided for, should, in the view of the Yugoslav Government, be reconsidered in detail, in order to avoid giving rise in practice to possible negative and confusing situations in the evaluation of the validity of international treaties owing to the differences in conditions imposed, as a result of the draft articles cited above, on States and on international organizations with regard to the formulation of reservations.

6. The Yugoslav Government is ready to accept the Commission's approach to the provisions of *article 27* (Internal law of a State, rules

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[l] *Yearbook ... 1979*, vol. II (Part Two), p. 138, para. 84.

[m] *Yearbook ... 1980*, vol. II (Part Two), p. 65, para. 55.

[n] *Yearbook ... 1966*, vol. II, p. 359, document A/6309/Rev.1 (Part Two), annex.

[o] Socialist Federal Republic of Yugoslavia, *Službeni list* [Official Journal], No. 55 (1978).

of an international organization and observance of treaties), in particular its approach to the extension of the meaning of the expression "rules of the organization"; that expression should be given a broader conception than is envisaged in article 1, paragraph 1, subparagraph (34), of the 1975 Vienna Convention, since in its present form the article represents an appropriate application of the rule *pacta sunt servanda* envisaged in draft *article 26*.

7. In the view of the Yugoslav Government, the Commission was quite right in making use, in the section on the interpretation of treaties (*arts. 31 to 33*), of the corresponding provisions of the 1969 Vienna Convention.

8. The text of *article 36 bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization) is based, in the view of the Yugoslav Government, on the provisions of treaties governing the status of supranational international organizations; however, these rules cannot be applied in a general manner to other international organizations. The provisions of the above-mentioned article, especially those contained in subparagraph (*a*), run counter to the provisions of *articles 35 and 36* and to the generally recognized rule of international law *pacta tertiis nec nocent nec prosunt*, and therefore they are not acceptable in their present wording. Furthermore, the provisions of the article do not make it possible to establish clearly the need to apply special treatment to States members of international organizations and to regard them as third States members in the treaties of international organizations to which those States belong. For that reason, the Yugoslav Government believes that it would be desirable to apply the rules contained in articles 35 and 36.

9. In the view of the Yugoslav Government, the Commission correctly drafted *article 43* (Obligations imposed by international law independently of a treaty) in taking the view that "there can be no doubt that rules of international law can apply to an international organization independently of any treaty to which it may have been a party".[p] The many documents adopted in the United Nations, such as the Definition of Aggression, the Charter of Economic Rights and Duties of States,[q] and others, only serve to support this proposition.

10. The Yugoslav Government supports the Commission's position with regard to *article 46* (Violation of provisions regarding competence to conclude treaties) and believes that even the simplest provision of the statute of an international organization cannot be considered to be of fundamental importance, and therefore its violation cannot be considered a reason for invalidating the treaty.

11. With regard to *article 52* (Coercion of a State or of an international organization by the threat or use of force), the Yugoslav Government believes that these provisions are fully applicable to international organizations as well. The question involves a general principle of international law, which is sanctioned by the 1969 Vienna Convention, relating to treaties concluded between States, but whose effect could be extended to cover the international treaties dealt with by the draft articles as well, in view of the very varied possibilities of recourse to the threat or use of force in international relations.

12. The Yugoslav Government particularly welcomes the introduction of the provisions of *article 53* (Treaties conflicting with a peremptory norm of general international law (*jus cogens*)), taken from the 1969 Vienna Convention, because the rules of *jus cogens* are the basis of modern international law as a whole.

13. In the view of the Yugoslav Government, the formulation of *article 60* (Termination or suspension of the operation of a treaty as a consequence of its breach), which is also taken from the 1969 Vienna Convention, is completely satisfactory. It sets down basic rules dealing with the termination of a treaty or the suspension of its operation as a consequence of its breach that can be applied equally well to international organizations. The matter dealt with by the provisions of the above-mentioned article is one of the problems that remain pending, primarily because the arbitrary breach of a treaty endangers its stability and the stability of the international legal order. In this context, with regard to paragraph 5 of article 60, it might be necessary to consider the question whether there are cases in which a treaty could not be terminated or its operations suspended as a consequence of its breach. The importance of this article is recognized not only by States and in writings on international law; it is also recognized by the International Court of Justice. In its Advisory Opinion of 21 June on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*,[r] the Court referred expressly to the provisions of article 60 of the Vienna Convention, although that Convention had not yet entered into force. The importance of those provisions, in the view of the Yugoslav Government, lies not only in the introduction of rules governing the termination or suspension of the operation of a treaty as a consequence of its breach. Those provisions also establish the possibility for drawing up rules dealing with the responsibility of States for the breach of treaties between States and international organizations or between international organizations, which do not exist in the Vienna Convention but are the subject of a detailed study connected with the preparation of the *draft articles on State responsibility* which the Commission is now preparing.

[p] *Yearbook ... 1979*, vol. II (Part Two), p. 150, commentary to article 43.

[q] General Assembly resolutions 3314 (XXIX) of 14 December 1974, annex, and 3281 (XXIX) of 12 December 1974, respectively.

[r] *I.C.J. Reports 1971*, p. 16.

B. Comments and observations of the United Nations and specialized agencies

1. United Nations

[Original: English/French]
[1 May 1981]

... [At] the present time, the Secretariat of the United Nations has considered only draft articles 1 to 60 ... The formal comments by the United Nations could be submitted after the International Law Commission has completed its elaboration of the whole of the text.

The attached preliminary comments and observations undoubtedly reveal the nature and the gravity of the issues that the set of draft articles raises for the United Nations. ...

I. Preliminary comments by the United Nations on draft articles 1 to 60

1. The United Nations wishes to express reservations concerning the Commission's general approach to the subject, namely to draft each article as a parallel to the corresponding article of the 1969 Vienna Convention. Although this approach has permitted a detailed examination of the extent to which the provisions of the Vienna Convention are applicable to treaties to which one or more international organizations are parties, it also has demonstrated that most provisions of the Vienna Convention are applicable to such treaties.

2. The Commission has emphasized the fact that while States in international law are equal also with respect to their capacity to enter into treaties, the capacity of international organizations differs from organization to organization. In this connection, the United Nations is an example of an international organization which has negotiated and concluded numerous treaties with States and other international organizations. Agreements in the form of treaties also have been concluded between the United Nations and entities not referred to in the draft articles, such as foundations, private and public corporations, and governmental organs and agencies. The continuous expansion of the number and subject areas of treaties to which the United Nations

has been or is a party has occurred without an express provision in the constitutive instrument—the Charter of the United Nations—granting the Organization the capacity to enter into treaties for the general purpose of carrying out the tasks entrusted to it. Alghough Article 104 of the Charter provides that "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes", this Article contains no express reference to treaty-making capacity, nor does the Convention on the Privileges and Immunities of the United Nations of 13 February 1946,[s] which is the principal international instrument—widely accepted—for the purpose of implementing Articles 104 and 105 of the Charter.[t] Although Article 4 (1) (*a*) of the Regulations to give effect to Article 102 of the Charter[u] foresees that the United Nations is to be a party to registerable treaties or agreements, and article 10 (*a*) similarly refers to instruments to be filed and recorded, the United Nations treaty practice may be said to find its legal basis principally in the intendment of the Charter as interpreted and accepted through practice. It follows that in the case of the United Nations the practice of the Organization is an essential source of the rules of international law governing the subject of treaties between the United Nations and States and/or international organizations.

3. The Commission's reports and its commentary to the draft articles extensively discuss whether the nature of treaties concluded solely among States differs from that of treaties between one or more States and one or more international organizations, and further whether such treaties differ in their nature from treaties among international organizations. Without necessarily intending to comment on the validity in theory of these distinctions, it seems clear that from the outset the method following in the United Nations practice has been to apply in principle the established international legal rules concerning treaties between States, and to modify these rules only so far as necessary in view of the special requirements of the United Nations.

II. Comments on particular articles

Article 2, para. 1, subparas. (c) *and* (c bis); *article 7*

1. It is the general practice of the United Nations not to require the production of full powers by permanent representatives of Member States to the United Nations with respect to treaties dealing with the relationship between the State in question and the Organization. However, if the treaty concerns a subject which is not part of the bilateral relationship between the State and the Organization, or if the representative of the State is not accredited to the United Nations, the practice is to require the production of full powers for any expression of consent to be bound by the treaty, but not for the purpose of authenticating the text by signature, signature *ad referendum*, or initialling.

2. With respect to the representative of the United Nations, no instrument of powers (or full powers) is issued when the Secretary-General himself signs a treaty on behalf of the United Nations. In practice, treaties of the United Nations are very often signed by heads of departments, offices, divisions, etc., it being understood that such officials may sign a treaty or agreement binding the Organization provided they act within their area of competence with the express or implied authorization of the Secretary-General. The considerable increase in the number of international treaties entered into by the United Nations and the fact that such treaties in most instances are not signed by the Secretary-General explains that Governments sometimes have demanded that the representative of the United Nations present formal powers, and in such cases formal powers have been issued by the Secretary-General.

Article 2, para. 1, subparas. (c) *and* (c bis); *article 7, para. 4; article 11*

3. The distinction between the terms "full powers" and "powers" is explained in the Commission's commentary on the basis of the different capacities possessed by certain representatives of States and representatives of international organizations, respectively. However, the actual instrument indicating a representative's authority need not—and in practice often does not—authorize the representative to express the Organization's consent to be bound by treaties in general, but rather refers merely to a particular treaty or to a category of treaties, such as those referred to in article 7, para. 2, subparas. (*b*), (*c*) or (*d*). Since, moreover, the draft articles attribute the same function and effect to "full powers" and "powers", it appears that the same term could, in the interest of clarity and simplicity, be used for representatives of States as well as for representatives of international organizations.

4. In the definitions of terms in article 2, para. 1, subparas. (*c*) and (*c bis*), as well as in the draft articles referred to above, a distinction is drawn between the capacity of representatives of States to "express" the consent of a State and the capacity of representatives of international organizations to "communicate" the consent of an international organization. The theory underlying the distinction seems, according to the Commission's commentary,[v] to be that to employ the term "express" consent in connection with representatives of international organizations might give rise to a misunderstanding concerning the representatives' authority to determine whether or not the international organization should be bound by a treaty. The commentary further states that the use of the verb "communicate" more clearly indicates "that the consent of an organization to be bound by a treaty must be established according to the constitutional procedure of the organization and that the action of its representative should be to transmit that consent". While these distinctions are of analytical interest, it is necessary to consider whether the draft articles incorporating these distinctions accurately reflect United Nations practice.

5. In this connection, it is well established that as far as treaties of the United Nations are concerned, in nearly every case it is the Secretariat that represents the Organization at all stages, including the negotiating stage and the establishment of the Organization's consent to be bound. In exceptional cases—such as the Headquarters Agreement with the United States of America, the bringing into force of which was authorized by the General Assembly in its resolution 169 (II) adopted on 31 October 1947—formal approval has been expressed by an intergovernmental organ of the United Nations, but in nearly all other instances, including headquarters agreements subsequently concluded, no formal action was taken by any intergovernmental organ either before or after the text of the treaty had been established as authentic and definitive. In accordance with this practice, the final clauses in United Nations treaties usually provide for entry into force immediately upon signature as far as the Organization is concerned.

6. In view of the characteristics of United Nations treaty practice outlined above, it is clear that the distinction between "expressing" and "communicating" consent has not found application except in highly exceptional cases. Consequently, it would seem advisable to suppress the distinction in the draft articles referred to here. It is noted that this solution has been adopted in the remaining draft articles.

Article 2, para. 1, subpara. (j) *and para. 2*

7. The definition of "rules of the organization" contained in article 2, para. 1, subpara. (*j*) is of paramount importance, for the legal position of international organizations under the draft articles.

8. In this connection, reference is made to the comments and observations made above concerning the legal basis of the treaty-making capacity of the United Nations and concerning the role of practice as an essential source in the development of the rules of international law applicable to treaties of the United Nations. There can be little doubt that the applicable international law rules have been and are being continuously developed. In this context it seems doubtful that the word "established" should be retained as a qualification to

[s] United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 329 (corrigendum to vol. 1).

[t] Some other Charter provisions, such as Articles 43, 57, 63 and 81, refer to particular types of agreements; however the provisions of Article 43, para. 3, concerning agreements between the Security Council and Member States or groups of Member States, have yet to be implemented.

[u] General Assembly resolution 97 (I) of 14 December 1946, modified by General Assembly resolutions 364B (IV) of 1 December 1949 and 482 (V) of 12 December 1950.

[v] *Yearbook ... 1975*, vol. II, p. 176, document A/10010/Rev.1, para. (11) of the commentary to art. 7.

"practice", because to do so might prevent the further development and adaptation to future needs of international organizations' treaty practice.

9. From the Commission's reports it is seen that article 2, para. 2 was approved at first reading before the definition contained in article 2, para. 1 (*j*) was introduced. Possibly because of this sequence, a semantic circle has been created through the references in both of these provisions to the rules of the organization.

10. That the "rules of the organization" necessarily must permit further development on the basis of practice appears to be recognized—at least by implication—in the Commission's commentary to article 2, para. 2, and to article 6.

11. The identical definition of "rules of the organization" contained in article 2, para. 1, subpara. (*j*) is also found in article 1, para. 1, subpara. (34) of the 1975 Vienna Convention. Indeed, the drafting history of the present draft articles suggests that this definition was simply transposed without full consideration of all implications of such a move. Naturally, it is necessary to explain why the same definition should not be used in both the 1975 Vienna Convention and in the draft articles now under consideration. A logical and convincing reason for not using identical definitions, especially a definition circumscribing "practice" by the term "established", lies in the fact that the draft articles do not contain a provision similar to article 3 of the 1975 Convention. The latter provision states in its relevant part that "The provisions of the present Convention are without prejudice to any relevant rules of the Organization ...". On the basis of a provision of this nature, the practice of an international organization with respect to the development of "rules of the organization" would not be affected by the application of the Convention.

Article 4

12. The commentary to this article raises the difficult question whether international organizations should be afforded the opportunity to become parties to any convention which may result from the draft articles. In view of the many unclarified questions raised by the draft articles, including whether the final instrument should be a multilateral treaty or a set of recommended norms adopted by the General Assembly, the United Nations is not in a position to offer comments on this point at the present time.

Article 6

13. Reference is made to the preceding comments and observations with respect to article 2, para. 1, subparas. (*c*), (*c bis*) and (*j*), and article 7.

Article 14; article 2, para. 1, subpara. (b bis)

14. As stated under the comments regarding article 2, para. 1, subparas. (*c*) and (*c bis*) (see paras. 2-6 above), it is not the practice in the United Nations to require the Secretary-General or his representatives to sign treaties subject to "an act of formal confirmation". In this connection, it is pertinent to recall that no practices or procedures have been developed in the United Nations which would fit the definition contained in article 2, subpara. 1 (*b bis*). Naturally, this observation is of a juridical nature and is not intended to de-emphasize the crucial importance in many cases of consultations between, on the one hand, the interested Member States, non-member States or interested intergovernmental organs, as the case may be, and, on the other hand, the Secretary-General or his representatives.

Part II, Section 2. Reservations

15. The draft articles in section 2, in so far as they are not essentially particular applications of the principle of *pacta sunt servanda* and of the will of the parties, appear to be codification *de lege ferenda* as far as the United Nations is concerned. This observation is based on the fact that the United Nations has not developed any general, let alone established, practices with respect to reservations, objections to reservations, and acceptance, opposition or withdrawal of reservations and opposition to reservations.

Article 30, para. 6

16. While the reservation in this provision regarding any possible overriding effect of Article 103 of the Charter seems justified with respect to the subject matter of article 30, the inclusion of paragraph 6 in article 30 gives rise to the question whether Article 103 of the Charter does not override all of the draft articles? This question seems to merit further study by the Commission, and attention is drawn, in particular, to the implication in this connection of article 2, para. 1, subpara. (*j*) and article 4, and to the comments and observations above concerning those draft articles.

Articles 35, 36 and 36 bis

17. It would seem desirable for the Commission to clarify further the criteria distinguishing between treaties falling under articles 35 and 36 and those governed by article 36 *bis*. In this connection, consideration might be given to the possibility of merging these provisions in order to minimize the potential for conflicting interpretations. Until the relationship between articles 35 and 36, on the one hand, and article 36 *bis*, on the other hand, has been further analysed and defined, it would not seem possible for the United Nations to comment on whether article 36 *bis* should be retained.

Article 37, para. 6

18. With respect to article 37, it appears timely to comment briefly on one aspect. This provision contains the requirement that "the States members of the organization" must give their consent to any revocation or modification of a right or obligation which has arisen from article 36 *bis*, para. (*b*). As examples of treaties considered to be governed by this provision the Commission's commentary mentions[w] headquarters agreements concluded between the United Nations and States that provide privileges and immunities for Member States. Therefore the question arises, whether it is at all necessary and practical to require the consent of all member States of an organization before any amendment revoking or modifying a right or an obligation of a Member State under a headquarters agreement may enter into effect, this would certainly be contrary to existing United Nations practice. Would the same rules apply also to a temporary agreement regarding arrangements for a conference held away from an established headquarters? It would appear preferable not to impose such a requirement of consent by all affected States, but to retain the freedom of action of the parties to the treaty in question.

2. International Labour Organisation

[*Original: English*]
[*21 August 1980*]

Article 1 (Scope of the articles) and article 2 (Use of terms)

1. The draft articles are to apply to any "international agreement governed by international law" concluded in written form between one or more "States" and one or more "international organizations" or between international organizations. In its comments, the International Law Commission recognizes that it would not always be easy to establish whether a conventional act was governed by international law or by some system of national law.

2. Both in the relations between States and international organizations and in those between international organizations, the problem known, in inter-State relations, as that of interdepartmental agreements exists and is growing in importance. For instance, in relation to technical co-operation activities, it is not uncommon for a government department having the necessary funds and the necessary constitutional authority to agree with the secretariat of an international organization that the latter would execute certain projects for the benefit of the State in which the funds originate or of a third State.

3. As regards interdepartmental agreements in inter-State relations, the view is taken by a number of States that they are matters of private law, and full powers are not issued for their negotiation. It may well be that arrangements of the kind referred to, in relations between States and international organizations, should be similarly regarded. At the same time, and with a view to avoiding any increase in the legal

[w] *Yearbook ... 1978*, vol. II (Part Two), p. 135, footnote 623.

uncertainties at present often attendant on such arrangements, it might be useful if some express reference to the issue were made at least in the commentary on the draft articles, with an indication whether the arrangements would or would not fall within the scope of the text.

Article 4 (Manner of making the articles applicable to international organizations)

4. Article 4 is concerned with the date on which the articles would become applicable. But in its commentary the Commission refers to the underlying issue, namely, how the articles are to be made applicable to international organizations. Since the articles envisage, on the part of States, behaviour essentially corresponding to that laid down in the 1969 Vienna Convention, it is their application to international organizations which is of key importance.

5. A preliminary question concerns the extent to which the articles innovate, or are merely declaratory of existing custom or practice. There would seem to be little doubt that—since conventional arrangements falling outside the internal law of organizations have had to draw on existing principles of international law—major rules of treaty law, such as the principle of *pacta sunt servanda* or the rules concerning interpretation of treaties, have long been applied by those concerned.[x] The same may not be true of more procedural requirements set out in the articles, such as the rules regarding powers. Moreover, there are matters—such as the rules regarding reservations envisaged in the articles—with respect to which the law has not developed much because this has not proved necessary.

6. In these circumstances, what are the main methods for making the substance of the articles legally binding on, or otherwise applicable to, international organizations?

(*a*) One approach would be to embody the articles in an international convention and to enable both States and international organizations to become parties thereto on the same footing. That approach would assume that, as suggested above, the main rules of treaty law are binding on the organizations irrespective of the terms of the convention. Conversely, such rules as may not yet be so binding—for instance, as regards reservations—would not apply to the acceptance of obligations under the convention. Such acceptance may, accordingly, be imperfect. It may also take a long time. It has taken ten years for the 1969 Vienna Convention to obtain the 35 ratifications necessary for entry into force. The number of intergovernmental organizations in the world is becoming comparable to that of States.

(*b*) Another approach is that of the various Conventions on Privileges and Immunities. These were "adopted" (United Nations, IAEA) or "accepted" (specialized agencies) by the representative organs of the organizations and then opened to ratification or accession by States. They speak, expressly, of being "in force" as between the organizations and ratifying or acceding States, and there is no doubt that the organizations consider themselves to be bound by their terms, without being "parties" thereto in the same sense as States. At the same time, the procedure followed in these cases is more difficult to envisage where the proposed convention would affect a substantially larger number of organizations.

(*c*) A variant of the foregoing would be the "third party" approach: a convention would be open to ratification and accession by States only, but since it would create both rights and obligations for international organizations, these would be invited to consent thereto. From a practical point of view, and again given the large number of States and organizations concerned, this variant might combine and compound some of the disadvantages of (*a*) and of (*b*).

(*d*) A quite different approach would be for the General Assembly of the United Nations to adopt the articles, not as an international convention destined to create legal obligations for the parties thereto, but as a standard of reference for action destined to harden into customary law. As regards the organizations of the United Nations system—i.e. the major universal organizations—such adoption could be accompanied by a formal recommendation which would be required, under the various relationship agreements, to be submitted to the competent organ of each organization (where agreement to use a standard of reference may be a less difficult issue than acceptance or consent for purposes of (*a*) to (*c*) above). As regards other organizations, it would be the responsibility of States members both of the United Nations and of those organizations to take the necessary steps so that due account is taken of the standard of reference. On the assumption of wide support for the articles in the General Assembly, it may well be that the effect, in practice if not in law, of such an approach would more than match that of more formal methods. At the same time, and without notably increasing the uncertainty of the rules (which, in any case, leave much to the internal law of organizations), this approach may permit an element of flexibility as regards such articles as have not yet been adequately tested in practice. It may also avoid some sterile controversy about the capacity of one organization or another to participate in more formal action.

Article 6 (Capacity of international organizations to conclude treaties) and article 2, para. 1, subpara. (j)

The draft articles leave the treaty-making capacity of international organizations to be governed by the relevant rules of each organization.

It is noted that, where the rules of the organization so permit, the term "relevant rules" is intended to embrace practice and that there is no intention of fixing these rules as they stand at the time the draft articles become effective.

It is assumed that any question or dispute regarding the treaty-making capacity of an organization will also fall to be decided exclusively by the methods applicable to the relevant rules of the organization.

Article 7 (Full powers and powers) and article 2, para. 1, subpara. (c bis)

10. In addition to the persons listed in paragraph 2 of article 7, ministers whose departments deal with the questions falling within the competence of the ILO are considered as representing their State both for the purpose of adopting the text of a treaty and for the purpose of expressing the consent of the State thereto. Presumably, this practice is covered by subparagraph 1 (*b*) of article 7, and the generality of that provision is not limited by the enumeration of paragraph 2.

11. As the commentary on article 7 indicates, "the chief administrative officer" of the organization is usually considered in practice as representing the organization without further documentary evidence. It is understood that subparagraphs 3 (*b*) and 4 (*b*) of the article allow that practice to be continued. Furthermore, the chief administrative officer is usually considered in practice as representing the organization for the purpose of communicating the consent of the organization to be bound by a treaty, without express powers, even where one of the representative organs of the organization is competent to decide on the matter. It is understood that subparagraph 4 (*b*) of article 7 as drafted allows that practice to be continued.

Part II, section 2 (Reservations)

12. The draft articles apply the regime of the 1969 Vienna Convention to the position of States in their relations with international organizations and to the position of international organizations in their relations with each other, but vary it as regards the position of international organizations in relation to States. It is clear that there is not, as yet, any existing practice to support or invalidate the proposed system. The system can, accordingly, be discussed only on a theoretical basis. From that point of view, it would seem that any departure from the general regime must be justified by a demonstration of need for such departure. It is not certain that this has been done.

13. The commentary explains that, in certain treaties, a reservation formulated by an international organization may be incompatible with the object and purpose of the treaty. Even under the general regime, reservations are permissible only if they are not incompatible

[x] See, on this, section I of Resolution I adopted by the Institute of International Law at its Centenary Session (Rome, 5-15 September 1973): "The Application of the Rules of the General International Law of Treaties to International Agreements concluded by International Organizations" (*Annuaire de l'Institut de droit international, 1973* (Basel), vol. 55, p. 797).

with the object and purpose of the treaty. It may be that this condition could, in certain cases, preclude reservations by an international organization regarding a range of provisions with respect to which it is open to States to make reservations. But it is equally possible that a treaty in which participation of an international organization is essential for its object and purpose may contain provisions that are not crucial to the object and purpose. It is not clear why it is necessary to preclude reservations to such provisions unless these reservations are specifically authorized. In a sense, of course, the proposed rules amount to the following: in relations between States and international organizations, pending solution of any dispute as to whether a particular reservation is compatible with the object and purpose of a treaty, States would not be bound by the provision to which they had made the reservation while organizations would be bound. At the same time, and from a practical point of view, the proposed rules could result in the organizations, refusing to participate in the treaty at all until the reservation on the point at issue is authorized. This would be so, in particular, where organizations whose freedom of action is circumscribed by the terms of their constitution find that particular treaty provisions are not wholly consistent with those terms; it is not altogether fanciful to envisage such an occurrence.

14. The proposed provisions concerning objections to reservations parallel those regarding reservations: in cases in which the freedom of organizations to make reservations is limited, the possibility to object to reservations is also limited; this is explained by reference to the different nature of States and organizations. Again, one may wonder whether the departure from the general regime is warranted. Particularly in cases in which the participation of an organization is essential to the object and purpose of a treaty, it may be necessary for the organization to be able to object to the terms to which a State, or other organization, subjects its own participation therein; not in all circumstances will such need be directly related to the tasks of the organizations under the treaty (which alone would justify objections under the draft articles). In so far as it is the intention that an organization should be bound by the terms of the treaty without possibility of exception, any reservation by another party—by virtue of its reciprocal effect under draft article 21—to some extent affects that intention, and it should be possible at least to highlight this by public objection. At the same time, the fact of objecting does not in any way limit the participation in the treaty of the organization regarded as essential; it may, but will not necessarily, limit the participation of the State or organization free to make reservations.

Article 27 (Rules of the organization and observance of treaties)

15. On the theoretical plane, the subject raises, as the commentary shows, considerable difficulties. Thus there may be a problem of hierarchy of norms. Does Article 103 of the Charter of the United Nations create a special status for the internal law of the United Nations? Is there—as suggested in a footnote to the commentary on article 27,[y] but as regards article 46—a distinction between treaties concluded with Member States and treaties concluded with non-member States (and hence, in effect, between universal organizations and organizations with more limited membership)? Can changes in the rules of an organization subsequent to the conclusion of a treaty modify the obligations under the latter (and, given the mechanisms for making constitutional changes binding even on States which have not consented thereto, do so without the consent of all the parties thereto)?

16. On the practical plane, every effort is and should be made to avoid the occurrence of these problems, by including in the terms of the international commitment such safeguards as appear to be called for by the internal law. This is widely done in bilateral agreements. As regards multilateral treaties, the issue underlines the need for a possibility to make reservations. As a footnote to the commentary to article 27[z] implies, a valid commitment, which can be fully complied with, is preferable, even if it is more limited in scope, to one which is wider in appearance only.

[y] *Yearbook ... 1977*, vol. II (Part Two), p. 119, footnote 499.

[z] *Ibid.*, p. 120, footnote 502.

Part III, section 3 (Interpretation of treaties)

17. Practice supports the indication, in the commentary, that preparatory work plays a larger role in the interpretation of treaties with which international organizations are concerned than in inter-State relations.

Part III, section 4 (Treaties and third parties)

18. Draft article 36 makes inapplicable to international organizations the principle according to which the assent of a third State to the acquisition of rights under a treaty is presumed as long as the contrary is not indicated; the assent of the organization to the acquisition of rights under a treaty to which it is not a party is required, in a form to be determined by its rules. This corresponds to certain rules regarding gifts presently applicable: thus, under the Financial Regulations of the ILO, gifts must be accepted by one of the representative organs (the Conference, where the gift may directly or indirectly involve an immediate or ultimate financial liability for the members of the Organization; the Governing Body, where no such liability is involved). Amongst the matters to which consideration has been given in that connection are the ability of the Organization to use the gift, in law or in fact, the ability of the Organization to respect conditions to which the gift may have been made subject, and, of course, the liabilities which may be attendant thereon. The proposed rule thus seems desirable, even if—as shown by the Special Rapporteur in his second report[aa]—it has not always been followed hitherto. At the same time, it is assumed that, as suggested by the Special Rapporteur, assent may be implied if the rules of the organization permit this.

19. As regards the problem of the position of member States of the organization in relation to treaties to which the organization is a party (possible article 36 *bis*), a fundamental question is that discussed in the second report of the Special Rapporteur, namely, to what extent the treaty creates international rights and obligations directly between the other contracting parties and the member States of the organization. Where a liability is created for member States by virtue of their obligation, under the constitution of the organization, to meet the expenses of the organization, there are probably no such direct relations; in such case the problem is linked to that dealt with in draft articles 27 and 46 (and possibly 61 and 62) and not to that of part III, section 4. Even in the case of agreements concerning the privileges and immunities of organizations, it may be arguable that the rights and obligations arise exclusively in relation to the organization and not directly as between States;[bb] if that is so, acceptance of the terms of the agreement by the organization in accordance with its rules may imply a certain liability—but to the organization—even for member States which dissented from the decision taken in the competent organ. For the rest, the ILO does not, at present, have experience which could throw any light on the needs which might call for provisions of the kind envisaged in possible article 36 *bis*.

Part VI (Miscellaneous provisions): article 73

20. Related, *inter alia*, to the questions considered above by reference to articles 27 and 46, is the question of the matters which have been reserved in pursuance of article 73. In this connection, the comments of the Commission on a number of articles suggest that the Commission envisaged wider reservations than the terms of article 73, strictly interpreted, might allow. The issue is of importance in that, as recognized in the Commission's commentaries, the interpretation of the rules laid down elsewhere in the draft articles will be affected by what is clearly understood not to be dealt with therein.

21. The commentary to article 73 itself makes clear that the examples given therein are not exhaustive; as drafted, however, the terms of the article do not bear out that view. It is recognized that it

[aa] *Yearbook ... 1973*, vol. II, pp. 90-91, document A/CN.4/271, para. 96.

[bb] This argument is relevant not only to the present issue, but also to that of the obligations, under one of the general Conventions, of a host State in respect of the representatives of another ratifying State which has made reservations regarding the treatment of such representatives. It might be recalled that, as regards the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947, the organizations concerned do not accept accessions subject to substantive reservations (see United Nations, *Treaty Series*, vol. 33, p. 261).

may be difficult to change that drafting if, as stated in the commentary, the parallel language of the 1969 Vienna Convention is also not intended to be exhaustive. The issue may, nevertheless, merit further reflection.

Food and Agriculture Organization of the United Nations

[*Original: English*]
[*17 February 1981*]

General

1. Having examined articles 1 to 60 adopted by the International Law Commission, FAO is of the opinion that they would not give rise to difficulties in its relations with States and other international organizations. FAO would, however, wish to make the specific comments set out below.

Article 2, para. 1, subpara. (b ter): *definition of the terms "acceptance", "approval" and "accession"*

2. This provision refers to "acceptance", "approval" and "accession", but does not refer to "adherence". It is true that the terms "accession" and "adherence" have become largely synonymous and that the term "accession" tends to be used more frequently than "adherence". However, since a number of States and international organizations still employ both terms, it would seem desirable for this practice to be reflected in the draft articles.

Article 2, para. 1, subpara. (i): *definition of the term "international organization"*

3. While the commentary to this provision contains cogent arguments in favour of the proposed text, it might none the less prove desirable for this definition, when read in conjunction with the definition of "treaty" contained in article 2, para. 1, subpara. (*a*), to bring out more clearly the extent to which the articles would apply to agreements concluded between subsidiary organs of international organizations, both with States and other international organizations, since it is well known that certain subsidiary organs of international organizations, in particular the United Nations, enjoy a wide measure of autonomy and conclude a large number of agreements.

4. The question also arises whether the definition of an "international organization" would cover international organizations whose membership was made up both of sovereign States and other international organizations.

Article 36 bis, para. (b)

5. As to the effects of a treaty to which an international organization is a party with respect to third States that are members of that organization, it is a fact that in a number of instances the treaties concluded by such an organization give rise, at least indirectly, to rights or obligations—or both—for third States. This can occur in a general manner in the case of treaties concluded with non-member States or other intergovernmental organizations, and more specifically in connection with topics such as privileges and immunities, as mentioned in the commentary to article 36 *bis*.[cc]

6. In the experience of FAO, the question of the way in which a third State's acceptance of the rights and obligations deriving from such treaties should be expressed does not appear to have given rise to any problems.

7. It may be appropriate, however, to distinguish between treaties concluded by an international organization that have been formally approved by the competent intergovernmental organ of that organization and those concluded at the secretariat level in accordance with less formal procedures. In the former case, the "acknowledgement" of third States that the application of the treaty may entail obligations as well as rights for it can be assumed. On the other hand, in the case of the numerous treaties which are concluded by the secretariats of international organizations with States and other international organizations, the "acknowledgement" is less clear. However, in so far as these latter treaties are concluded in virtue of powers delegated to the secretariats, either expressly or implicitly, under the constituent instrument or rules of the international organization concerned, it could be maintained that the obligations flowing from these treaties apply automatically to members of the international organization as a consequence of their membership and without any need for them to "acknowledge" that the application of a particular treaty entails obligations for them.

[cc] *Yearbook ... 1978*, vol. II (Part Two), p. 135, para. (6) of the commentary to article 36 *bis*.

C. Comments and observations of other international organizations

1. Council for Mutual Economic Assistance

[*Original: Russian*]
[*4 October 1980*]

... [T]he secretariat of the Council for Mutual Economic Assistance (CMEA) welcomes the considerable work done by the International Law Commission in connection with the preparation of the draft articles on treaties between States and international organizations or between international organizations.

1. Articles 1 to 60 of the draft articles under consideration appear on the whole to merit a favourable evaluation and could provide a good basis for the elaboration by the Commission of the final draft of articles on this subject.

2. However, the draft contains certain provisions which, in the opinion of the CMEA secretariat, require clarification. In particular, the CMEA secretariat would think it advisable in the final wording of the provisions concerning reservations (arts. 19 to 23) to proceed from the assumption that international organizations are not able tacitly to accept reservations formulated by States or by other international organizations. In our view, the parallel with States is inappropriate in this instance.

3. The CMEA secretariat would also consider it advisable to eliminate from the text provisions that would place on States members of a particular international organization obligations under international treaties concluded by it, without the express agreement of those States members with regard to the treaty concluded by the organization.

2. European Economic Community

[*Original: English/French*]
[*11 February 1981*]

I

The European Economic Community (EEC) recalls that its member States[dd] have transferred to the Community their competences within certain fields, in particular in respect of external trade policy, the common agricultural policy including management and conservation of fishery resources, and certain matters relating to the protection and preservation of the environment.

The draft articles under consideration are drawn up in parallel with the 1969 Vienna Convention and complete this Convention in relation to the application of treaty law in respect of international organiza-

[dd] The Community has since 1 January 1981 the following 10 member States: Belgium; Denmark; France; Germany, Federal Republic of; Greece; Ireland; Italy; Luxembourg; Netherlands and United Kingdom of Great Britain and Northern Ireland.

tions. The Community, having international legal personality and being capable under international law to conclude treaties with States and other entities, is therefore to be treated accordingly.

The Community's treaty-making powers are not restricted to the instances explicitly provided for in the Treaty of Rome.[ee] These powers may be extended in new fields under the conditions provided for in the Treaty.

II. General observations

1. The Community welcomes that the International Law Commission has adopted as a basic principle to keep the draft articles as close as possible to the text of the 1969 Vienna Convention. The deliberations that have taken place in the Commission show that it is not possible in all instances to transpose the provisions of the Vienna Convention. It is, however, important to maintain this basic principle in order not to create a new legal instrument which could have the effect of undermining the principles codified in the Vienna Convention.

2. The Community supports the recommendation made by several representatives in the Sixth Committee of the United Nations General Assembly that a simpler solution should be found in various instances to the draft articles. Reference is made in particular to articles 20 *bis*, 47, 54 and 57 as examples of unnecessarily complicated drafting, and in which a rather simple principle is buried in the obscurities of defining the cases to which it applies.

3. To avoid complicated and tedious drafting changes from the model of the Vienna Convention is a correct principle. International organizations vary to a large extent in legal form, functions, powers and structure and in their capacity to conclude treaties. The Commission was itself conscious of this fact, as witness its adoption of a broad definition of international organizations, a definition which would clearly cover the European Economic Community; a similar recognition underlies the Commission's decision to solve various essential questions by reference to the constituent instruments, relevant decisions and resolutions, and established practice of the organization. Too zealous a pursuit of distinctions between States and international organizations in each and every instance could all too easily lead to a situation in which the draft articles would fail to correspond to established and developing international practice.

III. Comments on individual draft articles

4. The Community prefers to focus its comments on a limited number of the draft articles which it considers to be of particular concern to it. These comments should be read in close connection with the outline made above, in section I, on the international legal personality of the European Economic Community and with the general observations contained in section II.

Article 2, para. 1, subpara. (j): *(Use of terms)*

5. The definition in this subparagraph of the term "rules of the organization" is important. It is recalled that the Commission inserted this definition when elaborating draft article 27, which deals with the internal law of a State, rules of an international organization and observance of treaties. The definition repeats article 1, paragraph 1 (34), of the 1975 Vienna Convention. It is a helpful clarification and it should be retained as a supplement to the preceding subparagraph of article 2, para. 1, which contains the definition of an "international organization".

6. The definition given in article 2, para. 1, subpara. (*j*), seems also necessary in order to ensure an adequate interpretation of other provisions of the draft articles; in particular draft article 6, on the capacity of international organizations to conclude treaties. The reference simply to "relevant rules of the organization" would be acceptable to the Community if read in conjunction with the clarification given in draft article 2, paragraph 1 (*j*).

Article 9 (Adoption of the text of a treaty)

7. *Paragraph 1* of this article states the general rule that treaties are concluded by agreement between the contracting parties. This principle, which repeats the provisions of the Vienna Convention, represents no difficulties.

8. The present draft of *paragraph 2* would not exclude international organizations from participating fully in an international conference convened for the purpose of adopting a treaty. It is, however, not adequate, as indicated in the Commission's commentary, to leave it to States in each case to decide whether such participation would be accepted.

Part II, section 2 (Reservations)

9. Most of the provisions contained in the section on reservations to treaties concluded between States and international organizations or between international organizations transpose the provisions on that subject matter in the 1969 Vienna Convention. The Commission has, however, attempted to draw up distinctions in respect of the right for an international organization to formulate reservations on its own behalf or object to reservations made by another contracting party to a treaty concluded between one or more States and one or more international organizations. The ability of an international organization in these instances is, limited in draft *article 19* bis, *para. 2*, and draft *article 19* ter, *para. 3*, on the one hand to cases where "the reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized", or, on the other, if "the possibility of objecting is expressly granted to it by the treaty or is a necessary consequence of the tasks assigned to the international organization by the treaty" or if the participation of such organization "in the treaty is not essential to the object and purpose of the treaty".

10. It is not clear why the Commission has adopted the position that international organizations should not be able to avail themselves of commonly agreed principles concerning the right to formulate reservations and especially the right to object to reservations formulated by other contracting parties to a treaty. The Community therefore recommends that the Commission should reconsider draft *article 19* bis, *para. 2* and draft *article 19* ter, *para. 3*, with particular reference to the need not to introduce distinction between the parties to freely negotiated treaties, unless such distinction is essential.

Part III, section 4 (Treaties and third States or third international organizations)

11. The provisions on this topic raise important issues relating to the status of international organizations in respect of the general rules of international law. Two points seem to be of particular interest:

(*a*) The position of an international organization vis-à-vis treaties between States intending to give powers to such organization—or organ thereof—in respect of the implementation of such treaties; and

(*b*) The legal position of member States of an international organization vis-à-vis treaties concluded by that organization.

12. The comments will be limited to the second point mentioned, namely, the legal position of member States of an international organization as dealt with in article 36 *bis*, a question which the Commission has left open pending the comments of States and international organizations.

13. The need for dealing with this problem in the draft articles is inescapable. The legal fiction that an international organization is, as such, separate and distinct from its member States cannot be carried to the extreme by stating that the member States as such have absolutely nothing to do with treaties, validly concluded by the organization to which they belong. Such attitude could actually be interpreted as a philosophical approach based upon the concept that an international organization constitutes an independent sovereign entity, possessing original powers, just like the national States.

14. The actual situation for the Community is that it possesses personality under international law to conclude treaties which are binding on its institutions and on the member States. Reference is hereby made to article 228 of the Treaty of Rome.[ff] The provisions of that article do not purport to lay down a general rule. They do at least recognize, in so far as the States parties to that treaty are concerned, the legal significance for those States of treaties concluded by the international

[ee] Treaty establishing the European Economic Community (Rome, 25 March 1957), United Nations, *Treaty Series*, vol. 298, p. 11.

[ff] *Ibid.*, p. 90.

organization they have established. One might even argue that this provision of the Treaty of Rome is a treaty provision which intends to give guarantees to non-member States which those States assent to and accept by entering into a treaty with the organization. However that may be, and quite apart from the specific situation of the EEC, the problem is obviously a general one and arises in respect of any international organization which enters into treaty relations with a third State or with another international organization. It is rather the effects of that treaty, validly entered into by an international organization, that require attention. The primary effect of such a treaty is to create rights and obligations as between the entities which are the formal parties to the treaty.

15. The rule formulated in article 36 *bis* actually serves to protect the State or other entity which enters into a treaty with an international organization, just like the existing and never challenged rule of international law as contained in article 27 of the 1969 Vienna Convention that, where there is a treaty between States, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Draft article 36 *bis* is not addressed to the question of responsibility of an international organization for the conduct of its organs or of its member States, but rather deals with the "primary" rules of rights and obligations of those member States. Nevertheless, the underlying function of protection of the interests of the State party to a treaty it concludes, in this case with an international organization, is the same. It is therefore surprising to see that objections to this article were brought forward in the Commission on the basis that the article serves the purposes and interests of some particular existing international organizations and their member States.

16. The Community fully endorses the principles underlying draft article 36 *bis*. The text as it stands does, however, have certain shortcomings. It should be noted that draft article 36 *bis* does not expressly envisage the situation where an international organization, together with its member States, concludes a treaty with a third State or organization. It is common practice, at least for the Community, that it becomes a contracting party to a treaty, together with its member States, if that treaty covers areas within which the competences are mixed. This situation of "mixed agreements" is, by way of example, the situation in respect of a number of international commodity agreements.[gg] The Community considers that it should be clear that article 36 *bis* also applies, in the case of mixed agreements, to those rights and obligations provided for in the agreement which fell within the competence of the international organization. As regards the rights and obligations resulting specifically from the treaty relations between member States of the organization and non-member States, it should be no less clear that they are governed by the rule set out in article 3, para. (*c*), of the 1969 Vienna Convention.

17. The Community's final observation is that, in the case of mixed agreements, the member States of the international organization would not necessarily be "third States"; the Community moreover draws attention to the awkwardness of describing member States as "third States" in relation to an organization of which they are members.

18. The Community is ready to continue its work in order to bring about the clarifications or amendments with regard to article 36 *bis* that would enable interpretation of that article to be made clearer or better account to be taken of the rules according to which the Community and its Member States become parties to treaties.

[gg] The International Wheat Agreement, 1971; the International Cocoa Agreement, 1975; the International Tin Agreement, 1975; the International Coffee Agreement, 1976 (all with later amendments) and the International Natural Rubber Agreement, 1979.