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Tenth report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur

Topic:

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QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

[Agenda item 3]

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Introduction

1. At its thirty-first session, the International Law Commission decided, in accordance with articles 16 and 21 of its Statute, to transmit to Governments the draft articles on treaties between States and international organizations or between international organizations provisionally adopted at that date, i.e. draft articles 1 to 60. Similarly, in accordance with paragraph 5 of General Assembly resolution 2501 (XXIV) of 12 November 1969, in which the Assembly recommended that the Commission should study the topic "in consultation with the principal international organizations", the Commission requested those organizations to submit comments and observations through the Secretary-General.[1] At its thirty-second session, the Commission renewed that invitation, requesting that comments and observations be submitted to the Secretary-General of the United Nations by 1 February 1981; furthermore, the Commission decided to transmit to Governments and the international organizations concerned draft articles 61 to 80 and the annex adopted on first reading at that session,[2] with a view to receiving their comments and observations through the Secretary-General by 1 February 1982.[3]

2. At the time when this report was prepared, comments had been submitted by the Governments of the Byelorussian SSR, Canada, the Federal Republic of Germany, Madagascar, Mauritius, the Ukrainian SSR and the Soviet Union, and by the following international organizations: the Council for Mutual Economic Assistance (CMEA), the European Economic Community (EEC), FAO, ILO, UNESCO, and WMO.[4] Moreover, many Governments have made substantive comments in the Sixth Committee of the General Assembly, during the discussion of the Commission's report not only on the work of its thirty-second session,[5] but also on that of its previous sessions.[6] The Commission thus has at its disposal a substantial body of comments and observations in the light of which to undertake the second reading of the draft articles.

3. The purpose of the present report is to submit these comments and observations to the Commission, defining the available options and making new proposals where appropriate. Although some comments and observations particularly those made in the Sixth Committee, relate to articles other than articles 1 to 60, this report will deal only with the latter articles, in view of the time-limit established for the submission of comments and observations on articles 61 to 80. However, since some comments concern the draft articles as a whole, we shall begin with a number of general observations.

[1] See *Yearbook ... 1979*, vol. II (Part Two), pp. 138, para. 84.

[2] For the text of all the articles adopted on first reading by the Commission, see *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.*, para. 58.

[3] *Ibid.*, pp. 64–65, paras. 54–56.

[4] A/CN.4/339. The comments submitted previous to the preparation of the present report appeared under the symbols A/CN.4/399/Add.1–8. Document A/CN.4/339 and its addenda are reproduced in *Yearbook ... 1981*, vol. II (Part Two) as annex II. References to the written comments of Governments and international organizations are to the relevant sections of that annex.

[5] See *Official Records of the General Assembly, Thirty-fifth Session, Annexes*, agenda item 106, document A/35/731; *ibid., Thirty-fifth Session, Sixth Committee*, 25th and 43rd to 60 meetings, and *ibid., Sessional fascicle*, corrigendum; and "Topical summary, prepared by the Secretariat, of the discussion on the report of the International Law Commission in the Sixth Committee during the Thirty-fifth session of the General Assembly" (A/CN.4/L.326).

[6] See "Topical summary, prepared by the Secretariat, of the discussion on the report of the International Law Commission in the Sixth Committee during the Thirty-fourth session of the General Assembly" (A/CN.4/L.311); as well as reports of the Sixth Committee at earlier sessions of the General Assembly: 1974—*Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 87, document A/9897; 1975—*ibid., Thirtieth Session, Annexes*, agenda item 108, document A/10393; 1976—*ibid., Thirty-first Session, Annexes*, agenda item 106, document A/31/370; 1977—*ibid., Thirty-second Session, Annexes*, agenda item 112, document A/32/433; 1978—*ibid., Thirty-third Session, Annexes*, agenda item 114, document A/33/419; 1979—*ibid., Thirty-fourth Session, Annexes*, agenda item 108, document A/34/785.

General observations

4. The most important general observations made, particularly in the Sixth Committee, can be grouped under three headings: (*a*) the general orientation of the proposed rules; (*b*) the methodological approach and the final form of the draft; (*c*) drafting matters. These questions, particularly the first and the second, involve the relationship between the draft articles and the Vienna Convention on the Law of Treaties[7] in different ways.

(*a*) General orientation of the proposed rules

5. At the beginning of its work on this topic, the Commission adopted a basic line of conduct: it would follow *as closely as possible*, for the treaties which form the subject of the draft articles, the solutions adopted in the Vienna Convention for treaties between States.[8] The Commission interpreted in a particularly rigorous way the

[7] For the text of the Convention, see *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. The Convention is hereinafter referred to as the "Vienna Convention".

[8] For the work of the sub-committee which studied the matter before a Special Rapporteur was appointed, see *Yearbook ... 1971*, vol. II (Part One), p. 349, document A/8410/Rev.1, chap. IV, annex, para. 10, and *Yearbook ... 1974*, vol. II (Part One), p. 290, document A/9610/Rev.1, para. 124. For the work of the Special Rapporteur, see *Yearbook ... 1972*, vol. II, p. 194, document A/CN.4/258, para. 76; *Yearbook ... 1973*, vol. II, p. 77, document A/CN.4/271, paras. 9 *et seq.*; *Yearbook ... 1974*, vol. II (Part One), p. 137, document A/CN.4/279, paras. 3–5. See also the report of the Commission on the work of its twenty-sixth session: *ibid.*, p. 292, document A/9610/Rev.1, paras. 137 *et seq.*

idea of respect for the Vienna Convention which it had thus accepted, since it refrained from refining, amending or adding to the solutions adopted in that Convention when transposing the rules applicable to treaties between States to treaties to which international organizations are parties. No criticism was levelled at the Commission with regard to the principle thus defined or the rigorous way in which it was applied. However, this principle of extending the Vienna Convention rules is not absolute, since it is applied only *as far as possible* and must be reconciled with the differences which clearly exist between States and international organizations. In the course of this necessary process of reconciliation, divergent opinions are frequently expressed, and two contradictory trends of opinion became apparent.[9] According to one, international organizations should be treated like States as far as treaties are concerned unless there is an obvious need to do otherwise, while in the other view, the differences are fundamental and should be emphasized at every opportunity, even from a purely formal point of view. Both approaches found supporters among the members of the Commission when the draft articles were being prepared, and many draft articles represent an attempt to reach a compromise solution. The general principle of consensualism which constitutes the basis of any treaty commitment necessarily entails the legal equality of the parties, and this principle plays an important role in the draft articles. On the other hand, account has been taken of the essential differences between States and international organizations, not only in certain substantive rules but even in matters of vocabulary.[10]

6. Any compromise is debatable, and it is quite natural that its necessity and merits should be discussed. It will be for the Commission to discuss them once again, taking into account some of the observations submitted. The Special Rapporteur will devote particular attention to the provisions which were the subject of lengthy and numerous observations and those in connection with which he can provide information not given in his earlier reports.

(*b*) Methodological approach and final form of the draft articles

7. At the beginning of its work on the topic, the Commission decided to prepare a set of *draft articles*,[11] that is, a text which, by reason of its presentation and style, could subsequently constitute the basis for a convention. It had no intention of prejudging the solution to a problem which, in the final analysis, depends solely on Governments and the General Assembly;[12] it was fully aware of the difficulties inherent in the conclusion of a convention on the subject and the possibility of envisaging such final solutions as machinery comparable to that used in connection with the 1947 Convention on the Privileges and Immunities of the Specialized Agencies,[13] or the endorsement of the draft articles in a General Assembly resolution.[14] The form of a set of draft articles was absolutely neutral vis-à-vis the final outcome of its work, neither imposing any solution nor excluding any. Thus the Commission was able to state, in its report on the work of its twenty-sixth session:

> Even at this stage ... a set of draft articles, because of the strict requirements it imposes upon the preparation and drafting of the text, appears the most suitable form in which to deal with questions concerning treaties concluded between States and international organizations or between international organizations.[15]

8. This decision was in keeping with a practice in the Commission which has by now become standard, and has not so far evoked the slightest criticism or reservation. However, as soon as the Commission resolved to prepare a text which could become a convention it was confronted with a choice: it could prepare a draft which *in form* was entirely *independent* of the Vienna Convention, or a draft which was more or less closely linked to that Convention *from the standpoint of form*. The Commission opted for the former course, that is, a draft that is formally independent of the Vienna Convention, and this choice must be re-examined in the light of certain comments that have been made.

9. The draft articles as they appear today are *in form* entirely *independent* of the Vienna Convention, meaning that they are independent in two respects, which must be carefully distinguished.

10. First, the draft articles are independent of the Vienna Convention in the sense that the text as a whole represents a complete entity that can be given a form which would enable it to produce legal effects irrespective of the legal

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[9] These approaches became apparent from the outset in the discussions in the Sixth Committee, for example, in 1975: see *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, paras. 167 *et seq.*

[10] Thus, for legal acts having the same nature, the same effect and the same purpose, the Commission used a different vocabulary according to whether those acts were performed by States or international organizations, for example "full powers" and "powers" (art. 7) or "ratification" and "formal confirmation" (art. 14). In its written comments, the Federal Republic of Germany found these distinctions pointless (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.7).

[11] In his second report, the final objective which the Special Rapporteur set himself was "the preparation of a set of draft articles, since it seems that this method, which is now followed by all special rapporteurs, is the only one which in itself incorporates the exactitude and the precision which should characterize all the Commission's work; it is indeed essential, unless one rules out the possibility that the work of the Special Rapporteur is ultimately to be reflected in the form of a formal convention." (*Yearbook ... 1973*, vol. II, p. 77, document A/CN.4/271, para. 8).

[12] The Special Rapporteur will not go into greater detail in this report concerning the various possible alternatives; if the Commission decides to do so, it will doubtless devote a good deal of its attention to the comments on the subject submitted by the ILO in connection with draft article 4 (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. B.2, paras. 4–6).

[13] United Nations, *Treaty Series*, vol. 33, p. 261.

[14] As the Special Rapporteur noted in his second report: "... the participation of international organizations in a general multilateral convention gives rise to certain objections. Possible solutions other than a general convention are a declaration by the General Assembly, or resort to machinery similar to that evolved for the 1947 Convention on the Privileges and Immunities of the Specialized Agencies." (*Yearbook ... 1973*, vol. II, p. 77, document A/CN.4/271, para. 8.).

[15] *Yearbook ... 1974*, vol. II (Part One), p. 292, document A/9610/Rev.1, para. 136.

effects of the Vienna Convention. If the set of draft articles becomes a convention, the latter will bind parties other than those to the Vienna Convention and will have legal effects whatever befalls the Vienna Convention. The draft articles have been so formulated that, as worded at present, they are fated to remain completely independent of the Vienna Convention. If they became a convention, there would be States which would be parties to both conventions at once. That being so, there may be some problems to be solved, as the Commission indicated briefly in its report on its twenty-sixth session:

> The draft articles must be so worded and assembled as to form an entity independent of the Vienna Convention: if the text later becomes a convention in its turn, it may enter into force for parties which are not parties to the Vienna Convention possibly including, it must be remembered, all international organizations. Even so, the terminology and wording of the draft articles could conceivably have been brought into line with the Vienna Convention in advance, so as to form a homogeneous whole with that Convention. The Commission has not rejected that approach outright and has not ruled out the possibility of the draft articles as a whole being revised later with a view to providing for States which are parties both to the Vienna Convention and to such convention as may emerge from the draft articles, a body of law as homogeneous as possible, particularly in terminology.[16]

11. Second, the draft articles are independent in the sense that they state the rules they put forward in full, *without referring back to the articles of the Vienna Convention*, even when the rules are formulated in terms identical with those of the Vienna Convention. To take an example, one could conceivably have a draft article reading as follows:

> "The rules regarding treaties between States set forth in articles 26, 28, 31, 32, 33, 41, 52, 53, 55, 56, 58, 59, 61, 64, 68, 71, 72, 75 and 80 of the Vienna Convention shall apply to treaties concluded between States and international organizations or between two or more international organizations."

Technically, such an article would be unimpeachable, since the draft articles appearing under the same numbers in the current set have exactly the same wording as the corresponding provisions of the Vienna Convention. Having thus accepted the principle of a *renvoi* to the Vienna Convention, it would be possible to apply it to a considerable number of draft articles that differ from the Vienna Convention only in their references to the international organizations which are parties to the treaties covered by the draft articles.[17] Although such an approach would simplify the drafting process, the Commission did not follow it during the first reading—for several reasons, apparently. To begin with, the preparation of a complete text with no "*renvoi*" to the Vienna Convention would undoubtedly be advantageous from the standpoint of clarity, and would make it possible to measure the extent of the parallelism with that Convention. Furthermore, it seems to be a tradition in the Commission to avoid all formulas involving *renvois*; one need only compare the 1961 Vienna Convention on Diplomatic Relations,[18] the 1963 Vienna Convention on Consular Relations,[19] the 1969 Convention on Special Missions[20] and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character[21] to realize that, although there was ample opportunity to refer from one text to another, there is not a single example of a *renvoi* to be found. Moreover, such a *renvoi* is likely to cause certain legal difficulties: since every convention may have a different circle of States parties, would States not parties to the convention to which the *renvoi* referred be bound by the interpretation given by States which were parties to the convention in question? Should a *renvoi* to a convention be understood to apply to the text as it stands at the time of the *renvoi*, or to the text as it might conceivably be amended as well?

12. All these considerations are reason enough for the Commission's choice, at least in first reading, but the period preceding a second reading is certainly an appropriate time for a re-examination of the position adopted. Some time ago it was suggested in the Sixth Committe that it would be a good idea to streamline as much as possible a set of draft articles which appeared to be a belated annex to the Vienna Convention and whose main point was to establish the very simple idea that the principles embodied in the Convention are equally valid for treaties to which international organizations are parties. During the Sixth Committee's discussions in 1980, one speaker made the ingenious suggestion that "the methodological approach hitherto adopted"[22] should be reviewed and the draft articles combined with the relevant

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[16] *Ibid.*, para. 141. Regarding the Commission's reference to the desirability of bringing the terminology into line, it can be stated that the terminology used in the draft articles is, with but a single exception identical with that of the Vienna Convention and that the problem of bringing terminology into line does not arise. The one word which is used in different senses in the two texts is "treaty", which in the Vienna Convention means a treaty between States. If the definitions of the term used in the Convention and the draft articles were to be made the same, the text of the draft articles would be encumbered to no purpose. The rule given in article 3, para (*c*) of the Vienna Convention might also give rise to certain problems; many of the draft articles follow the principle set forth therein, but some do not and should not be required to. Thus article 3, para (*c*) could not lead to the application of article 47 of the Vienna Convention regarding relations between States in the circumstances described in paragraph 1 of the draft article 47; both the States *and the organizations* themselves must be notified in order to produce consequences in *the relations among States*.

[17] During the Sixth Committee's debates in 1980, it was suggested, as an example, that article 65 of the draft articles might be phrased:

> "Article 65 of the Vienna Convention on the Law of Treaties shall apply to treaties to which the present articles apply, it being understood that any notification or objection made by an international organization shall be governed by the relevant rules of that organization." (*Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 45th meeting, para. 22.)

[18] United Nations, *Treaty Series*, vol. 500, p. 95.

[19] *Ibid.*, vol. 596, p. 261.

[20] General Assembly resolution 2530 (XXIV) of 8 December 1969, annex.

[21] *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. The Convention is hereinafter called "1975 Vienna Convention".

[22] *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 45th meeting, para. 22.

provisions of the Vienna Convention so as to simplify the proposed text, one method being to increase the number of *renvois* to the articles of the Vienna Convention. Additionally, it was said, such a manner of proceeding would make it more likely that the provisions of the Vienna Convention would be adhered to, by removing the temptation to depart from them; simplifying the text of the articles proposed would ease the task of a plenipotentiary conference, thereby saving time and money. This new approach would not necessarily affect the substance of the rules proposed in the draft articles, only their over-all presentation. The Commission cannot ignore this suggestion and must consider it from every angle. Without taking a definitive stand as to the course to be pursued—only the Commission can do that—the Special Rapporteur believes it is his duty to present the Commission with a few ideas that may help it to delve a little more deeply into the question.

13. If we take the approach of strengthening the formal links between the draft articles and the Vienna Convention, then thought must be given, at least in theory, to an extreme position which no one has so far suggested (or at least no one seems to have examined very closely the implications of such a position), but which helps to define the terms of the problem. This position entails considering the draft articles as constituting, from the technical standpoint, a proposal to amend the Vienna Convention. Such a position cannot be accepted by the Commission for many reasons. The simplest is that, since the Vienna Convention does not contain any specific provisions governing its amendment, the rules of article 40 of the Convention would apply and amendments would be decided upon both as to principle and substance by the contracting States alone. Of course, any contracting State can take the initiative to have the treaty amended on any ground it deems appropriate, but the Commission is completely foreign to such a procedure and cannot direct its work to that end. Moreover, returning to the initial point, it must be borne in mind that the draft articles should be structured in such a way as to accord with whatever solution the General Assembly may ultimately adopt. The Commission cannot at the present stage and on its own authority adopt an approach which would foreclose all but one very specific option, namely, amendment of the Vienna Convention. It should be added, moreover, that incorporating the draft articles into the Vienna Convention by means of an amendment would create difficulties with regard to the role of international organizations in the preparation of the text and the procedure in accordance with which they would agree to be bound by the provisions relating to them. In addition, incorporating the substance of the draft articles into the Vienna Convention would entail a number of drafting problems on which there is no need to dwell here.[23]

14. The problem therefore seems to be deliminated in the following manner. The commission must prepare a comprehensive set of draft articles that will remain legally separate from the Vienna Convention. The draft articles will be given legal force by incorporation in a convention or another instrument (a declaration of the General Assembly, for example),[24] depending upon the decision of the General Assembly. It remains to be decided whether the presentation of the articles will be changed and rendered less cumbersome by including in them references to the Vienna Convention along the lines of the examples given above. It is equally conceivable that the draft articles will become a convention or be incorporated into a General Assembly resolution. The choice depends on judgements concerning the style of legal instruments, in particular. The Special Rapporteur, for his part, is inclined to favour the present approach in order to preserve the force and authority of the text, apart from the considerations set forth above (para. 11). However, numerous references to the Vienna Convention could be incorporated into the draft articles fairly quickly should the Commission so wish. The streamlining of the text of the draft articles is certainly desirable, but can be achieved, at least to some extent, by means other than the inclusion of references to the Vienna Convention.

(c) Purely drafting questions

15. As the Commission's work has progressed, views have been expressed to the effect that the wording of the draft articles is too cumbersome and too complex.[25] Almost all the criticisms levelled against the draft articles stem not from any fault on the part of the drafters but rather from the dual position of principle that is responsible for the nature of some articles: on the one hand, it is held that there is a sufficient difference between a State and an international organization to rule out in many cases the application of a single rule to both; on the other hand, it is held that a distinction must be made between treaties between States and international organizations and treaties between two or more international organizations, and that different provisions should govern each.

16. There is no doubt that these two principles are responsible for the drafting complexities which are so apparent in the draft articles. The first principle relates to a substantive issue which has already been dealt with at some length (paras. 5 and 6 above). The second principle also involves a substantive issue in some cases. Some comments made during the discussion in the Sixth Committee seem almost to imply denial that treaties between two or more organizations have any real legal interest and agreement that they should be excluded from the draft articles. That position may reflect an underestimation of the importance of such agreements, some of which deal, for example, with financial matters and are concluded in exactly the same way as agreements between

[23] See footnote 16 above.

[24] See in this connection the written comments of the ILO (*Yearbook ... 1981*, vol. II (Part II), annex II, sect. B.2, para. 6).

[25] See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 112, document A/32/433, para. 162; *ibid., Thirty-third Session, Annexes*, agenda item 114, document A/33/419, para. 224; "Topical summary ..." (A/CN.4/L.311), para. 170; "Topical summary ..." (A/CN.4/L.326), paras. 169 *et seq.* See also the written comments (sect. I, para. 5) of the Federal Republic of Germany (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.7).

international organizations and States.[26] In any event, the Commission's mandate also covers treaties between international organizations, and it remains to be determined whether, for reasons of substance, the draft articles should have dual wording so as to cover the two categories of treaties. The reason of substance would remain the same: the difference in nature between States and international organizations. In treaties between international organizations, all the parties are on an equal footing; in treaties between States and international organizations there is, it is argued, an inequality rooted in principle. The rules applicable to the two categories of treaties would therefore not always be the same and it would even be easier to extend the rules applicable to treaties between States to treaties between international organizations than to treaties between States and international organizations. This apparently paradoxical consequence is responsible for certain provisions of the draft articles, particularly those relating to reservations. Such analyses have been discussed and can be discussed further, but they do not relate to purely drafting matters.

17. Nevertheless, there are some cases[27] in which, solely in the interest of precision, a distinction has been made between treaties concluded between international organizations and treaties concluded between States and international organizations. The Commission should therefore carefully consider whether more ingenious wording would make it possible to streamline the text, or even whether in some cases it might be possible to make a slight sacrifice in precision in the interest of simplicity.

18. It can be concluded, in general, that the Commission should continue to pay close attention to the quality of the wording and should seek to simplify it as far as possible without introducing any ambiguities or altering any substantive position which the Commission may intend to confirm.

[26] A case frequently thought of in this connection, as evidenced by the interesting observations of the ILO (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. B.2, paras. 2–3), is that of agreements referred to as "interagency" about whose legal nature there is sometimes doubt (in this connection, see the comments below concerning art. 2 subpara. 1(*a*)). What seems certain is that some important agreements concluded between international organizations are not subject either to the national law of any State or to the rules of one of the organizations that is a party to the agreement, and hence fall within the purview of public international law. A case in point is that of the United Nations Joint Staff Pension Fund, which was established as a subsidiary body of the United Nations by General Assembly resolution 248 (III) (subsequently amended on several occasions). The principle organ of the Fund is the Joint Staff Pension Board (art. 5 of the Regulations (JSPB/G.4/Rev.10)). Article 13 of the Regulations provides that:

"The Board may, subject to the concurrence of the General Assembly, approve agreements with member Governments of a member organization and with intergovernmental organizations with a view to securing continuity of pension rights between such Governments or organizations and the Fund".

Agreements have been concluded in pursuance of that article with four States (Canada, the Byelorussian SSR, the Ukrainian SSR and the USSR) and seven intergovernmental organizations (EEC, the European Space Agency, EFTA, IBRD, IMF, OECD and the European Centre for Medium Range Weather Forecasts). For the text of these agreements, see *Official Records of the General Assembly, Thirty-second Session, Supplement No. 9* (A/32/9/Add.1); *Thirty-third Session* (A/33/9/Add.1); *Thirty-fourth Session* (A/34/9/Add.1); *Thirty-fifth Session* (A/35/9/Add.1). An agreement has legal effect only when the General Assembly "concurs" (for an example, see resolution 32/215 A, sect. IV, of 17 December 1980).

[27] In particular, "Topical summary ..." (A/CN.4/L.326), para. 168. See also the written observations of Canada (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.3, para. 8).

Consideration of draft articles

PART I. INTRODUCTION

19. Of the four articles which make up the introduction to the draft articles, article 2 (Use of terms) should be divided into its component parts so that they can be reviewed at the appropriate time. This method has already been followed during the first reading: the Commission took up the various subparagraphs of article 2 individually in conjunction with the articles in which the term in question was used for the first time. The same method will be used once again, in a flexible manner and without necessarily following the same procedures as before. The Commission will immediately take up some provisions which will not necessarily be the same as those it considered in 1974 with the first articles drawn up by the Commission.[28]

Article 1 (Scope of the present articles) *and*
Article 2 (Use of terms), subpara. 1(*a*) (the term "treaty")

20. Defining the scope of the draft articles and the meaning of the term "treaty" entails making a distinction between treaties concluded between one or more States and one or more international organizations, on the one hand, and treaties concluded between international organizations, on the other. Such a distinction is necessary in terms of principle; it also suits the purposes of the draft articles. The definition of the term "treaty" adds a fundamental element by specifying that what is involved is an agreement "governed by international law". It has been suggested that a further distinction should be introduced into the article according to whether or not a State linked by an agreement to an international organization is a member of that organization.[29] The idea is interesting in so

[28] See *Yearbook ... 1974*, vol. II (Part One), pp. 294 *et seq.*, document A/9610/Rev.1, chap. IV, sect. B, art. 2 and commentary).

[29] See *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 53rd meeting, para. 18.

far as it would make it possible to investigate whether some agreements are of an "internal" nature as far as an international organization is concerned, that is, whether they are governed by rules peculiar to the organization in question. The Special Rapporteur addressed inquiries on this point to various international organizations without receiving any conclusive replies.[30] However, the draft articles, in referring to agreements "governed by international law", have established a simple and clear criterion. It is not the purpose of the draft articles to state whether agreements concluded between organizations, between States and international organizations, or even between organs of the same international organization may be governed by some system other than international law, whether the law peculiar to an organization, the national law of a specific country, or even, in some cases, the general principles of law. Granting that, within certain limits, such a possibility exists in some cases, the draft articles do not purport to provide criteria for determining whether an agreement between international organizations or between States and international organizations is not governed by international law. Indeed, that is a question which, within the limits of the competence of each State and each organization, depends essentially on the will of the parties and must be decided on a case-by-case basis.

21. What is certain—and this is underscored by the written observations of the ILO[31]—is that the number of agreements dealing with administrative and financial questions has increased substantially in relations between States and organizations or between organizations, that such agreements are often concluded in accordance with streamlined procedures, and that the practice is sometimes uncertain as to which legal system governs such agreements. If an agreement is concluded by organizations with recognized capacity to enter into agreements under international law and if it is not by virtue of its purpose and terms of implementation placed under a specific legal system (that of a given State or organization), it may be assumed that the parties to the agreement intended it to be governed by international law.[32] Such cases should be settled in the light of practice; the draft articles are not intended to prescribe the solution.

22. In conclusion, the Special Rapporteur does not propose any changes in article 1 or article 2, subparagraph 1(*a*).

ARTICLE 2, subpara. 1(*i*) (the term "international organization")

23. The draft articles adopt unchanged the definition of "international organization" contained in the Vienna Convention. The Commission had wondered, as did the Canadian Government in its written comments,[33] whether the concept of an international organization should not be defined by something other than the "intergovernmental" nature of the organization.[34] Should it not be made clear that the draft articles related only to international organizations with the capacity to conclude treaties (which would thus provide a link between the definition of the term "international organization" and article 6, to which we shall return later)? It is a fact that international law has no accepted definition of the term "international organization" that is valid in all cases. The meaning of the term does or can vary according to the text in which it is used. In the present case, the term can apply only to an intergovernmental international organization with the capacity to conclude at least *one* treaty; otherwise, the "international organization" has no concern with the draft articles. This in no way rules out the possibility of using the term in a broader sense in connection with another text. It is therefore true that the meaning of the term in the draft articles is slightly more precise than is implied by the mere reference to the intergovernmental nature of the organization. Is it necessary, however, to spell this out? The Special Rapporteur does not think so, but that can be done easily, and apparently without detriment.

24. Another point is not made clear in this "definition": how is the identity of an international organization defined in relation to a broader system of which it forms part? For example, does UNICEF, a subsidiary organ of the United Nations, conclude treaties which, being specifically UNICEF treaties, are not United Nations treaties? After fruitless efforts to obtain information on this general matter,[35] the Special Rapporteur concluded that there was no single answer to such a question and that the answer depended on the organization. The question does not have to be reviewed for the purposes of the draft articles. The fact is:

> that the main purpose of the present draft is to regulate, not the status of international organizations, but the regime of treaties to which one or more international organizations are parties. The present draft articles are intended to apply to such treaties irrespective of the status of the organizations concerned.[36]

[30] See *Yearbook ... 1973*, vol. II, pp. 88–89, A/CN.4/271, paras. 83–87. Apart from the relatively few cases in which a true legal system that can govern legal acts exists within an organization, the question may arise as to whether some agreements between the organization and a member State are not completely subordinated to a unilateral act of the organization and represent a purely executive measure adopted by the latter. As early as 1973, the Special Rapporteur indicated in his report that this problem arose in connection with article 27: of the report of the Commission on the work of its twenty-ninth session: *Yearbook ... 1977*, vol. II (Part Two), p. 118. In its written comments (sect. I, para. 7) the Federal Republic of Germany has emphasized the problems arising in the special relations between an organization and its members (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.7).

[31] *Yearbook ... 1981*, vol. II (Part Two), annex II, sect. B.2, paras. 1–3.

[32] In this sense, the agreements referred to in footnote 26 can be regarded as agreements "governed by international law".

[33] *Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.3, paras. 3–4.

[34] For a similar approach, see "Topical summary ..." (A/CN.4/L.311), para 171.

[35] See *Yearbook ... 1973*, vol. II, pp. 85–86, document A/CN.4/271, paras. 65–68.

[36] *Yearbook ... 1974*, vol. II (Part One), p. 296, document A/9610/Rev.1, chap. IV, sect. B, para. (9) of the commentary to article 2.

25. In short, the Special Rapporteur would propose no amendment to article 2, subparagraph 1(*i*).

ARTICLE 2, subpara. 1(*j*) and para. 2 (the term "rules of the organization")

26. Article 2, paragraph 2, which prompted no observations, uses for the first time the term "rules of an international organization", the meaning of which is given in subparagraph 1(*j*) ("rules of the organization"). It should be noted that the term was defined not in 1974 during consideration of the initial draft articles, but in 1977, in connection with draft article 27. The text which became article 2, subparagraph 1(*j*), was borrowed from article 1, paragraph 1 (34), of the 1975 Vienna Convention.[37] In its report, the Commission pointed out:

> This is only a provisional solution, which will have to be re-examined later in the light of all the provisions of the draft in which the expression is used. The transposition of this definition to the draft articles as a whole already raises certain questions which will have to be clarified at a later stage. Some members of the Commission pointed out, in particular, that, in the context of the present draft articles, it was not perhaps quite correct to place the constituent instrument and other rules of an organization on the same footing, as appears from the commentary to article 27 below.[38]

27. Turning to the other draft articles, we find a different term: "relevant rules of that organization" (art. 6; art. 36, para. 3). The term "rules of the organization" appears in art. 27, para. 2; [art. 36 *bis*, subpara. (*a*)]; art. 37, [para. 5]; art. 37, para. 7; art. 39, para. 2; art. 45, para. 3); while article 46, para. 3, refers to "rules of the organization regarding competence to conclude treaties". One conclusion immediately emerges from this comparison. The use of the adjective "relevant" with the word "rules" has a precise purpose: the text refers not to all the rules of the organization, but only to those relating to the subject-matter of the respective articles (in article 46 that subject-matter is designated precisely and directly with the reference to "rules of the organization regarding competence to conclude treaties"). On the other hand, article 2, paragraph 2, does indeed refer to *all* the rules of the organization.

28. This very simple finding raises several questions: does the definition in article 2, subpara. 1(*j*), adequately cover all the rules of an organization? Does such a definition have to be retained in the draft articles? Is the reference to "relevant rules" in the other draft articles adequate? These three questions have to be answered one by one.

29. Does the definition in article 2, subpara. 1(*j*), adequately cover all the rules of an organization? The wording borrowed from the 1975, Vienna Convention was perfectly suited to the subject-matter of that Convention and to the nature of the organizations to which it was initially intended to apply, i.e., organizations of a universal character. However, two criticisms suggest themselves. In the first place, the definition does not cover *all* the rules of such organizations, since it focuses on the "relevant decisions and resolutions". This restriction is perfectly justifiable in view of the *limited scope* of this Convention, but becomes out of place in a definition referring to all the rules of the organization. Secondly, the choice of the words "decisions and resolutions" is not necessarily felicitous, considering that the definition should be valid for all international organizations; however, this criticism may be countered with the argument that the words "in particular" make it possible to include all legislative instruments, and the incomplete and descriptive listing in this definition is more appropriate than a theoretical expression such as "legislative instruments" or any other expression along the same lines. In short, the Special Rapporteur would be in favour of retaining the present wording, with the deletion of the word "relevant", provided that the answer to the next question is in the affirmative.

30. Does such a general definition have to be retained in the draft articles? The definition could, at first sight, prompt this question because, whenever the other articles refer to rules of the organization, they mean specific rules relating to a specific question, and it could therefore be astonishing that there is a definition for a term that will have such a general meaning only once. To reason thus, however, would be to look at only one side of the question. Article 2, subpara. 1(*j*)—it must be repeated—in no way seeks to lay down a rule relating to the status in international law of international organizations; it merely describes the very general components of the "distinctive law", the "internal law" of the organization, including constituent instruments, resolutions, decisions and many other instruments ("in particular"), as well as *well-established practice*. The purpose of the draft articles is not and cannot be to establish that the sources of the law of a specific organization are bound to derive from the elements listed in the draft; that is a question determined in a different way for each organization, the manner of such determination depending on what will be described as its constitutional status, which is outside the scope of the draft articles. However, the general description given in article 2, subpara. 1(*j*), is still very useful, despite its enunciative nature; it reflects the fact that the source of the statute of an organization may be, *inter alia*, well-established practice; the extent to which this is a factor will vary according to the organization and depend on its particular nature. This is a very important point. During the proceedings of the United Nations Conference on the Law of Treaties and in the course of the work on the draft articles that became the 1975 Vienna Convention, international organizations attached fundamental importance to the reference to practice.[39] As to the present draft articles, the written comments of the Canadian Govern-

[37] See footnote 21 above.

[38] *Yearbook ... 1977*, vol. II (Part Two), p. 118, para. (3) of the commentary to article 2. See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 112, document A/32/433, para. 168.

[39] See *Yearbook ... 1972*, vol. II, pp. 186–187, document A/CN.4/258, para. 51.

ment and of the EEC[40] show that the retention of article 2, subpara. 1(*j*), is one of the basic elements of the compromise reached in connection with draft article 6. For this and other reasons, this definition should be retained in its most general wording.[41]

31. Is the reference to "relevant rules" in the other draft articles adequate? As already noted, article 46, para. 3, instead of using the term "relevant rules", uses the more explicit expression "rules of the organization regarding competence to conclude treaties". If, therefore, it is felt that a more precise wording should be found for the other articles that use the term "relevant rules", the most appropriate expression would have to be sought on an article-by-article basis. In point of fact, it does seem that the question will seriously arise only in connection with article 27, which, as we have said, is chronologically at the source of these difficulties.

32. The Special Rapporteur therefore proposes that the two provisions under consideration, namely, article 2, subpara. 1(*j*), and article 2, para. 2, should be retained; he merely wishes to add that it would be better to delete from article 2, subpara. 1(*j*), the adjective "relevant" qualifying the words "decisions and resolutions".

ARTICLE 3 (International agreements not within the scope of the present articles),

ARTICLE 4 (Non-retroactivity of the present articles), *and*

ARTICLE 2, subpara. 1 (g) (the term "party")

33. Articles 3 and 4 did not prompt any substantive comments. Before the square brackets around the word "parties" in article 3 can be deleted, article 2, subpara. 1(*g*), which provoked no comment, would have to be adopted. It is unfortunately impossible to delete the square brackets around the words "entry into force" in article 4; the expression is inherently unsatisfactory because it refers only to a hypothetical transformation of the draft articles into a convention.[42] It might be more appropriate to use the more general term "application".

34. Article 3 is one of those articles of which the wording was found to be particularly cumbersome.[43] In order to remedy this, the structure and wording of the corresponding provision of the Vienna Convention could be followed more closely: subparagraphs (i) and (ii) would be merged in a single subparagraph; subparagraph (iii) would remain unchanged and become subparagraph (ii). Subparagraph (i), in its new wording, would read as follows:

> **(i) to international agreements concluded between, on the one hand, one or more States and one or more international organizations or several international organizations, and, on the other hand, one or more entities other than States or international organizations.**

35. To sum up, the Special Rapporteur proposes:

(*a*) that article 2, subpara. 1(*g*), should be adopted unchanged;

(*b*) that the square brackets around the word "parties" in article 3 should be deleted;

(*c*) that article 3, subparas. (i), (ii) and (iii), should be amended as indicated at the end of the preceding paragraph;

(*d*) that the words between square brackets in article 4 "entry into force" should be replaced by the word "application".

[40] *Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.3, para. 6; and sect. C.2, para. 3, respectively.

[41] There is no doubt that because of the evolutionary nature of practice, some organizations are sometimes dubious about the capacity of international organizations; this is why the States members of an organization become parties to the same treaty as the organization. See "Topical summary ..." (A/CN.4/L.311), para. 172; and *Bulletin of the European Communities* (Luxembourg), vol. 13, No. 12 (1980), p. 87, point 2.3.2.

[42] On the question of the ultimate destiny of the draft articles, see paras. 7 *et seq.* of the introduction above. See also the written observations of the ILO (*Yearbook ... 1981*), vol. II (Part Two), annex II, sect. B.2, para. 6).

[43] See *Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 87, document A/9897, para. 150.

PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1. CONCLUSION OF TREATIES

ARTICLE 6 (Capacity of international organizations to conclude treaties)

36. In the Sixth Committee in 1974 and 1975,[44] representatives expressed somewhat divergent views regarding the capacity of organizations to conclude treaties. These views reflected and sometimes accentuated the differences that had emerged in the Commission. Such being the case, the Commission would apparently have absolutely nothing to gain by reopening the debate and departing from the compromise text adopted on first reading. The written observations of Canada and of the ILO[45] lead to the same conclusion and emphasize the link, to which we referred in connection with article 2, between article 2, subpara. 1(*j*), and article 6.[46] At this juncture, it

[44] *Ibid.*, paras. 151–157, and *ibid.*, *Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 175.

[45] *Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.3, para. 5; and sect. B.2, paras. 7–9, respectively.

[46] According to the ILO, "where the rules of the organization so permit, the term 'relevant rules' is intended to embrace practice and ... there is no intention of fixing those rules as they stand at the time the draft articles become effective." (*ibid.*, sect. B.2, para. 8). This has been the Special Rapporteur's position from the outset (cf. footnote 39 above).

should be noted that the term "relevant rules" of the organization is perfectly clear here and that there would be nothing, save a tautological effect, to be gained by replacing that term with the wording of article 46, "rules of the organization regarding competence to conclude treaties".

ARTICLE 7 (Full powers and powers) *and*
ARTICLE 2, subparas. 1(*c*) and (*c bis*) (the terms "full powers" and "powers")

37. Some substantive observations have been submitted; other observations relate to questions of form. The two types will be examined in turn. The substantive observations concern the representation of international organizations. The Canadian Government suggested that the general wording of paragraphs 3 and 4 could perhaps be made more precise with a provision, by analogy with the text adopted with regard to the State, according to which the "executive head" of an organization would be considered as representing that organization for the purpose of performing all acts relating to the conclusion of a treaty.[47] The fact is that powers have to be issued by a person, and that person cannot issue powers to himself; there must therefore be someone in an international organization competent to represent it without having to produce powers. However, since organizations do not all have the same structure, it is very difficult to designate by any one expression the office held by such a person. Not all organizations have an official fitting the designation "Executive Head", "Secretary-General", "Chief Administrative Officer" or "Director". In practice, a notification that a person such as the chairman of an intergovernmental body will be authorized to represent the organization is sometimes an alternative to the presentation of powers. It is for this reason that the Commission contented itself with laying considerable stress on the question of practice in article 7, subparas. 3(*b*) and 4(*b*). The written comments of the ILO[48] show how flexible and acceptable practice is, and the draft article gives the fullest weight to this question. It is precisely because of the relative frequency with which a secretary-general or administrative director notifies the other parties of the decision constituting the consent of an organization to be bound by a treaty, even when the decision has been taken by an intergovernmental corporate body, that the word "communicating" was used instead of "expressing" in article 7, paragraph 4. The discussion in the Sixth Committee in 1975 brought these very points into sharp focus;[49] accordingly, it does not seem necessary to make any substantive amendments to article 7.

38. As far as the wording is concerned, various suggestions have been or can be made. In the first place, the words "between one or more States and one or more international organizations" could be deleted from paragraph 1, since a treaty between international organizations obviously cannot be in question here. If the Commission is amenable to that suggestion, it could then simplify other articles along the same lines. (Incidentally, an example may be given here of the results of a method which, as we have seen, the Special Rapporteur does not recommend: if the Commission decided to proceed on the basis of references to the Vienna Convention, paragraphs 1 and 2 would be replaced by a text worded along the following lines:

> "The representation of a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty is governed by the rules set forth in article 7 of the Vienna Convention on the Law of Treaties.")

39. It has also been suggested that paragraphs 3 and 4 should be merged in a single paragraph and thus made less unwieldy.[50] This is an excellent suggestion, which does not affect the substance of the text. The amended text could read as follows:

A person is considered as representing an international organization for the purpose of adopting or authenticating a treaty or for the purpose of communicating the consent of that organization to be bound by a treaty if:

(*a*) he produces appropriate powers; or

(*b*) it appears from practice or from other circumstances that that person is considered as representing the organization for one or more such purposes.

40. Although it has also been suggested that one term, "full powers", should be used to designate the documents whether they emanate from States or organizations.[51] the Special Rapporteur, in view of the fact that this proposed drafting change would involve a question of substance for some members of the Commission, thinks it would be better to retain the present wording and the definitions given in article 2, subparas. 1(*c*) and 1(*c bis*).

41. To sum up, the Special Rapporteur proposes that paragraphs 3 and 4 of article 7 should be merged in a single paragraph (see para. 39 above) and that the first part of paragraph 1 should be streamlined in the way indicated above in paragraph 38.

ARTICLE 8 (Subsequent confirmation of an act performed without authorization),
ARTICLE 9 (Adoption of the text),
ARTICLE 10 (Authentication of the text),
ARTICLE 11 (Means of establishing consent to be bound by a treaty), *and*

[47] *Ibid.*, sect. A.3, para. 7.

[48] *Ibid.*, sect. B.2, paras. 10–11.

[49] See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 178. In its written comments (sect. II, para. 4), the Federal Republic of Germany proposed that the word "communicating" be replaced by "declaring", since the role of the representative may go beyond the communication of consent (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.7).

[50] See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 178.

[51] *Ibid.*, para. 176. See also the written comments (sect. II, para. 3), of the Federal Republic of Germany (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.7).

ARTICLE 2, subparas. 1(*b*), (*b bis*) and (*b ter*) (the terms "ratification", "act of formal confirmation", and "acceptance", "approval" and "accession")

42. The fact is that these texts did not as a whole prompt any really substantive comments; they do call, however, for a few observations relating more or less to form or to the language proper. Article 9 gave rise to some comments,[52] which have to do not with the wording, but with side issues referred to in the commentary. In accordance with the wish expressed by one representative in the Sixth Committee in 1975, article 10 could be greatly simplified if paragraphs 1 and 2 were merged in a single paragraph.[53] To that end, one would simply have to use the expression "participants in the drawing-up", which was accepted without comment in the text of article 9. Article 10 would thus become:

Article 10

The text of a treaty is established as authentic and definitive:

(*a*) by such procedure as may be provided for in the text or agreed upon by the participants in the drawing-up of the treaty; or

(*b*) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those participants of the text of the treaty or of the final act of a conference incorporating the text.

43. The question which then arises with regard to article 10 (and article 9) is whether the expression "participants in the drawing-up" should be defined. As early as 1975, the Commission had raised that question, and had deferred an answer until the time of the second reading.[54] The reason was that some organizations sometimes participate in the drawing-up of the text of a convention (and occasionally even sign it) although they have merely a consultancy role and are not expected to accede to the convention. It is quite clear that both in article 9 and in article 10, participation in the drawing-up of a text is envisaged only in the context of a disposition on the part of the participants to become parties. Is there any need to include another definition in article 2, paragraph 1, for the sake of clarification? In order to avoid making the text unwieldy, the Special Rapporteur would be inclined to give a negative answer.

44. Article 11 calls for no substantive comments other than the criticisms voiced in the Sixth Committee regarding the introduction of the term "act of formal confirmation" and regarding the parallelism created between this act of formal confirmation and ratification.[55] Since there is no doubt that international organizations have a procedure allowing them to express their consent to be bound by a treaty in two phases, with only the second expression of consent being actually binding, and since organizations use the widest variety of terms to describe the second phase,[56] the Special Rapporteur proposes that the present wording should be retained together with the definitions given for the terms in question.

45. The only drafting change which should be made in article 11, if the course suggested above (para. 38) is acceptable, would be to delete for paragraph 1 the words "between one or more States and one or more international organizations", which are totally unnecessary.

ARTICLE 12 (Signature as a means of establishing consent to be bound by a treaty),

ARTICLE 13 (An exchange of instruments constituting a treaty as a means of establishing consent to be bound by a treaty),

ARTICLE 14 (Ratification, act of formal confirmation, acceptance or approval as a means of establishing consent to be bound by a treaty),

ARTICLE 15 (Accession as a means of establishing consent to be bound by a treaty),

ARTICLE 16 (Exchange, deposit or notification of instruments of ratification, formal confirmation, acceptance, approval or accession),

ARTICLE 17 (Consent to be bound by part of a treaty and choice of differing provisions),

ARTICLE 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force), *and*

ARTICLE 2, subparas. 1(*e*) and (*f*) (the terms "negotiating State" and "negotiating organization" and "contracting State" and "contracting organization")

46. No comments were made on any of these provisions, but all, with the exception of the definitions, could be made less unwieldy or simpler. Like article 11, paragraph 1, and for the same reasons, article 12 could be slightly simplified: the words "between one or more States and one or more international organizations" could be deleted from paragraph 1 without detriment. For the rest, the term "the participants in the negotiation" makes its first appearance in article 12, subpara. 1(*b*); it will reappear in article 14, subpara. 1(*b*), and article 15, subpara. 2(*b*). The terms "negotiating State" and "negotiating organization" were defined in article 2, subpara. 1(*e*). It would be useful to provide a definition of the term "the participants in the negotiation", which could read as follows:

"the participants in the negotiation" means, in each case:

(i) one or more States and one or more international organizations,

(ii) several organizations

which took part in the drawing-up and adoption of the text of the treaty.

[52] See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 179. See also the written comments (sect. II) of the Federal Republic of Germany (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.7); and of the EEC (*ibid.*, sect. C.2, para. 3).

[53] See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 180.

[54] See *Yearbook ... 1975*, vol. II, p. 177, document A/10010/Rev.1, chap. V, sect. B.2, para. (3) of the commentary to art. 9.

[55] See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, paras. 181–182. See also the written comments (sect. II) of the Federal Republic of Germany (*Yearbook ... 1981*, vol. II (Part Two), sect. A.7).

[56] The example referred to in footnote 26 above states that the General Assembly "concurs", while in fact it "confirms".

It should be noted too that the terms "negotiating States" and "negotiating organizations" are used only once in the draft articles (in article 76), and that they could easily be replaced there by the term "the participants in the negotiation". The Special Rapporteur therefore proposes that the definition of the two terms now contained in article 2, subpara. 1(*e*), should be replaced by the definition of the term "the participants in the negotiation".

47. Article 13 did not elicit any substantive comments. The wording could be simplified with advantage if the article were condensed into a single paragraph and worded impersonally:

Article 13

Consent to be bound by a treaty constituted by instruments exchanged is established by that exchange when:

(*a*) the instruments provide that their exchange shall have that effect; or

(*b*) it was otherwise agreed that the exchange of instruments should have that effect.

48. Article 14 did not give rise to any substantive comments. It could be simplified through the deletion of the words "between one or more States and one or more international organizations" in paragraphs 1 and 3.

49. Article 15 did not evoke any substantive comments. The wording could easily be simplified by condensing the article into a single paragraph as follows:

Article 15

The consent of a State or organization to be bound by a treaty is expressed by accession when:

(*a*) the treaty provides that such consent may be expressed by means of accession;

(*b*) the participants in the negotiation were agreed that such consent might be expressed by means of accession; or

(*c*) all the parties have subsequently agreed that such consent may be expressed by means of accession.

50. Article 16 did not occasion any substantive comments. Its wording could be simplified by reducing it to a single paragraph. To this end, a new term should be added to the definitions contained in article 2, paragraph 1, i.e. the term "the contracting entities". This new term would immediately simplify articles 16 and 17, and also a number of other articles in the draft—particularly, as the Special Rapporteur has noted, articles 77 and 79.[57] The term could thus be modelled on the definition of the term "the participants in the negotiation":

(*f bis*) "the contracting entities" means respectively:

(i) one or more States and one or more international organizations,

(ii) several organizations

which have consented to be bound by the treaty, whether or not the treaty has entered into force.

The question whether the given definitions of the terms "contracting State" and "contracting organization" are to be retained will depend on whether they can be used in other articles in the draft. The problem will arise in the case of reservations, and the Special Rapporteur considers that they should be retained, at least provisionally, until the Commission indicates its views on the articles concerned. Article 16 would thus read as follows:

Article 16

Unless the treaty otherwise provides, instruments of ratification, formal confirmation, acceptance, approval or accession establish the consent of a State or of an international organization to be bound by a treaty upon:

(*a*) their exchange between the contracting entities;

(*b*) their deposit with the depositary; or

(*c*) their notification to the contracting entities or to the depositary, if so agreed.

51. No comments have been made with regard to article 17, which, after the square brackets enclosing the figures "19 to 23" have been deleted, can be reduced to two paragraphs by using the term "the contracting entities", and the Special Rapporteur suggests that the article should read as follows:

Article 17

1. Without prejudice to articles 19 to 23, the consent of a State or of an international organization to be bound by part of a treaty is effective only if the treaty so permits of if the other contracting entities so agree.

2. The consent of a State or of an international organization to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

52. Only one comment was made with regard to article 18.[58] Its wording could be improved by reducing it to one paragraph, which would read as follows:

Article 18

A State or an international organization is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(*a*) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, an act of formal confirmation, acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

(*b*) that State or that organization has established its consent to be bound by the treaty pending the entry

[57] See *Yearbook ... 1980*, vol. II (Part One), pp. 146 and 148, document A/CN.4/327, para. (2) of the commentary to art. 77, and commentary to art. 79. The Special Rapporteur envisaged that in future the terms "contracting parties" and "signatory parties" would be used; he is now proposing that, still more simply, the terms "the contracting entities" and "the signatories" should be used.

[58] According to the written comments (sect. I, para. 7) of the Federal Republic of Germany, this article could create a special problem in the case where both an organization and one or more States members of that organization are parties to a treaty (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.7).

into force of the treaty and provided that such entry into force is not unduly delayed.

SECTION 2: RESERVATIONS

General observations

Background

53. Even in the case of treaties between States, the question of reservations has always been a thorny and controversial issue, and even the provisions of the Vienna Convention have not eliminated all these difficulties.[59] Difficulties attended the Commission's discussions with regard to treaties to which international organizations are parties;[60] the compromise text finally adopted did not receive unanimous support within the Commission.[61] The question was discussed extensively in the Sixth Committee, and widely diverging points of view emerged in 1977.[62] The question was also touched upon in 1978 and 1979.[63] It is brought up in the written comments submitted by Canada, the Federal Republic of Germany, the USSR, CMEA, EEC, and, particularly, the ILO.[64]

54. The fundamental difficulty is to be found in the right to formulate reservations, since the question of objections to reservations or acceptance of reservations is largely (though not completely) dependent on that right. As has already been noted (see above, paras 5 *et seq.*), there are two trends of opinion, one tending towards the view that international organizations should simply be accorded the same status as States, while the other would completely reject such a viewpoint. The compromise solution in the draft articles consisted in equating the status of international organizations with that of States in two cases: the case of treaties concluded between international organizations and the case of treaties in which the participation of the organization is not essential to the object and purpose of the treaty. In other cases the organization can formulate a reservation only if that reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized. A lack of clarity has been noted in the provision stating that participation of an international organization is essential to the object and purpose of the treaty; it must be acknowledged that the written comments of the Canadian Government and of the ILO are convincing in this respect, despite the fact that the Commission was principally concerned with a relatively simple case: one in which an international organization is called upon, in a treaty between States, to perform a supervisory function with regard to the obligations undertaken by those States and is for that reason accepted as a party to the treaty. In the draft articles the question of objections is dealt with in the same way as that of reservations, the only difference being the extension of an organization's right to object when such an extension necessarily follows from the duties assigned to the organization by the treaty; here, too, what has been borne in mind is the status of an organization which is a party to a treaty between States and which has a duty to supervise the implementation by those States of their obligations under that treaty.

Current international practice

55. Before examining the options open to the Commission on second reading, it should be considered whether it would not in fact be possible to find some information concerning practice, despite the prevailing view that practice is lacking in this regard. In fact, this view is not entirely justified; there are a certain number of cases in which such questions have arisen. Admittedly the value of these cases is open to question: do the examples to be adduced involve genuine reservations, genuine objections or even genuine international organizations?[65] It would seem difficult to claim that the problem of reservations has never arisen in practice, although the issue is a debatable one.[66]

56. An interesting legal opinion has been given in the form of an aide-mémoire addressed to the Permanent Representative of a Member State from the Secretary-General of the United Nations concerning the "juridical standing of the specialized agencies with regard to reservations to the [1947] Convention on the Privileges and Immunities of the Specialized Agencies".[67] In becom-

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[59] See P. H. Imbert, *Les réserves aux traités multilatéraux: Evolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de Justice le 28 mai 1951* (Paris, Pedone, 1979); see also the same author's "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord", *Annuaire français de droit international, 1978* (Paris), vol. XXIV, p. 29.

[60] See *Yearbook ... 1975*, vol. I, pp. 237–249, 1348th to 1350th meetings; *Yearbook ... 1977*, vol. I, pp. 70–103, 1429th to 1435th meetings.

[61] One member of the Commission did not associate himself with the compromise solution adopted and proposed another text (A/CN.4/L.253) (see *Yearbook ... 1977*, vol. II (Part Two), pp. 109–110, footnote 464, and p. 113, footnote 478).

[62] See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 112, document A/32/433, paras. 169–177. While some representatives supported the compromise submitted by the Commission (*ibid.*, para. 170), some sought a stricter system on the lines envisaged in the preceding footnote (*ibid.*, para. 171), while others asked for a more liberal system (*ibid.*, para. 172).

[63] *Ibid., Thirty-third Session, Annexes*, agenda item 114, document A/33/419, para. 228; and "Topical summary ..." (A/CN.4/L.311), paras. 175–176.

[64] See *Yearbook ... 1981*, vol. II (Part Two), annex II—comments of Canada: sect. A.3, para. 8; of the Federal Republic of Germany: sect. A.7, II, paras. 8–9; of the USSR: sect. A.13, para. 2; of the EEC: sect. C.2, III, paras. 9–10; CMEA: sect. C.1, para. 2; ILO: sect. B.2, paras. 12–14.

[65] A number of precedents relate to the EEC, and it has sometimes been maintained that the Community does not constitute an international organization; on the other hand, it has been argued that the Community considers itself entitled to at least the same treatment as that accorded to international organizations. See "Topical summary ..." (A/CN.4/L.326), para. 157.

[66] The Special Rapporteur wishes to thank Professor P. H. Imbert, a member of the Directorate of Legal Affairs of the Council of Europe, who has pointed out a number of precedents he had overlooked.

[67] United Nations, *Juridical Yearbook, 1964* (Sales No. 66.V.4), pp. 266 *et seq.*

ing parties to this Convention, States have sometimes entered reservations, and several specialized agencies have objected to the reservation; after various representations, four States which had formulated reservations withdrew them. It is at the level of objections to reservations that such precedents can be invoked. According to the Secretary-General's legal opinion,

> Practice ... has established ... the right ... to require that a reservation conflicting with the purposes of the Convention and which can result in unilaterally modifying that agency's own privileges and immunities, be not made effective unless and until it consents thereto.[68]

As an example of an objection by an international organization to a reservation formulated by a State, this case is open to dispute in that the specialized agencies are not usually considered as "parties" to the 1947 Convention.[69] However, even if they are denied this status, there is obviously a link under the terms of the Convention between each specialized agency and each State party to the Convention, and it is on the basis of this link that the objection is made.[70]

57. A second case which arose a little later involved reservations not only to the 1947 Convention but also to the 1946 Convention on the Privileges and Immunities of the United Nations.[71] In a letter addressed to the Permanent Representative of a Member State,[72] the Secretary-General of the United Nations referred still more specifically to the position of a State which has indicated its intention of acceding to the Convention with certain reservations. Without using the term "objection", the Secretary-General indicated that certain reservations were incompatible with the Charter of the United Nations, and strongly urged that the reservation should be withdrawn, emphasizing that he would be obliged to bring the matter to the attention of the General Assembly if, despite his objection, the reservation were retained, and that a supplementary agreement might have to be drawn up "adjusting" the provisions of the Convention in conformity with section 36 of the Convention. This precedent is of additional interest in that the Convention contains no provision concerning reservations and objections to reservations, and also in that the States parties have made a considerable number of reservations.[73]

58. A number of precedents concern EEC, and at least one of them is of particular interest. The Community is a party to several multilateral conventions, usually on clearly specified conditions. Some of these conventions prohibit reservations or give a restrictive definition of the reservations authorized; in other cases there are no indications.[74] EEC has already entered reservations authorized under such conventions.[75] One case which merits some attention is the Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention), concluded at Geneva on 14 November 1975.[76] This Convention has established that customs or economic unions may become parties to the Convention, either at the same time as all the member States do so or subsequently; the only article to which reservations are authorized is the article relating to the compulsory settlement of disputes. Both Bulgaria and the German Democratic Republic have made declarations to the effect that:

> the possibility envisaged in article 52, paragraph 3, for customs or economic unions to become Contracting Parties to the Convention, does not bind Bulgaria [the *German Democratic Republic*] with any obligations whatsoever with respect to these unions.[77]

The nine member States of the Community and the Community have jointly formulated an objection in the following terms:

> The statement made by Bulgaria [the *German Democratic Republic*] concerning article 52 (3) has the appearance of a reservation to that provision, although such reservation is expressly prohibited by the Convention.
>
> The Community and the Member States therefore consider that under no circumstances can this statement be invoked against them and they regard it as entirely void.[78]

There is no need to discuss or even to consider the legal problems created by this precedent. It merely indicates that international organizations (or at least, organizations sharing many common features with international organizations) are henceforward called upon to take cognizance of questions relating to reservations at a time when it would not perhaps be universally recognized, even

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[68] *Ibid.*, p. 267, para. 6.

[69] The legal opinion wisely states that:

> "each specialized agency enjoys the same degree of legal interest in the terms and operation of the Convention as does a State party thereto, irrespective of the question whether or not each agency may be described as a 'party' to the Convention in the strict legal sense". (*ibid.*, para. 5).

See also the report of the Secretary-General "Depositary practice in relation to reservations" (*Yearbook ... 1965*, vol. II, p. 102, document A/5687), paras. 23–25.

[70] That was the view expressed by the Special Rapporteur in his first report: *Yearbook ... 1972*, vol. II, p. 194, document A/CN.4/258, footnote 181.

[71] United Nations, *Treaty Series*, vol. 1, p. 15.

[72] United Nations, *Juridical Yearbook*, *1965* (Sales No. 67.V.3), pp. 234 *et seq.*

[73] See: United Nations, *Multilateral treaties in respect of which the Secretary-General performs depositary functions: List of Signatures, Ratifications, Accessions, etc. at 31 December 1979* (Sales No. E.80.V.10), pp. 334 *et seq.*

[74] Examples of prohibition have already been cited in the Commission's report on its twenty-ninth session (*Yearbook ... 1977*, vol. II (Part Two), pp. 108–109, footnotes 458–462). Mention can also be made of the Convention on the Conservation of Migratory Species of Wild Animals, signed at Bonn on 23 June 1979, which recognizes, in article I, subpara. 1(*k*), "any regional economic integration organization" as a party; article XIV restricts the right to enter reservations, but states that the reservations permitted are open to "any State or any regional economic integration organization" (*International Protection of the Environment, Treaties and Related Documents*, eds. B. Rüster, B. Simma and M. Bock (Dobbs Ferry, N.Y., Oceana, 1981), vol. XXIII, pp. 14 and 24). The USSR objected to the mention of such organizations and has not become a party to the Convention.

[75] The International Convention on the Simplification and Harmonization of Customs Procedures, concluded at Kyoto on 18 May 1973, authorizes certain reservations; EEC, which is a party to the Convention, has on several occasions accepted "annexes" while availing itself of the power to formulate reservations. (*Official Journal of the European Communities* (Luxembourg), vol. 18, No. L 100 (21 April 1975), p. 1; *ibid.*, vol. 21, No. L 160 (17 June 1978), p. 13; and *ibid.*, vol. 23, No. L 100 (17 April 1980), p. 27).

[76] ECE/TRANS/17.

[77] United Nations, *Multilateral treaties ...* (*op. cit.*), p. 335.

[78] *Ibid.*

in the context of inter-State relations, that the rules of the Vienna Convention have become customary rules of international law. All that can be said is that this precedent, taken in conjunction with that of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies and the 1946 Convention on the Privileges and Immunities of the United Nations, shows that it is not unknown in current practice for international organizations to formulate reservations or objections.

Equality or inequality?

59. Bearing all these examples in mind, in conjunction with the comments made by representatives in the Sixth Committee and the written observations transmitted so far to the Commission, we should try to return to the crux of the matter, namely, the equality and inequality of international organizations in relation to States. It must be admitted, in this connection, that in draft articles dealing with the regime of treaty instruments, rather than the general status of international organizations, it is indeed equality that should come first, since the whole regime of treaty commitments itself is based on the freedom and equality of parties. While this premise is indisputable,[79] it does involve a major limitation from the outset. As far as accession to open multilateral treaties is concerned, there is a distinct tendency to open them to all States, and often some go so far as to say that all States even have a right to become parties to such treaties, but no one has ever invoked or even sought to invoke the principle that international organizations have a right or, for that matter, a disposition to become parties to open multilateral treaties. This is so self-evident that there is no need to give the reasons. On the contrary, international practice is visibly limiting accession by organizations to such treaties to well-defined categories of organizations or expressly designated organizations. Moreover, as we shall see later, specific conditions are often attached to their accession.

60. In examining the reasons that would none the less justify a regime of inequality at the expense of international organizations, we shall begin with one reason which is most often just suggested; it involves what might be described as the constitutional nature of international organizations. It is argued that the constitutional status of such organizations is fraught with uncertainties; their constituent instruments contain only sketchy provisions concerning their international commitments (when they contain any at all); it would be difficult to find one constituent instrument that includes a provision concerning reservations to treaties concluded by the organization. In the face of this uncertainty, some say it would be reasonable to limit, as far as possible, the right of international organizations to formulate reservations. Strangely enough, a line of argument based on the same facts has also been developed to support a diametrically opposed contention,[80] the point being made that collective organs composed of government representatives are often faced with a choice between purely and simply rejecting or accepting the treaty as is.

61. While there is some merit in all these ideas, no absolute conclusions can be drawn from them. A regime for reservations cannot be established—in one way or another—on the basis of the risk which organizations would run of violating their constituent charters. If indeed such a principle were to be followed, organizations would have to be prohibited not only from formulating reservations, but purely and simply from concluding international treaties, and the thousands of treaties concluded to date by international organizations would never have seen the light of day.[81] On the other hand, if the option to formulate reservations is to be granted because of that risk, it should be granted in all cases and without any restriction at all. Accordingly, absolute and diametrically opposed conclusions may be drawn from the same situation.

62. Of greater importance are the ideas that could be prompted by another situation clearly illustrated in practice—the simultaneous participation in a convention of an organization and all its member States[82]—a situation which has specific implications for the other parties to the treaty. This situation could indeed give rise to the objection that the same States might seek to play a twofold part, in the performance of the treaty and in the administration of any organization established thereunder, thus participating severally as parties and again by acting collectively through an international organization. This objection has so far been voiced very strongly, and has been met by various mechanisms that give the

[79] See the written comments of the Federal Republic of Germany (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.7).

[80] Report of the Commission on its twenty-ninth session:

"It was pointed out ... that the opportunity for an international organization to formulate a reservation, even at the stage of formal confirmation, would afford the States members of that organization useful safeguards with respect to undertakings signed too hastily", (*Yearbook ... 1977*, vol. II (Part Two), p. 106, para. (2) of the commentary to art. 19).

Written comments of the ILO:

"... from a practical point of view, the proposed rules could result in the organization's 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." (*Yearbook ... 1981*, vol. II (Part Two) annex II, sect. B.2, para. 13).

[81] It would be beyond the scope of this report to examine, even superficially, the number, variety and complexity of treaty commitments governed by international law to which international organizations will be parties within the framework of the regime for the exploitation of the sea-bed instituted by the Third Conference on the Law of the Sea or under the Common Fund for Commodities. As far as the Fund is concerned, article 41 of the Agreement establishing it gives it "full juridical personality, and, in particular, the capacity to conclude international agreements with States and international organizations", and it is virtually inconceivable that the Fund's freedom of action could be limited without reasons of substance. See *Agreement Establishing the Common Fund for Commodities*, adopted at Geneva on 27 June 1980 (United Nations publication, Sales No. E.81.II.D.8).

[82] There is no need to examine here a hypothetical situation which is more complicated, but of which there are examples, namely, that of a treaty which has among its parties an organization and some of its member States (see *Yearbook ... 1977*, vol. II (Part Two), p. 108, footnote 458).

participation of the organization a necessary distinctiveness.[83]

63. Apart from these political aspects, there are various technical issues arising out of such a situation. The crux of the matter is that it is difficult to divorce the exercise of the competence of the organization from the exercise of that of its member States. One can think of certain situations in which the problem would not arise.[84] For example, if the United Nations was responsible for administering a territory and became a party to a convention on the protection of nature as regards that territory, there would be no interference between the competence of the United Nations and that of its Member States which are parties to the same convention. However, the dividing line between the competence of the organization and that of the member States is frequently blurred. Moreover, it is often necessary to co-ordinate the exercise of the competence of the organization with that of its member States. The problem arising with regard to reservations is thus clear. If, on the one hand, the organization formulates reservations, and, on the other hand, the member States also formulate reservations, a confused situation full of contradictions is sometimes likely to result.[85] All the same, we should not assume that in a situation of this kind one need only deny the organization the right to make reservations; if it does not have this right, the reservations formulated by States will fail in their purpose, inasmuch as the exercise of the competence of States is bound up with the exercise of that of the organization. In fact, the organization must enjoy the same right as States, but at the same time, if the exercise of that right is to be consistent with the object and purpose of the treaty, it must be co-ordinated.[86] Failing this, the right cannot be invoked against the other parties to the treaty. The problem could therefore be solved on the basis of the general principles regarding reservations.

64. In this connection, the importance, both for international organizations and for States, of the restriction relating to respect for "the object and purpose of the treaty" should be stressed. Admittedly, this restriction has been criticized on the grounds that it is vague.[87] If this criticism were to be entertained, the entire Vienna Convention would be called into question—not only the articles dealing with reservations, but also, *inter alia*, articles 18, 31, 41 and 58, and article 60, subpara. 3(*b*). If the Vienna Convention repeated so consistently a form of wording actually used by the International Court of Justice in connection with reservations, it did so not without good reason: it used general wording so as to avoid introducing numerous subdistinctions in all possible categories of treaties. It was through a deliberate choice of legislative policy that the Convention avoided introducing such distinctions and even refrained from using, in connection with reservations, the most conventional of distinctions, namely, the one dealing with bilateral and multilateral treaties. It might seem as if, with regard to treaties between States and international organizations, every effort is being made to find and mention cases in addition to the one that is referred to in article 19 *bis*, paragraph 2. Despite the wish expressed by some Governments, the Special Rapporteur did not take that approach, because such an investigation would not be in the spirit of the Vienna Convention, which sought to allow practice of some measure of freedom so that the general principles laid down in the Convention could be given concrete application.

Conclusion: possible solutions

65. Two successive choices must be made. First, it is essential to choose a general rule of principle: freedom to formulate reservations, or no reservations permitted. Once this choice has been made, it must be admitted that there are exceptions to the rule chosen. These exceptions (and this is where the second choice comes in) may in turn be stated in general terms or listed in detail. As far as the first choice is concerned, the first version of the draft articles which now stand before the Commission opted for the freedom to formulate reservations; as far as the second choice is concerned, the exception is stated in rather general terms. The Special Rapporteur, for his part, does not think it advisable to change these basic alternatives.

66. Thus, only two questions remain to be considered. The first relates to the wording used in article 19 *bis*, paragraph 2, which has rightly been described as unclear. As noted on several occasions in the foregoing text, the current wording concerns treaties in which two or more States entrust an organization (rarely two or more organizations) with a new function, namely, that of ensuring that those States observe and fulfil the obligations they have assumed in the treaty. Thus, the organization is not placed on the same footing as the States; it performs a supervisory function with regard to them. That function is closely linked to the object and purpose of the treaty: the States would not have accepted those obligations had there not been an international organization to supervise their fulfilment. The organization can refuse to accept the responsibilities entrusted to it, it can request during the negotiations that those responsibilities be modified, but once the treaty has been adopted the organization naturally cannot call in question, by formulating reservations, the scope of an international supervisory mechan-

[83] An example was already given earlier (see footnote 74 above). For a more recent example, see the Convention on the Conservation of Antarctic Marine Living Resources, signed at Canberra on 20 May 1980, art. XII, para. 3 (*International Legal Materials* (Washington, D.C.), vol. XIX, No. 4 (July 1980), p. 849).

[84] There are instances where the parties have taken the view that problems did not arise; at least this is the conclusion that can apparently be drawn from the provisions of the Convention on Long-Range Transboundary Air Pollution of 13 November 1979 (ECE/HLM.1/2, annex I), which is open to organizations composed of sovereign States members of the Economic Commission for Europe. According to art. 14, para. 2, if the organization exercises its rights, the member States cannot exercise theirs.

[85] See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 112, document A/32/433, paras. 171–173.

[86] This indeed is what actually happens with regard to reservations and objections to reservations (see para. 58 above).

[87] See the written comments (sect. II, para. 8) of the Federal Republic of Germany concerning the articles dealing with reservations (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect. A.7).

ism, which is always the result of a delicate adjustment process. If this line of reasoning is accepted, the current wording could be improved by amending it to read: "When, by reason of the functions entrusted to it by the treaty with regard to the application of the latter by States, the participation of an organization is essential to the object and purpose of the treaty . . .".

67. The second question relates solely to drafting matters. It would indeed be very useful to simplify the current wording of the articles on reservations, for they are hard to read and hence, hard to follow. The text can be simplified, provided that the Commission is not averse to drastic changes. However, the Special Rapporteur will bear in mind the need to be clear and the fact that the Commission may not wish to depart radically from the text already adopted. He will therefore submit alternative versions where appropriate.

Article-by-article review

ARTICLE 19 (Formulation of reservations in the case of treaties between several international organizations) *and*
ARTICLE 19 *bis* (Formulation of reservations 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)

68. In accordance with the foregoing, and provided that the Commission decides to maintain the structure of the current wording, paragraph 2 of article 19 *bis* would read as follows:

When, by reason of the functions entrusted to it by the treaty with regard to the application of the latter by States, the participation of an organization is essential to the object and purpose of the treaty, that organization, when signing, formally confirming, accepting, approving, or acceding to that treaty, may formulate a reservation if the reservation is expressly authorized by the treaty or if it is otherwise agreed that the reservation is authorized.

69. The current wording can nevertheless rightly be criticized as being somewhat unclear and unnecessarily cumbersome. It is unclear because the current wording of article 19 *bis*, paragraph 2, when compared with that of paragraph 3, leads to the conclusion that the formulation of reservations by international organizations is subject to the same principles as the formulation of reservations by States—with one exception, that set forth in paragraph 2. It would be highly desirable to say this in a simpler way. The text is unnecessarily cumbersome because the distinction between the two categories of treaties is not of fundamental importance in this context. Articles 19 and 19 *bis* can therefore be merged and the text considerably simplified as follows:

Article 19. Formulation of reservations

1. A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(*a*) the reservation is prohibited by the treaty;

(*b*) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) in cases not falling under subparagraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty.[88]

2. An international organization, when signing, formally confirming, accepting, approving or acceding to a treaty, may formulate a reservation within the same limits as those set for States in paragraph 1, subparagraphs (*a*), (*b*) and (*c*); it may not do so when, by reason of the special functions entrusted to it by the treaty with regard to the application of the latter by States, the participation of the organization is essential to the object and purpose of the treaty.

70. The wording given above could be further simplified without making any substantive changes, and the article, with the same title, would then read:

A State or an international organization, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, may formulate a reservation unless:

(*a*) the reservation is prohibited by the treaty;

(*b*) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) in cases not falling under subparagraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty; this is so in the case of an international organization when, by reason of the special functions entrusted to it under the treaty with regard to the application of the latter by States, the participation of the organization is essential to the object and purpose of the treaty.

ARTICLE 19 *ter* (Objection to reservations)

71. If one refers to the relevant passage in the report of the Commission,[89] it is clear that the latter did not adopt that article provisionally without some doubt or hesitation. The reasons for those doubts, as expressed in the commentary to article 19 *ter*, must be reviewed. The Vienna Convention contains no definition of the notion of an "objection" and no text analogous to article 19 *ter*; in that Convention, the regime concerning objections to reservations derives from articles 21, 22 and 23. In a footnote to that commentary,[90] doubts are expressed as to whether a distinction should be drawn between cases where a State bases its opposition to a reservation on the ground that it is not authorized under the treaty and cases in which the reason for the opposition is "the mere defence of an interest". A review of practice and further reflection have led the Special Rapporteur to conclude that such considerations are superfluous and probably groundless.

72. It must be observed, first, that under the regime of the Vienna Convention the effects of a simple objection are not radically different from those of acceptance. The

[88] This paragraph 1 is identical to article 19 of the Vienna Convention.

[89] See *Yearbook . . . 1977*, vol. II (Part Two), pp. 110–111.

[90] *Ibid.*, p. 110, footnote 467.

hypothetical case mentioned in the aforementioned footnote in which a State lodges an objection to a reservation while acknowledging that the latter is authorized under the treaty is somewhat gratuitous,[91] since the State would thus be acknowledging that it could not even request that the reservation be withdrawn. The only remaining hypothetical case is that in which a State not only objects to the reservation, but makes an express declaration to the effect that its obligation will prevent the treaty from entering into force with the reserving State, while acknowledging that its objection is designed merely to defend its own interests and that the reservation is perfectly legitimate. This, too, is an academic hypothesis, for a State will always seek to justify so serious a decision by a reference to law. Indeed, practice shows that legal reasons are always given for objections. This view is fully confirmed by the limited number of precedents concerning objections lodged by international organizations which are referred to above (paras. 53 *et seq.*). This has an important consequence: objections are always based on juridical allegations.

73. The Vienna Convention did not dwell on the question of the entities entitled to lodge an objection, for the simple reason that the power to object is linked to the status of signatory, contractor or party to a treaty in a natural and indissoluble manner. It constitutes a right which is even broader than the right to formulate a reservation, since in most cases an objection constitutes a response to an allegedly unlawful act, namely the formulation of the reservation. Thus, when a treaty prohibits reservations and a State party associates its commitment with a declaration, there is nothing to prevent its partners from demonstrating that its declaration in fact constitutes a reservation and objecting to that "declaration".

74. It is clear from the foregoing that, from the time when they embark upon the course of becoming parties or have become parties, international organizations have an unconditional right to lodge objections, irrespective of the solution adopted concerning their right to formulate reservations. That being so, article 19 *ter* is in any event superfluous, and the Special Rapporteur suggests that it should be deleted. This would make it possible to follow the Vienna Convention more closely and in a simpler manner.

ARTICLE 20 (Acceptance of reservations in the case of treaties between several international organizations) *and*

ARTICLE 20 *bis* (Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States)

75. These articles raise a substantive problem and a drafting problem, which must be considered separately. A number of Governments and one international organization (Byelorussian SSR, Ukrainian SSR, USSR and CMEA) criticized, in their written comments,[92] the final provisions of both draft articles, requesting that the provisions relating to the presumption of acceptance of reservations by international organizations after the expiry of a period of twelve months should be deleted. The reasons adduced for objecting to the solution arrived at are largely the same; they are based on a position of principle strikingly formulated by the Soviet Union:[93]

> 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.

Consequently, provisions which should not be accepted are those which

> 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.

The point of principle invoked as the basis for the observation certainly has merit and makes it necessary to review the question.

76. It is worth while to recapitulate the antecedents of the question for treaties between States.[94] The tacit acceptance of reservations was introduced in international practice, *inter alia*, by the depositaries, from the time when the number of parties to multilateral treaties increased, although some writers and some countries, including France and the United States of America, objected to such a principle. At the time of the first report on the law of treaties, Sir Humphrey Waldock introduced the machinery for a tacit acceptance of reservations.[95] In their written comments, Australia, the United Kingdom and the United States of America evinced some reluctance; the wording of the article in question was amended, but without affecting the principle itself.[96] The Commission's draft no longer presented any major difficulty at the Conference on the Law of Treaties. Certainly the proposed new system in respect of reservations would have led to an odd situation of uncertainty if, following the formulation of a reservation, the other States were to have remained silent. Such a situation cannot last long in the case of a treaty concluded between a small number of participants because the entry into force of the treaty dispels the uncertainty, but for an open multilateral treaty it would often have been necessary to wait a long time before knowing what the contractual status of the treaty was if a rule such as that proposed by the Commission had not been adopted[97] (see para. 78 below). Some delegations

[91] This case was admitted in theory by the Expert Consultant at the Conference on the Law of Treaties. See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), p. 133, 25th meeting of the Committee of the Whole, para. 3.

[92] See *Yearbook ... 1981*, vol. II (Part Two), annex II, sects. A.2, A.12, A.13 and C.1, respectively.

[93] *Ibid.*, sect. A.13, para. 2.

[94] See Imbert, *op. cit.*, chap. II, sects. I and II B.

[95] *Yearbook ... 1962*, vol. II, p. 61, document A/CN.4/144, art. 18, para. subpara. 3(*b*).

[96] See *Yearbook ... 1965*, vol. II, pp. 53–54, document A/CN.4/177 and Add.1 and 2, para. 17.

[97] Few delegations emphasized the disadvantages of this situation (see, however, the statement by Mr. Sepúlveda Amor on behalf of Mexico in *Official Records of the United Nations Conference on the*

(*Continued on next page.*)

even lauded tacit acceptance.[98] Finally, the text as a whole was adopted at a plenary meeting by 83 votes to none, with 17 abstentions, paragraph 5 having occasioned very few comments.[99]

77. This brief reference back to the origin of article 20, paragraph 5 of the Vienna Convention enables some elements of the question to be clarified. From the practical point of view, the specific circumstances in which this article will apply must be borne in mind. First of all, paragraph 5 provides for two distinct hypotheses depending on whether the State expressing its consent to be bound by the treaty is already notified of the reservation formulated or has not yet been notified. In the former case, it cannot be said that there is truly tacit acceptance because, as was pointed out, there is, rather, implicit acceptance by a formal act. Actually the competent authorities of the State have been perfectly aware of the reservation and they subsequently commit themselves in full knowledge of the facts. International practice proves that in this case States like to remain silent on the reservations because they accept them; hence it cannot be said that their acceptance is not established by a formal act. On the other hand, when the reservation is formulated after consent to be bound has been given by another State, silence on the latter's part is really tantamount to tacit acceptance without any formal act.

78. It may then be asked what the situation would be if article 20, paragraph 5, did not exist. Obviously this would create some uncertainty so long as States other than the one which formulated the reservation did not reveal their position; the uncertainty would be most serious for treaties which require the consent of all signatories for their entry into force. Could it be said that the treaty has really entered into force if all the States have consented to be bound but if one has remained silent on a reservation made by another of them? Would the silent State thus retain indefinitely the right to enter an objection by declaring, in support of its objection, that it did not consider the reserving entity to be a party to the treaty? In other words, would it retain indefinitely the right to terminate the treaty by an act implying that the treaty had never been concluded? This situation is largely imaginary, because treaties are made to be applied and because the State remaining obstinately silent would nevertheless be obliged either to apply or not to apply it. But could it apply the treaty by declaring that, while it had not taken a position on the reservation, it would apply it only provisionally? Such a declaration could be interpreted as a refusal to consider itself bound. These remarks show that, when the treaty is intended to bind only a small number of parties, the difficulties are necessarily quickly resolved. Actually, the most important point of article 20, paragraph 5, concerns open general multilateral treaties, for which the entry into force question is of a different nature.

79. The foregoing points are valid for treaties to which international organizations are parties. It must therefore be acknowledged that for them the problem is rather minor from the practical point of view, because there are not, and probably never will be, many open multilateral treaties to which they may be called upon to become parties. It can rightly be said that for them, as for States, if the relevant paragraph of article 20 had established that silence on a reservation is equivalent to objection they could subsequently have changed their position because, unlike acceptance, objection is not definitive, but to equate silence with objection would have been contrary to the spirit of the Vienna Convention. Be that as it may, even if it were thought desirable to make a formal act mandatory for organizations and for them alone, it would be advisable to retain the rule laid down in article 20, paragraph 4, in cases where the wish to be bound is expressed subsequently to the reservation since, for them as for States, there is indeed a formal act in this case.

80. The theoretical explanation of the rule set forth in article 20 also raises some questions. Admittedly, the terminology of *tacit acceptance* has been used consistently, and that is due to the fundamental ambiguity of the Vienna Convention as regards the term "formulate" which means, depending on the circumstances and simultaneously, "propose" and "make", but the effect of paragraph 5 is simply to *place a time-limit* on the right to submit objections; hence any criticism prompted by the need to resort to certain forms is unconvincing. In fact, to subject international organizations to the rule laid down in paragraph 4 is to grant them an extraordinary privilege: whereas States forfeit the right to submit objections after one year, the international organizations would retain it indefinitely. Not only would the creation of such inequality be rather surprising, but it would also involve calling into question many solutions sanctioned by the draft articles. Indeed, whenever a time-limit expires and terminates the exercise of a right, it would be necessary to exempt the international organizations—*inter alia*, in the case of article 65, paragraph 2.

(*Footnote 97 continued.*)

Law of Treaties, First Session, Summary records of the plenary meetings . . ., p. 113, 21st meeting of the Committee of the Whole, para. 64). It should not be forgotten that it was not until its second session that the Conference radically changed the effects of an objection by accepting that, in the absence of an express declaration, the objection did not prevent relations under a treaty from being established between the reserving party and the objecting party.

[98] The USSR and Australia even proposed reducing the period from twelve to six months (*ibid.*, *Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 133, para. 175(*a*), and p. 136, para. 179, subpara. 1(v)(*f*), respectively. Mr. Khlestov (USSR) said he would have:

> "thought it consistent with practice and in the interests of the stability of treaties to maintain the presumption that, in the absence of an expressed intention to the contrary, a treaty was in force between the objecting and reserving State." (*Ibid.*, *First session*, *Summary records* . . ., p. 134, 25th meeting of the Committee of the Whole, para. 18).

This was the solution which prevailed at the Conference, not without difficulty. But for this representative, one of the premises to this solution was tacit assent. Actually, he began by saying that "it would greatly simplify matters if tacit assent could be allowed as a method of accepting reservations" (*ibid.*). The representative of only one State (Trinidad and Tobago) strongly objected on principle to paragraph 5 (*ibid.*, *Second session*, *Summary Records* . . . (United Nations, Sales No. E.70.V.6), p. 35, 11th plenary meeting, para. 4).

[99] *Ibid.*, *Second session, Summary Records* . . ., p. 35, 10th plenary meeting, para. 82.

81. It is possible that, in the observations made on paragraph 4, the criticisms of the text may derive from questions of principle rather than from the specific problems it tries to solve. These questions of principle will be taken up in connection with article 45. Let it be noted simply that, however salutary and well-intentioned the principle on which the criticisms are based may be, it is very rare for a problem to be solvable by a single principle, for there are often several of them which need to be harmonized. The principle invoked is certainly equally valid for States, and it has been and still is acknowledged, with regard to article 20, that it should be brought into line with others, such as the principle whereby a legal entity is responsible for its conduct, or the principle urging each legal entity to define its juridical positions within a reasonable time.

82. For all the foregoing reasons, the Special Rapporteur is not convinced that any substantive amendment has to be made to articles 20 and 20 *bis*, especially as regards paragraph 4 in both texts.

83. Their wording can be considerably abridged by introducing the simplifications previously described and using the term "contracting entity" which was previously adopted. Articles 20 and 20 *bis* can be combined in a single article with the following title and text:

Article 20. Acceptance of reservations and objections to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting entities unless the treaty so provides.

2. When it appears from the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides,

(*a*) acceptance by another contracting entity of a reservation constitutes the reserving entity a party to the treaty in relation to that other contracting entity if or when the treaty is in force for those contracting entities;

(*b*) an objection by another contracting entity to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving entities unless a contrary intention is definitely expressed by the objecting entity;

(*c*) an act expressing consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting entity has accepted the reservation.

4. For the purposes of paragraphs 2 and 3 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a contracting entity if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty.

ARTICLE 21 (Legal effects of reservations and of objections to reservations),

ARTICLE 22 (Withdrawal of reservations and of objections to reservations),

ARTICLE 23 (Procedure regarding reservations in treaties between several international organizations), *and*

ARTICLE 23 *bis* (Procedure regarding reservations in treaties between States and one or more international organizations or between international organizations and one or more States)

84. No substantive observation was made with regard to the other articles of the section on reservations (arts. 21, 22, 23 and 23 *bis*). The wording of these articles can be abridged in the same way as for the preceding articles; this entails a slight modification of article 21, paragraph 1; a slight modification of article 22, paragraph 1 and the combination of paragraphs 3 and 4 of article 22; and the combination of articles 23 and 23 *bis*; so that the titles and texts would read as follows:

Article 21. Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

...

[*The rest of the article is unchanged*]

Article 22. Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or international organization which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(*a*) the withdrawal of a reservation becomes operative in relation to another contracting entity only when notice of it has been received by that entity;

(*b*) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

Article 23. Procedure regarding reservations in treaties

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting entities and other States and international organizations entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

ARTICLE 24 (Entry into force of treaties between international organizations) *and*

ARTICLE 24 *bis* (Entry into force of treaties between one or more States and one or more international organizations),

ARTICLE 25 (Provisional application of treaties between international organizations) *and*

ARTICLE 25 *bis* (Provisional application of treaties between one or more States and one or more international organizations)

85. No substantive observations were made with regard to articles 24, 24 *bis*, 25 and 25 *bis*. The wording of these articles and of their titles may be simplified, and articles 24 and 24 *bis* and articles 25 and 25 *bis* may respectively be combined in a single article.

Article 24. Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the participants in the negotiation may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the participants in the negotiation.

3. When the consent of a State or an international organization to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State or organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of consent to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25. Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(*a*) the treaty itself so provides, or

(*b*) the participants in the negotiation have in some other manner so agreed.

2. Unless the treaty otherwise provides or the participants in the negotiation have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization shall be terminated if that State or organization notifies the other States or organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III. OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION 1. OBSERVANCE OF TREATIES

ARTICLE 26 (*Pacta sunt servanda*) *and*

ARTICLE 27 (Internal law of a State, rules of an international organization and observance of treaties)

86. There is no question arising from article 26 and only one written comment, which was favourable, has been submitted on article 27, although in the Sixth Committee it gave rise to a broad exchange of views continuing and extended the discussions which took place in the Commission.[100] As has already been stated at length (see paras. 8 *et seq.* above), the Commission decided in 1977 to reconsider this text at the second reading. The basic question is whether the expression "rules of an ... organization" is correct in the case of article 27. It is apparent from the outset that this expression is too broad, since it includes the rules of an organization in respect of its competence to conclude treaties, and an international organization has every right to invoke such rules to justify failure to perform a treaty. However, is it necessary to change the wording and replace it by an expression such as "rules of an organization other than those concerning the conclusion of treaties"? This seems doubtful as the present paragraph 3 makes a specific reservation relating to article 46. The matter thus becomes a question of drafting, since by dissociating the reservation relating to article 46 from the main statement, paragraph 3 leaves the impression that the main rule is too broad.

87. Another matter was raised by the ILO in its written comments:

> 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)?[101]

The Commission, had already raised this matter in its

[100] See *Official Records of the General Assembly, Thirty-second Session, Annexes*, agenda item 112, document A/32/433, paras. 179–183.

[101] *Yearbook ... 1981*, vol. II (Part Two), annex II, sect. B.2, para. 15.

discussions in 1980[102] and again in its report.[103] While limiting itself in draft article 73 to including reservations relating to two examples of changes in the characteristics of international organizations, i.e. termination of the existence of organizations and termination of participation by a State member, it pointed out that those were merely examples. Since possible links between articles 73 and article 27 were mentioned in the discussions, it would seem advisable to make a reservation in article 27 not only in relation to article 46, but also to article 73.

88. From the drafting point of view, the concerns thus expressed might perhaps be resolved by mentioning article 46 not in a third paragraph, as in the present text, but at the beginning of both paragraphs 1 and 2. Also included in paragraph 2 would be the reservation relating to article 73. Without any chance in title, and with the elimination of the square brackets around the words "article 46", article 27 would therefore read as follows:

Article 27

1. Without prejudice to article 46, a State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. Without prejudice to articles 46 and 73, an international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, 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.

SECTION 2. APPLICATION OF TREATIES

ARTICLE 28 (Non-retroactivity of treaties),

ARTICLE 29 (Territorial scope of treaties between one or more States and one or more international organizations) *and*

ARTICLE 30 (Application of successive treaties relating to the same subject-matter)

89. There has been no comment on articles 28, 29 and 30. The square brackets in paragraph 5 of article 30, where reference is made to articles 41 and 60, should be deleted, and only in paragraph 4 of article 30 may drafting changes be useful to simplify the wording considerably, as follows:

Article 30

...

4. When the parties to the later treaty do not include all the parties to the earlier one:

(*a*) as between two parties which are each parties to both treaties, the same rule applies as in paragraph 3;

(*b*) as between two parties of which one is party to both treaties and the other to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations.

SECTION 3. INTERPRETATION OF TREATIES

ARTICLE 31 (General rule of interpretation),

ARTICLE 32 (Supplementary means of interpretation), *and*

ARTICLE 33 (Interpretation of treaties authenticated in two or more languages)

90. No observation has been made on articles 31, 32 and 33, which are identical to the corresponding texts in the Vienna Convention, and they require no comment or change.

SECTION 4. TREATIES AND THIRD STATES OR THIRD INTERNATIONAL ORGANIZATIONS

ARTICLE 34 (General rule regarding third States and third international organizations),

ARTICLE 35 (Treaties providing for obligations for third States or third international organizations),

ARTICLE 36 (Treaties providing for rights for third States or third international organizations), *and*

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization)

91. All the difficulties as regards substance have centred around article 36 *bis*, both in the Sixth Committee and in the written comments. For the moment, only minor points on drafting matters will be made until article 36 *bis*, which needs to be re-examined, is taken up. The first point is that article 36 *bis*, even with a new, amended text, will be kept in square brackets until the Commission reconsiders the decision it took in 1978;[104] obviously, this will also apply to the *renvois* in the articles (35, 36 and 37) as required. In addition, the wording of article 34 may be simplified by reducing it to a single paragraph, as follows:

Article 34.

A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

92. Article 36 *bis* was discussed in the Sixth Committee not only in 1978,[105] but also, and extensively, in the following years.[106] It is not possible to do justice in a few

[102] See in particular the statements of Mr. Ushakov (*Yearbook ... 1980*, vol. I, p. 42, 1591st meeting, paras. 44–46) and the Special Rapporteur (*ibid.*, pp. 44–46, 1592nd meeting, paras. 6–16).

[103] See *Yearbook ... 1980*, vol. II (Part Two), p. 93, para. (10) of the commentary to art. 73.

[104] See *Yearbook ... 1978*, vol. I, p. 203, 1512th meeting, para. 41.

[105] See *Official Records of the General Assembly, Thirty-third Session, Annexes*, agenda item 114, document A/33/419, paras. 233–248.

[106] See "Topical summary ..." (A/CN.4/L.311), paras. 177–180, and "Topical summary ..." (A/CN.4/L.326), paras. 180–184.

pages to a discussion of exceptional density, but three positions may be said to have emerged, reflecting schools of thought which had already become apparent in the Commission. One position is that article 36 *bis* is only concerned with the problems peculiar to economic integration systems which have gone beyond the stage of international organizations and that, without even going into its merits, it should be omitted from the draft articles. A second position favours such an article. A third position, sometimes overlapping with the second, recognizes that a problem does exist but considers it a complex and difficult one and is not sure that the current formulations for article 36 *bis* are satisfactory.

93. The written comments of the Byelorussian SSR, the Ukranian SSR, the USSR and CMEA reflect the first position: one pointed comment of the USSR states that this article "goes beyond the scope of the questions to be dealt with in the draft".[107] The comments from the Federal Republic of Germany and EEC reflect the second position,[108] and the Canadian comments tend more towards the third.[109] The comments by the ILO are on the whole unfavourable, because:

> 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*.[110]

Further, the ILO's comments do not seem to favour interpreting headquarters agreements between an organization and a host State to mean that such agreements would give rise to obligations on the part of member States vis-à-vis the host country.[111] The comments from FAO,[112] seem to indicate that, in a number of cases, treaties concluded by an organization give rise to rights and obligations on the part of member States, but that this has not caused any particular problem—a valuable observation because it suggests that the agreements adopted on theoretical grounds may give rise to problems which are easier to solve in practice.

94. It may be worth while in the present circumstances for the Commission to begin by taking stock and trying to show what the problem actually is. The Vienna Convention adopted very strict and very simple rules: for the purposes of treaties an entity must be either a "contracting" or a "third" party, and treaties do not affect third parties. While this solution is generally foolproof, it does not cover all eventualities in international law, in the case of the succession of States, for example, there has had to be partial recourse to other solutions. In considering the effect on treaties of the existence of international organizations, it has to be decided whether an international organization is to be deemed a "third party" vis-à-vis the inter-State treaty establishing it and should therefore have to accept, expressly and in writing, the obligations which the treaty imposes on it.[113] It must be realized that the relationship between an organization and its membership may lead, where treaties are concerned, to delicate and awkward problems, some of which are forestalled by draft article 73, as pointed out apropos of article 27 (see paras. 87 and 88 above).[114] It might, on the other hand, seem rather odd to omit from the draft articles all problems which actually do relate specifically to the substance of treaties involving international organizations.[115]

95. The question dealt with in article 36 *bis* is only one of the problems surrounding treaties to which international organizations are parties. Article 36 *bis* concerns the consequences for member States of treaties concluded by an international organization. Can such treaties have consequences for member States? In order to avoid confusion, the nub of the question has to be made specific. The problem is not whether the conclusion of such a treaty can have *de facto* consequences for member States; this is obviously so. If an organization concludes a treaty with a non-member State which has repercussions on its finances, and if its funds are contributed to by member States (as is normal), there may be financial repercussions on the latter. Nor is the problem whether the treaty can have *de jure* consequences *in the relations between the organization and its member States*. That depends on the relevant rules of each organization, not on general international law. It is certainly hard to imagine that certain modes of behaviour would not be condemned by the principle of good faith, for example if member States were to seek to block the implementation of treaties duly concluded by an organization of which they were members. Likewise, most

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[107] See *Yearbook ... 1981*, vol. II (Part Two), annex II—comments of the Byelorussian SSR: sect. A.2, para. 3; of the Ukrainian SSR; sect. A.12, para. 3; of the USSR: sect. A.13, para. 1; of CMEA: sect. C.1, para. 3.

[108] *Ibid.*, Federal Republic of Germany: sect. A.7, II, para. 14; EEC: sect. C.2, III, paras. 11–18.

[109] *Ibid.*, sect. A.3, paras. 9–10.

[110] *Ibid.*, sect. B.2, para. 19.

[111] It is quite possible for an international organization to opt to deal exclusively with the host State in the event of difficulties over member States' observance of the obligations set forth in the headquarters agreements. However, another, equally possible solution was endorsed by the 1975 Vienna Convention (see footnote 21 above); according to this Convention, difficulties in implementation are essentially the concern of the host countries and member States.

[112] See *Yearbook ... 1981*, vol. II (Part Two), annex II, sect. B.3, para. 5.

[113] In his second report the Special Rapporteur elaborated on these questions at length, leaning ultimately towards a different solution from that proposed in article 36 *bis* (*Yearbook ... 1973*, vol. II, pp. 89–93, document A/CN.4/271, paras. 89 *et seq.*).

[114] During the Sixth Committee's discussions in 1980, one representative pointed out that article 73, para. 2, ought to be reconsidered, especially in view of its close relationship with article 36 *bis* (see "Topical summary ..." (A/CN.4/L.326), para. 216). If the Commission finally decided not to include a provision in the same vein as article 36 *bis* in the draft articles, it would then have to decide whether to include a reservation on such problems in article 73.

[115] None the less, there are many questions which cannot be taken up in the draft articles. For treaties between States, any contradiction between a treaty between State A and State B and a treaty between State A and State C presents tricky problems, which the Vienna Convention chose not to tackle. Do they arise in the same terms if B is an organization and C a State member of that organization? See the written comments (sect. I.7) of the Federal Republic of Germany (*Yearbook ... 1981*, vol. II (Part Two), annex II, sect A.7).

instruments of association contain a more or less explicit *obligation* incumbent on member States *to co-operate* for the benefit of the organization;[116] and it must be recognized that States members' obligations will vary from one organization to the next and that the extent of their obligations vis-à-vis the organization in the case of treaties concluded by the organization must therefore be left to the "relevant rules of [each] organization". So this is not the matter at issue which will arise from the draft articles before the Commission.

96. The real question which may be dealt with in article 36 *bis* is how *direct* relationships can evolve between States members of an organization and parties other than the organization to a treaty concluded by the organization. The ultimate source of such direct relationships is clear: it can only be the consent of all interested parties. There seems to be no doubt on this principle. But having accepted this, the question is in what form and in what manner consent may be given.[117] This is the crux of the matter. If it is felt that articles 35 and 36 can cope with it adequately, article 36 *bis* is clearly useless. The only justification for article 36 *bis* would then be circumstances in which the conditions laid down in draft articles 35 and 36 seemed too exacting and inappropriate to the situation. This is the essence of the current question about the two sets of consent required: from the parties to the treaty and from the organization's member States.

97. If the parties to the treaty intended to establish rights and obligations for the benefit of the States members of the organization, the rules that apply are those of ordinary law. The intent may be expressed more or less directly; it may also derive from the very aim and purpose of the treaty. What is beyond dispute is that the functions of international organizations lead them to conclude treaties which by their very nature will establish rights and obligations for their member States. This is the case with headquarters agreements between an organization and a host State; this is the case when an international organization is empowered to conclude certain agreements on economic matters, for the implementation of which States members are at least partially responsible. The intent of the parties to such treaties to establish rights and obligations for member States must be defined according to the normal rules on the interpretation of treaties.

98. Here the focus is on the consent of States members of an organization, since they are in the position of third parties and it is on the subject of their consent that draft articles 35 and 36 impose special rules, which are different for rights and obligations. When it is a matter of establishing rights, consent is subject to the most liberal regime imaginable, since it is presumed; when it is a matter of obligations, consent is subject to more rigorous conditions since it must be *expressly* stated *in writing*. The immediate consequence of this simple point, as far as the establishment of rights for member States is concerned, is that a special draft article—an article 36 *bis*—is unwarranted. Additionally, although this is a secondary point, when rights are established they are most often indissolubly bound up with obligations, making the stricter regime—the one governing obligations—the applicable one. It was on these grounds that the draft article 36 *bis* taken up in first reading mentioned both obligations and rights; but in the interest of strict textual accuracy, mention need only be made of obligations, and the comment on the subject made in the Commission can be borne in mind. At all events, one thing is certain: the utility of article 36 *bis* has to be considered in the light of the rules laid down to cover the establishment of *obligations*.

99. How should the words "expressly in writing", which qualify acceptance with respect to the establishment of obligations, be interpreted? The *travaux préparatoires* of the Vienna Convention shed little light on this expression. The text prepared by the Commission confined itself to "expressly accepted".[118] Only at the last minute, at a plenary meeting of the Conference on the Law of Treaties, was the requirement that it should be in writing inserted.[119] The Vienna Convention has entered into force as a treaty; its interpretation is henceforth a matter for States parties. But that interpretation cannot but reflect whatever interpretation is subsequently placed on the same wording in draft article 35, which is closely modelled on the Vienna Convention. That the term might be deemed to require a written communication in the form of an "instrument", subsequent to the conclusion of the treaty, cannot therefore be ruled out. This would exclude all cases where there was no formal communication, the written statement simply taking the form of minutes rather than of a document drawn up for the specific purpose of giving written assent, and it would also preclude assent given in a written form but deviating from the procedure for concluding a treaty. It is here precisely that the Commission has a choice: either it finds that member States must be protected in the most strictly formal manner with respect to any commitment that might arise from their membership in the organization, because vis-à-vis its treaty commitments they are third parties in the fullest sense of the term—in which case article 36 *bis* should be eliminated on principle—or it considers that the solidarity and close ties which exist between an organization and its member States justify their giving their assent in a less

[116] See P. Reuter: *Introduction au droit des traités* (Paris, Armand Colin, 1972), p. 124, para. 183.

[117] All States members of an organization can, of course, be required to participate in the treaty *as parties* ("mixed agreements"), which eliminates the problem; but it creates others in their stead, and the procedure is so cumbersome as to create serious disadvantages. This question was raised in some oral and written comments, but it seems to lie beyond the scope of the draft articles.

[118] *Yearbook ... 1966*, vol. II, p. 227, document A/6309/Rev.1, part II, chap. II, art. 31.

[119] The representative of Viet Nam who introduced this amendment merely stated: "The words 'expressly accepts' could be understood in the widest sense as embracing acceptance by solemn declaration or any other form of oral acceptance which did not provide the necessary safeguards." The amendment was adopted by 44 votes to 19, with 31 abstentions. See *Official records of the United Nations Conference on the Law of Treaties, Second session, Summary records ...*, p. 59, 14th plenary meeting, para. 5.

formal manner in respect of the effects on them of treaties concluded by the organization of which they are members, yet without sacrificing the principle. In this case, an article 36 *bis* has a place in the draft articles, subject to eventual discussion of its exact tenor. When the Commission considered draft article 36 *bis* in first reading, it chose the second alternative. It discussed two cases in which this flexible approach to assent seemed to meet the practical requirements, namely the two cases dealt with in subparagraphs (*a*) and (*b*), which need to be commented upon and critically scrutinized.

100. The case for which provision is made in subparagraph (*a*) of article 36 *bis* is one where the rules of the organization provide that the States members are bound by the treaties concluded by it. Such a formulation has a twofold effect: on the one hand, it governs the relationship between the organization and its members and, on the other, with respect to the parties to treaties concluded by the organization it constitutes prior blanket acceptance of whatever obligations may be set forth in the treaties by that organization. There is certainly assent, but it has a number of peculiar features in that it is given *ex ante*, not *ex post* as is usual. In fact, in order to conclude this collateral instrument linking the members of the organization to its treaty partners, it is the members of the organization which, in the first instance, have to enunciate the principle of consent which will subsequently be given concrete expression through the conclusion of the treaties of the organization.

101. The case for which provision was made in subparagraph (*b*) of article 36 *bis* at the time of the first reading of the article concerns the hypothesis that "the States and organizations participating in the negotiation of the treaty as well as the States members of the organization acknowledged that the application of the treaty necessarily entails such effects", that is to say, gives rise to obligations on the part of States members. So in what manner is the required assent expressed here? The key to the answer lies in the fact that there are situations where, as already indicated (para. 97 above), it is the treaty which, by its very purpose, *entails* such assent. In this case, we are dealing with something more than a *presumption*, because a presumption, by its very nature, can be invalidated if the contrary can be indicated. What we have here is a situation in which the very purpose of the commitments precludes the treaty from not being binding on member States. Several examples of this can easily be found. For instance, in a customs union which includes an organization competent to conclude tariff agreements with third States, it is the member States which collect the customs revenues through their agents; it would be inconceivable for one of those States to refuse to grant an exemption authorized under a duly concluded tariff agreement which it had had no part in negotiating and to which it had not expressly given its written consent. Likewise, in the case of a headquarters agreement concluded between a host country and an international organization and involving particular obligations on the part of States members of that organization vis-à-vis the host country, it would be unimaginable for member States that recognized the full validity of the headquarters agreement to refuse to honour such obligations on the ground that they had never explicitly accepted them in writing. These are not theoretical questions. Recourse, through arbitration or even judicial remedy, may be available to a State which has successfully negotiated a tariff agreement with an organization, vis-à-vis a State member of the organization which fails to comply with the agreement, while such recourse is unavailable vis-à-vis the organization.

102. In this case, every assent required in order to impose obligations on States members of an organization therefore derives from an *implication*, and this implication is equally valid for the assent of the organization and of its treaty partners, on the one hand, and for the assent of the States members of the organization, on the other. This does not mean that the implication does not have to be recognized,[120] but recognition is not subject to any formalities and, for this reason, subparagraph (*b*) uses the term "acknowledged", which here has the same connotation as "recognized". Since this "acknowledgement" requires the assent of all interested parties, there would have to be reference not only to the organization and its treaty partners, as in subparagraph (*b*), but also to the members of the organization. If objections were to be raised to the very notion of "implication", the analysis could be simplified and, though the reference to the notion of "implication" reflects the true nature of the situation, it could be dropped and a much simpler approach adopted, giving members of the organization more flexibility in the matter of assent. It would then have to be made clear that assent may be constituted by "any unequivocal manifestation" of such assent. The reference to a "manifestation" would exclude implied or presumed assent but, by qualifying it as "unequivocal", there would be no mention of any particular form of assent.

103. In conclusion, an article 36 *bis* does not really purport to revolutionize the fundamental principles underlying the law of treaties. It acknowledges that for a treaty to take effect with regard to a State which is not a party thereto,[121] but which is a member of an organization which is party thereto, the State must assent in some form. Article 36 *bis* is designed to make that assent more flexible. The basic reason for such flexibility is that the relations established between an organization and its member States create particular conditions whereby excessive formality is not only unnecessary but a seemingly unjustifiable obstacle to the functioning of international organizations.

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[120] As usual, there are some obvious cases and others that are less obvious. The first example given above (case of the customs union) (para. 101) leaves no room for doubt; the second (headquarters agreement) will depend on the actual stipulations of the agreement. Conceivably an organization might wish to maintain a monopoly on relations with the host country and, as a consequence, claim that the latter cannot have direct recourse to a remedy against any member State which may fail to fulfil its obligations under the agreement.

[121] In theory, the case of an international organization which is a member of another organization is conceivable, but it was felt that there was no need to complicate the text. In a case of this nature, the member organization would be in the same situation as member States and the same rules would apply to it.

104. A new text of article 36 *bis* is proposed below. Compared with the version submitted at the first reading, it presents three changes of varying importance. First of all, it makes it formally explicit that the assent of members of an organization is necessary before the treaties of the organization create obligations for them. Secondly, it no longer mentions the establishment of rights, but covers only the establishment of obligations, and thus takes account of the comment made by some of the Commission to the effect that no specific provision was necessary to facilitate the establishment of rights, given the liberal provisions of article 36. Thirdly, in subparagraph (*b*), States members of the organization have been added to the States and organizations participating in the negotiation of the treaty. It is only natural that they too should acknowledge that the treaty entails certain obligations for the States members of the organization. The text of article 36 *bis* would thus read as follows:[122]

Article 36 bis

The assent of States members of an international organization to obligations arising from a treaty concluded by that organization shall derive from:

(*a*) the relevant rules of the organization applicable at the moment of the conclusion of the treaty which provide that States members of the organization are bound by such a treaty; or

(*b*) the acknowledgement by the States and organizations participating in the negotiation of the treaty as well as the States members of the organizations that the application of the treaty necessarily entails such effects.

Should the Commission object to subparagraph (*b*), it could be drafted, as has just been indicated, in the following manner:

(*b*) any unequivocal manifestation of such assent.

[122] Should the Commission follow the general trend of this new version, it would certainly be necessary also to change the title and probably the position and number of the article too. The title might perhaps read: "Assent to the establishment of obligations for the States members of an organization". As the article would thereafter appear only as a derogation from article 35, it would take its logical place immediately after the latter, as article 35 *bis*.

ARTICLE 37 (Revocation or modification of obligations or rights of third States or third international organizations)

105. No particular comment was made on this article. Nevertheless, two of its paragraphs, 5 and 6, are linked to article 36 *bis* and therefore depend of the fate reserved for that article. While remaining in square brackets for the time being, in accordance with the proposal of the Special Rapporteur that article 36 *bis* should no longer cover rights, the words "or a right" should be deleted from the first line of each paragraph. Moreover, since in the new draft of article 36 *bis* the expression "third States which are members of an international organization" has been deleted to take account of certain criticisms already made, it should be possible to delete the word "third" here too. The two paragraphs would therefore begin as follows:

When an obligation has arisen for States which are members of an international organization under the conditions provided for in . . .

ARTICLE 38 (Rules in a treaty becoming binding on third States or third international organizations through international custom)

106. No criticism was expressed of this article, so no amendment is required.

PART IV. AMENDMENT AND MODIFICATION OF TREATIES

ARTICLE 39 (General rule regarding the amendment of treaties),

ARTICLE 40 (Amendment of multilateral treaties), *and*

ARTICLE 41 (Agreements to modify multilateral treaties between certain of the parties only)

107. No comments were made on the three articles which comprise this part, so no amendment is required, save to article 40, paragraph 2. As a result of the introduction of the term "the contracting entities" into the draft articles, the introductory wording of article 40, paragraph 2, can be simplified to read:

Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting entities, each one of which shall have the right to take part in:

. . .