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Question of treaties concluded between States and international organizations or between two or more international organizations. Comments and observations of Governments and principal international organizations on draft articles 61 to 80 and annex

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ANNEX

Comments and observations of Governments and principal international organizations on articles 61 to 80 and annex of the draft articles on treaties concluded between States and international organizations or between international organizations adopted, by the International Law Commission at its thirty-second session*

CONTENTS

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NOTE

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

Comments and observations of Governments and principal international organizations on articles 1 to 60 of the said draft articles are reproduced in annex II to the report of the Commission on its thirty-third session (*Yearbook ... 1981*, vol. II (Part Two), p. 181).

Sources for the multilateral conventions concluded under the auspices of the United Nations which are cited in the present annex are given on p. 6 above.

A. Comments and observations of Governments

1. Bulgaria

[Original: English]
[30 April 1982]

1. The Government of the People's Republic of Bulgaria notes with satisfaction that draft articles 61 to 80 concerning treaties concluded between States and international organizations or between international organizations, as well as draft articles 1 to 60, adopted by the International Law Commission on first reading at its thirty-second session in 1980, are a valuable contribution to the regulation of treaty relations between States and international organizations or between international organizations themselves, and should be highly appreciated. In general, they reflect the practice followed so far in this field and, in accordance with the approach adopted by the Commission, they follow as close as possible the structure and terminology of the Vienna Convention on the Law of the Treaties.

2. Along with the high assessment which the Bulgarian Government gives to the draft prepared by the Commission, it considers that some

* Comments and observations reproduced in this annex were originally circulated in documents A/CN.4/350 and Add.1-6, Add.6/Corr.1 and Add.7-11. Some of these comments and observations relate not only to articles 61 to 80 and annex of the above-mentioned draft articles, but also to other articles of the draft, or contain general remarks relating to the draft as a whole.

remarks and improvements of a preliminary order could be made in order to emphasize the specific nature of the international organizations as subjects of international law of limited legal capacity, as laid down accordingly in their statutes, as well as to ensure more adequate implementation following the draft's final adoption.

3. Thus, for example, in the drafting of article 62, paragraph 2, the Bulgarian Government considers that the term "boundary" should be specified as "State boundary". Besides, it considers that on a matter of such importance touching upon the interests of States alone, the participation of an international organization as an equal party to the treaty is unfounded.

4. The Bulgarian Government wishes to draw attention to the fact that the three-month period for raising objections under article 65, paragraph 2, may prove insufficient for studying the circumstances and motivations invoked by the party to the treaty under paragraph 1 of the same article.

5. The Bulgarian Government furthermore considers that the submission, upon request by one of the parties, of disputes concerning the application or the interpretation of articles 53 or 64 to the International Court of Justice for a decision, as envisaged in article 66, subparagraph 1 (*a*), is not fully justified or purposeful. What is more, article 65, paragraph 3, refers to Article 33 of the United Nations Charter, which envisages precisely a judicial settlement as one of the possibilities for settling the dispute by choice of the parties to it.

6. The Bulgarian Government also considers that the application of the procedure envisaged in article 66, subparagraph 1 (*b*), and specified in the annex to the draft articles, will be difficult and not quite effective, bearing in mind the complex mechanism and the volume of work that must be done in appointing conciliators for the States and for the international organizations. The problem of the choice of these persons by the international organizations would present further difficulties. Considering the availability of a great variety of peaceful means for settlement of disputes, envisaged in the Charter of the United Nations and tested in practice, one may doubt whether this procedure will be often used by the parties to the dispute, and will find a truly effective implementation.

7. The Bulgarian Government proposes that draft article 80 should envisage registration of treaties as a possibility for the parties, taking into account the provision of Article 102 of the Charter of the United Nations to invoke the treaties at the United Nations bodies. This matter should be decided upon by the parties to the treaty if they consider it appropriate.

2. Byelorussian Soviet Socialist Republic

[*Original: Russian*]
[*10 June 1982*]

1. The draft articles on treaties between States and international organizations or between international organizations elaborated by the International Law Commission are an acceptable basis for the preparation of an international convention on that topic.

2. The text has been prepared on the basis of the corresponding provisions of the Vienna Convention on the Law of Treaties. It does not, however, fully take into account the specific features of treaties in which international organizations participate. Simply to borrow provisions on treaties concluded between States without due regard to the specific legal relations and to the juridical status of international organizations cannot be considered a sound procedure.

3. More particularly, the mere transfer of the provisions concerning a fundamental change of circumstances into article 62, paragraph 2, is open to question.

4. Article 66, subparagraph 1 (*a*) provides for the right of any of the parties to a dispute to submit that dispute to the International Court of Justice. The Byelorussian SSR's position of principle on this question is that in each specific case the consent of all parties to the dispute is required for the submission of the dispute to the International Court. A number of other States are known to take the same position in this matter. The question also arises whether international organizations can lawfully submit cases to the International Court, since under the Statutes of the Court only States, and more particularly States parties to the Statutes of the International Court, may be parties to disputes investigated by the Court.

5. As regards article 80, which provides for the registration in the United Nations Secretariat of international treaties concluded between States and international organizations or between two or more international organizations, the Byelorussian SSR takes the view that the inclusion of such an obligation for international organizations parties to such treaties is inappropriate. The provision unlawfully extends the scope of Article 102 of the United Nations Charter, which provides for such action only by States Members of the United Nations.

6. The provisions on conciliation procedures established in application of draft article 66 and contained in the annex to the draft articles need to be thoroughly revised and simplified. The procedures are extremely complicated and cumbersome and therefore difficult to apply in practice. More particularly, the procedure laid down in paragraph 1 of section I of the annex for drawing up a list of conciliators is open to question.

7. The Byelorussian SSR expresses the hope that at the second reading of the articles its comments on draft articles 61 to 80 will be taken into account by the International Law Commission.

3. Canada

[*Original: French*]
[*28 April 1982*]

1. Although the final form which the draft will take has not yet been decided, the comments which follow have been formulated as for a draft international convention. However, this position should not be taken as precluding any option of which the Government of Canada may wish to avail itself in this regard in the future. Furthermore, while bearing in mind the Commission's working hypothesis that the draft should follow the Vienna Convention on the Law of Treaties as closely as possible, the Government of Canada regards that hypothesis as one of the arguments in favour of the wording of the draft, without according it any absolute value, given the diversity of the situations covered by the two texts. In this regard, the Government of Canada also reserves the right to take a position at the appropriate time.

The following comments relate mainly to those aspects of the draft articles which appear open to question.

2. *Article 61.* The content of this article, and in particular of paragraph 2, appears ambiguous in the context of an international organization, especially in view of the lack of certainty as to the exact meaning of article 27, paragraph 2. If the latter provision to be taken as meaning *(in fine)* "... unless performance of the treaty ... is subject to *the possibility of* the exercise of the functions and powers of the organization", article 61, paragraph 2, would be clearer if it began: "In view of the condition laid down in article 27, paragraph 2 ...", with the rest of the paragraph remaining unchanged. The import of this would be that an international organization could invoke the impossibility of performing the treaty only where the disappearance or destruction of the object indispensable for the execution of the treaty was attributable to the action of factors beyond the control of the organization and of its member States themselves (e.g. adoption of an amendment to the constituent treaty abolishing an organ or preventing certain expenditures; refusal of member States to contribute to the execution of a treaty with money, personnel or equipment; arbitration ruling declaring the organization to be incompetent in respect of the execution of the treaty), as opposed to acts attributable to the organization itself, such as resolutions or decisions relating to its internal administration.

3. *Article 62.* The above comments also apply to paragraph 3 of this article. A fundamental change of circumstances, independent of the wishes of the organization (e.g. mass withdrawal of member States), would constitute grounds for terminating the commitments of an international organization, whereas, for example, a change in the structure of the organization pursuant to a decision of the organization itself and rendering the execution of the treaty significantly more difficult, would not constitute such grounds.

4. *Article 63.* Ignorance of the relations of representation between international organizations and States (members or even non-members) would appear difficult to explain in the light of interna-

tional practice. Not only are these relations amply provided for (permanent missions to international organizations, representatives or missions to States), but, in certain cases, are necessary to the execution of the treaty by virtue of its provisions (e.g. assistance agreements under UNDP requiring the presence of permanent representatives of the participating organizations in the territory of the receiving States; international inspection or observation agreements entailing the presence of inspectors or observers mandated by the international organization; agreements relating to the stationing of United Nations peacekeeping forces, etc.). It would seem advisable, therefore, to designate the existing text of article 63 as paragraph 1 and to add the following as paragraph 2:

"The severance of relations of representation between States and international organizations parties to a treaty or between international organizations party to a treaty shall not affect the legal relations established between those parties by the treaty, except in so far as the existence of relations of representation is indispensable for the application of the treaty".

The title of article 63 should also be amended to read "Severance of diplomatic or consular relations or relations of representation". In order to avoid any confusion between the severance of relations of representation and the withdrawal of a State from the international organization (see art. 73, para. 2), as well as any prejudice to the possible effects of article 36 *bis* and article 70, paragraph 1, it might be advisable to add to article 2, paragraph 1, the following subparagraph (*k*):

" 'Relations of representation' means relations, reciprocal or otherwise, between States and international organizations or between international organizations, entailing the continuous presence, in the accrediting State or at the accrediting organization, of duly authorized persons representing the interests of the accredited party."

5. *Article 65.* Paragraphs 2 and 4 are potentially contradictory, since, under paragraph 2, action may be taken after the expiry of a period of three months following notification and in the absence of objections (see art. 62), whereas, under paragraph 4, notifications and objections appear to be governed by the "relevant rules of the organization". Consequently, there is nothing to prevent an organization which is precluded by the internal rules from raising an objection prior to the expiry of the period in question, from claiming that the objection is valid, on the basis, not of article 65, paragraph 2, but of its own rules (a similar situation exists in article 45, paragraphs 2 and 3). While such a claim would probably be incompatible with the spirit of article 27, paragraph 2, the draft as a whole nevertheless does not appear to contain a general rule concerning the reciprocal effects of treaties concluded by international organizations and their internal rules. The Commission might therefore reconsider the possibility of inserting in the draft an article 5 to read:

"The provisions of the present articles apply to any treaty to which an international organization is a party, except where such treaty derrogates from them".

The inclusion of a general rule of this kind would enable the provisions of article 65, paragraph 2, and article 45, paragraph 3, to be deleted and would, at the same time, eliminate a potential conflict which might upset the economy of the present draft. Such a solution would also induce international organizations to take steps to make their internal procedures compatible with the short notice periods necessitated by the nature of treaty relations between subjects of international law.

6. *Article 66 and annex.* The distinctions drawn in the three paragraphs of this article and their consequences in the form of variants of the conciliation procedure set out in the annex, do not entirely meet the criterion which is nevertheless recognized by the Commission as of paramount importance, namely the existence of a peremptory norm of international law. While it may be accepted that international organizations are not competent to appeal to the International Court of Justice under the dispute procedure and that they would probably have difficulty in gaining a hearing under the advisory opinion procedure, it would nevertheless seem essential that decisions affecting international organizations, in respect of the application or interpretation of articles 53 and 64, should be entrusted to a body for the legal settlement of disputes (i.e. international arbitration), rather than to a body for the political settlement of such disputes (i.e. international conciliation).

Article 66, paragraph 1, should therefore be redrafted to show clearly that it relates solely to disputes concerning the application or interpretation of a peremptory norm of international law (arts. 53 and 64), and should be followed by two subparagraphs (*a*) and (*b*), of which the first would concern only States parties to a dispute and would keep its current wording *(in fine)*, and the second would cover all disputes to which organizations were parties and would provide for the mandatory settlement of disputes by international arbitration. The annex could then also include provisions concerning the appointment of arbitrators similar to those which it already contains concerning conciliators, and suparagraph 2 (*a*) could be deleted as no longer necessary.

In addition, the distinction between conciliation procedures involving only States and procedures involving both States and international organizations (art. 66, paras. 2 and 3) appears unnecessary. All such disputes could be governed by one provision contained in a new paragraph 2 and differing from the two existing paragraphs only in the designation of the parties: "... an objection was raised by one or more States or by one or more international organizations against an international organization or a State ...". Similarly, the existing paragraph 2 of the annex could embody only provisions (i) and (ii) of subparagraphs (*a*) and (*b*), which stipulate the different procedures for the appointment of two conciliators by States and international organizations respectively, and could include a subparagraph (*c*) stipulating that States and international organizations, acting jointly as one party to a dispute, shall appoint two conciliators by common agreement, in accordance with the conditions applicable to them under paragraphs (*a*) (i); (*b*) (i); (*a*) (ii); (*b*) (ii), respectively. In this regard, the provisions of the existing subparagraphs (*b*) (i) and (ii) should include and exclude respectively persons having working links with the international organization, regardless of their duration and nature. Paragraph 2 (*bis*) seems unnecessary.

7. Quite apart from the above observations, the current wording of article 66 and the annex calls for the following drafting changes in order to avoid ambiguities:

(*a*) the period of twelve months (art. 66, paras. 1, 2 and 3) should begin with the raising of the first objection, in chronological order;

(*b*) The number of States and international organizations constituting a party to a dispute should be limited to those which have expressed the wish to be considered as such at the time when the matter is submitted to the International Court of Justice or the request for conciliation is submitted to the Secretary-General of the United Nations or the President of the ICJ. Others having an interest in the outcome of the dispute may be heard by the ICJ (Article 34, paras. 2 and 3, and Articles 62 and 63 of the Statute). It would be advisable to provide for the same possibility for the procedure before the Conciliation Commission;

(*c*) Wherever a number of States or international organizations may appoint one conciliator (annex, subparas. 2 (*a*) (ii), (*b*) (ii) and (*c*) (ii)), the word "list" should be made plural;

(*d*) In order to avoid unnecessary delays, the Commission might suggest, in the annex, a standard international conciliation procedure, which would be automatically applicable, except in the case of a specific objection by the parties.

8. *Article 76.* The references to relations of representation between States and international organizations (see para. 4 above) should be included in both sentences of this article.

9. *Article 77.* The addition of the words "the classification and registration" in subparagraph 1 (*g*) seems advisable (see art. 80, para. 1); subparagraph 2 (*b*) would be clearer if it read "where appropriate, of the organization designated as depositary".

10. *Article 79.* Paragraph 1 should provide for the association with the correction procedure of States and international organizations which participated in the negotiations and are collectively responsible for errors.

4. Czechoslovakia

[*Original: English*]
[*19 May 1982*]

The Czechoslovak Socialist Republic highly appreciates the results of the work of the International Law Commission achieved in the course of the past years in the preparation of draft articles on treaties concluded between States and international organizations or between international organizations. Having carefully studied draft articles 61 to 80, it wishes to submit the following comments on them:

1. As is known, the Commission, when drafting the articles of the treaty, proceeded from the provisions of the Vienna Convention on the Law of Treaties (contractual law). In preceding comments by the Czechoslovak Socialist Republic, this was assessed in a very positive way, since we believe that this kind of codification of international law helps to unify the legal standards regulating the problems at hand. At the same time, however, the Czechoslovak Socialist Republic repeatedly drew attention to the fact that an analogy between the draft which is now being prepared and the Vienna Convention has certain limits, resulting from the different scope of the subjectivity of States and international organizations. In contrast to States as the original subjects of international public law which can, within the framework of limits defined by *jus cogens*, conclude treaties on everything possible, international organizations, as we have already noted, can only conclude agreements, the contents of which are covered by the functions entrusted to the organization by States. And in the differing extent of the subjectivity of States and international organizations, which has not always been sufficiently reflected in the draft articles, one must look for the roots of the reservations and comments by the Czechoslovak Socialist Republic in respect of draft articles 61 to 80.

2. Particularly unacceptable for the Czechoslovak Socialist Republic is the provision of article 62, paragraph 2, which forbids the possibility of invoking a fundamental change of circumstances in the cases when the treaty establishes a boundary. In our opinion, an international organization is not competent, in view of its limited legal personality, to withdraw from the treaty establishing the boundary since such competence only belongs to States as sovereign subjects of international law and not to international organizations, whose legal personality and capacity to contract are, as we stated before, secondary, derived from the legal personality of the member States of the organization.

3. The negative point of view of the Czechoslovak Socialist Republic in regard to draft article 65, paragraph 2, on the procedure to be followed by the parties to a treaty with respect to invalidity or termination of the treaty or withdrawal from it, is due to the three months' limit—proposed by the Commission—for raising objections in cases when another contracting party invokes invalidity, withdrawal from or termination of the treaty. It might happen that the objection would not be raised in time due to the fact that the bodies of international organizations meet sometimes at longer intervals than three months which would result in practical difficulties in the implementation of the treaty. The Czechoslovak Socialist Republic also takes a negative attitude towards the view of the Commission according to which the objection may subsequently be recalled. Although this question is not clearly substantiated in the commentary of the Commission,[1] it is possible to assume that such a view is based on the consideration that the objection could be raised for an international organization by an administrative body of the organization within the fixed time limit of three months, and the respective body could recall it later on. Such a solution, although it is conditioned by internal rules of an international organization, is not suitable because it gives too much power to the administrative body, regardless of the fact that this body does not necessarily have that power on the basis of its statute—in which case it would be difficult to preserve the limit of three months. For the above-mentioned reasons, the Czechoslovak Socialist Republic recommends re-examining the question of a three months' limit for raising objections by another party in the cases when one contracting party refers to the invalidity, withdrawal from or termination of the treaty fixed in draft article 65, paragraph 2, so as to take into consideration a different position of States and international organizations, as well as the solution to which the Commission came in the course of the second reading when formulating articles 19 to 23 of the codification document which is now being prepared.

4. The Czechoslovak Socialist Republic also has reservations of principle in respect of draft article 66, concerning the solution of disputes which may arise in connection with the request for the termination of the treaty, withdrawal from it or with the question of invalidity of the treaty, and recommends the deletion of subparagraph 1 (*a*) providing for obligatory jurisdiction of the International Court of Justice. The provision on obligatory jurisdiction is, in the opinion of the Czechoslovak Socialist Republic, at variance with the freedom of decision of the parties in the dispute to choose the means of its solution. We consider it sufficient to solve disputes on the basis of the means stated in Article 33 of the United Nations Charter and recommend therefore, in the course of the second reading of draft articles, to examine draft article 66 in the spirit of what is mentioned above.

5. In connection with the annex to the draft articles, the Czechoslovak Socialist Republic assesses positively the fact that the annex, relatively sufficiently, reflects the different extent of legal subjectivity of States and international organizations, yet simultaneously draws attention to the rather complicated election of the members of the Conciliation Commission which, in Czechoslovakia's opinion, should be simplified.

6. The Czechoslovak Socialist Republic expresses its positive view of draft article 73 of the codification document which is being prepared, which concerns the succession of States, the responsibility of States and international organizations, outbreak of hostilities, termination of the existence of an international organization and termination of participation by a State in the membership of an organization. These are, in essence, problems the codification of which is already solved in other instruments (Vienna Convention on Succession of States in Respect of Treaties, 1978) or of which the codification is being prepared (responsibility of States, succession of States in respect of matters other than treaties). Paragraph 2 of article 73 states that the draft shall not prejudge any question that may arise in regard to a treaty from the international responsibility of an international organization, from the termination of the existence of the organization or from the termination of participation by a State in the membership of the organization. Though the draft article leaves open a number of questions relating to treaties between States and international organizations or between international organizations, it is not expedient to try to solve them within the framework of this draft. At the same time, however, we express our conviction that due attention will be paid also to this sphere of problems in the course of further codification work.

7. The Czechoslovak Socialist Republic has furthermore reservations in respect of draft article 80, on registration and publication of treaties, with regard to the fact that Article 102 of the United Nations Charter—on which draft article 80 of the codification document which is being prepared is based—regulates the registration of the treaties concluded only between States; it is not obligatory for international organizations to send their international treaties to the United Nations Secretariat for registration.

5. Denmark

[*Original: English*]
[*24 February 1982*]

Article 66

1. From a general point of view, the settlement procedures which have been laid down in article 66, and which correspond to the system of the Vienna Convention on the Law of Treaties, are acceptable to Denmark.

2. As for the annex to article 66, Denmark finds, however, that the square brackets in paragraph 1, second sentence, should be removed in order to establish that international organizations to which the articles are applicable also shall be invited to nominate two conciliators. Particularly in the matter of settling disputes, it is of importance that the parties should be accorded equal status. Neither fundamental nor practical reasons seem to militate against affording international organizations the same opportunities as States to nominate conciliators.

[1] *Yearbook ... 1980*, vol. II (Part Two), p. 85.

Article 73

3. Denmark share the Commission's view that it will hardly be possible to transpose *in extenso* the provisions of article 73 of the Vienna Convention to the treaties referred to in the draft articles.

4. Denmark agrees to the solution by which the principle contained in article 73 of the Vienna Convention has been included in paragraph 1 with regard to States. However, for international organizations, it should be carefully considered whether the provision in paragraph 2 is appropriate.

5. It is, admittedly, very difficult in relation to both States and international organizations to give an exhaustive list of cases which should be subject to the reservation set out in article 73, and that, indeed, never was the Commission's intention. However, the present wording of paragraph 2 of the draft article—with explicit emphasis on the international responsibility and the addition of two further situations which are not mentioned in the Vienna Convention—might suggest that the enumeration is in fact exhaustive in regard to international organizations.

6. The problem can be solved by mentioning explicitly in article 73 that the enumeration is not exhaustive. That solution might give rise to difficulty of a systematic nature. Since the enumeration in paragraph 1, which corresponds to that given in article 73 of the Vienna Convention—which also cannot be regarded as exhaustive—does not contain any explicit statement to that effect, the greatest possible conformity between the two sets of rules which is generally aimed at could not be achieved on this point. However, this inconvenience is, in the view of the Danish Government, of minor importance compared to the advantage of a clearer formulation of the scope of the paragraph.

Final provisions

7. Final provisions have not been drafted because, as stated in the Commission's report,[2] this question should be left to the body entrusted with the task of elaborating the final instrument of codification. Denmark is of the opinion that such a procedure may often be expedient. However, in cases like the present there might be a need for drafting by the Commission of the final provisions too. In the event of codification of the draft articles in the form of a convention, it would be useful if there existed analyses and recommendations as to the modalities for signature of and accession to the convention by international organizations.

6. German Democratic Republic

[Original: English]
[22 April 1982]

The German Democratic Republic believes that articles 61 to 80 and annex of the draft articles on treaties concluded between States and international organizations or between international organizations, as presented by the International Law Commission after the first reading, as well as draft articles 1 to 60 which were submitted to States for comments in 1981, are basically mature enough for the second reading. The German Democratic Republic can agree in general to the majority of the draft articles in their present version.

Because of the difference between the legal quality of States and that of international organizations, some draft articles should, however, take more account of the specific nature of treaties to which international organizations are parties. In particular, the German Democratic Republic wishes to make the following observations in this regard.

1. *Article 61.* It would be appropriate to make more allowance for the specific status of international organizations, especially in cases where the state of legal facts and conditions upon which the application of a given treaty was founded has ceased to exist. Since international organizations do not exist, and cannot act, independently from their member States, such legal situations are likely to disappear more often in the case of international organizations than they would in the case of States.

2. *Article 62.* Non-application of the rule of a fundamental change of circumstances to treaties establishing a boundary as laid down in article 62, paragraph 2, of the Vienna Convention on the Law of Treaties is highly consistent with the particular importance of boundaries and of treaties establishing boundaries for the preservation of international peace and the development of good neighbourly relations. In the opinion of the German Democratic Republic, the term "boundary" comprises exclusively boundaries between the territories of States.

The German Democratic Republic appreciates that the principle of non-application of the rule of a fundamental change of circumstances with regard to treaties establishing a boundary has been embodied in the present codification project. But also in this case, the term "boundary" should only be meant to apply in respect of State frontiers.

It is the view of the German Democratic Republic that with this principle being applied, account should also be taken of the fact that international organizations have no right to exercise authority over the territory of a State and cannot therefore exercise the rights and duties flowing from those stipulations of a treaty which establish a boundary, as referred to in article 62, paragraph 2. A treaty establishing a boundary may confer only certain control or guarantee functions upon international organizations. For that reason it should be examined whether it would be appropriate for article 62, paragraph 2, to differentiate between States parties to a treaty and organizations parties to a treaty.

3. *Article 63.* Besides the severance of diplomatic or consular relations between States parties to a treaty, this article should also deal with the severance of relations between States parties to a treaty and an international organization party to a treaty, or between international organizations. This would unambiguously provide that the severance of such relations would not affect the legal relations established by a treaty.

In making this observation, the German Democratic Republic believes that relations between States and international organizations and between international organizations are now developing on a large scale and that this trend is likely to gain momentum henceforth. This trend should be taken into account in the present codification project, which will, upon completion and entry into force, for a long time determine the law of treaties between States and international organizations and between international organizations.

4. *Article 66.* With regard to the obligatory procedures for the peaceful settlement of disputes as set forth in article 66, the German Democratic Republic wishes to reaffirm its fundamental legal position that procedures which are unilaterally set in motion by one party to a dispute are in contradiction with the generally recognized principle of international law according to which international disputes are to be settled on the basis of the sovereign equality of States and in conformity with the principle of free choice of means.

5. *Article 80.* In accordance with article 102 of the Charter of the United Nations, treaties concluded between international organizations should not be registered, or at least be registered on an optional basis.

6. In conclusion, the German Democratic Republic expresses its hope that further work on the codification project in the Commission will be continued steadily and along proven lines so that the second reading of the draft articles can be completed soon.

7. Federal Republic of Germany

[Original: English]
[24 February 1982]

1. The present comments deal with articles 61 to 80 of the International Law Commission's draft, which have already been commented on verbally during the deliberations of the Sixth Committee of the General Assembly, in November 1980. Since then, the second reading has commenced and partial results have been made available. In its appraisal during the deliberations of the Sixth Committee in 1981, the Federal Republic of Germany welcomed the fact that the Commission regards the Vienna Convention on the Law of Treaties as the model to be used as far as possible, adapting it in line with the particular

[2] *Yearbook ... 1980*, vol. II (Part Two), p. 64, para. 53.

features of treaties in which international organizations participate.[3] During the second reading, the Commission has until now systematically adhered to this approach and has, with regard to the substantive provisions of articles 1 to 26, kept to a minimum the deviations from the Vienna Convention. There is therefore reason to hope that in the continuation of the second reading, the middle section, with article 36 *bis* (highly important, not only for the European Economic Community) and parts V and VI, commented on here, will be aligned in a suitable and reasonable manner with the Vienna Convention. It is also hoped that the Commission will be able to complete the second reading in 1982 as planned. The Commission will again be faced with the difficult problems deriving from the particular conditions of international organizations participating in treaties, especially the different treatment accorded to them by the International Court of Justice.

2. In the provisions of *part V: Invalidity, termination and suspension of the operation of treaties*—the Commission has placed international organizations on a par with States, proceeding on the assumption that international organizations which are parties to treaties are responsible to the same degree as States participating in treaties; like the latter, they must account for any violation when concluding and performing treaties. This assumption and its consequences are to be welcomed. It is therefore logical to adopt the principles of the Vienna Convention with regard to supervening impossibility of performance (art. 61) and fundamental change of circumstances (art. 62). It has been foreseen that additional questions may occur when international organizations participate in treaties. These have rightly not been included in the provisions of the draft, because that would exceed the scope of these new provisions (cf. art. 73).

3. In its commentary to article 63 (paras. 2 and 3), the Commission has conceded that the basic idea of *articles 63 and 74* must be applied to international organizations even though there are no diplomatic and consular relations between them and States. The basic idea also holds true for the official relations between States and international organizations, which are highly formalized in some cases (permanent missions). Their absence does not prevent the conclusion or existence of treaties.

However, so far, articles 63 and 74 of the draft do not place international organizations on a par with States. In order to remedy this shortcoming, the Federal Republic of Germany had proposed in 1980 in the Sixth Committee that the wording of the two articles be supplemented as follows: "(diplomatic or consular) or other formal relations", and furthermore that article 63 be reworded to read "between parties to a treaty" and article 74 to read "between two or more States or between a State and an international organization or between international organizations".[4] These proposals are repeated here.

4. It is to be welcomed that in the *procedure* for contesting the validity of treaties and the *settlement of disputes* pursuant to part V, section 4, international organizations are in principle placed on a par with States along the lines of the Vienna Convention. As in the Convention, the procedures are confined to the circumstances dealt with in part V, lest the existing system be abandoned. In view of this regrettable, but probably indispensable, limitation, the procedures provided for in the Vienna Convention must, however, be extended as far as possible to international organizations. As regards system and scope, the draft should follow the structure of the Vienna Convention, because this was achieved through a difficult compromise at the United Nations Conference on the Law of Treaties without which the Convention would hardly have been accepted. The solution should be extended fully to international organizations.

Despite some misgivings about the three-month period, which is rather short for international organizations, the arrangement of the Vienna Convention has fortunately been retained for *article 65*. It has to be accepted that international organizations, in order to observe the three-month period, might be induced to raise objections which they subsequently withdraw *ex abundante cautela*. The essential principle is that international organizations should be given equal treatment—neither discrimination against them nor advantages over participating States.

5. *Article 66,* however, does not afford equal treatment for international organizations and States to the extent actually possible without deviating from the principle of the Vienna Convention. In paragraphs 2 and 3, a judicial decision is not envisaged for all instances in which *jus cogens* is at dispute. The Federal Republic of Germany has already criticized the shortcoming verbally in 1980 in the Sixth Committee.[5] In its view, in disputes involving *jus cogens* a judicial decision should be obligatory in all cases. Moreover, in view of the importance of the role of the International Court of Justice for the interpretation of *jus cogens,* the possibility of requesting advisory opinions from it pursuant to Article 96 of the United Nations Charter should not go unmentioned, in so far as this is possible for the international organizations concerned and represents a suitable and adequate solution.

6. Placing international organizations on a par with States also involves the *nomination of conciliators* for the conciliation procedure. In paragraph 1 of the annex, the capacity of international organizations to nominate candidates is still placed in brackets. These should be dropped, since there are no obvious reasons why international organizations participating in treaties on equal terms should not be entitled to participate in drawing up the list of conciliators.

7. In part IV, the wording which *article 73* will ultimately be given is especially important in terms of substantive law. In the draft, a number of marginal questions have deliberately been excluded, including the succession of international organizations (or succession of States transferring powers to international organizations), responsibility (analogous to State responsibility and liability), the conclusion of treaties by subsidiary organizations, etc. Other questions belonging to this complex which do not arise when reproducing the Vienna Convention but are closely linked with the implementation of the provisions of a treaty are those concerning the relationship between international organizations and their member States, e.g., voting rights and distribution of powers for the performance of a treaty. It seems justified to exclude expressly or tacitly those complexes from the draft because otherwise the scope of the Vienna Convention would be transcended. Article 73 could, while retaining an inexhaustive list of the excluded matters, be given the form of a general reservation regarding the particular conditions of international organizations participating in treaties. Such a general reservation might prove useful to prevent provisions of the draft from impeding the future development of this subject-matter (cf. the provisions of the third United Nations Conference on the Law of the Sea in respect of participation of international organizations).[6]

8. Although the Commission has not yet discussed the *final provisions* for a convention codifying the subject-matter dealt with in the draft, it has announced that this question will be dealt with during the second reading. As stated in its comments of 10 March 1981,[7] the Federal Republic of Germany expects international organizations capable of concluding treaties to be granted the right to participate on equal terms, as they already do in the work of the Commission, in a conference for drafting a convention on treaties between States and international organizations. In creating such a convention, they should be allowed to participate in the deliberations, voting, signing and ratification in the same manner as the participating States.

9. In the second reading of draft articles 1 to 26 it proved possible to clarify and simplify the *drafting*. Among the provisions discussed here, only article 73 and the annex appear to offer any prospects of redactional simplification.

8. Spain

[Original: Spanish]
[21 October 1981]

The Spanish Government has examined with the utmost interest and thoroughness articles 61 to 80 of the draft articles on treaties con-

[3] *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee,* 44th meeting, para. 34.

[4] *Ibid., Thirty-fifth Session, Sixth Committee,* 45th meeting, para. 15.

[5] *Ibid.,* para. 13.

[6] Annex IX to the Convention on the Law of the Sea, signed on 30 April 1982 (A/CONF.62/122 and corrigenda).

[7] *Yearbook ... 1981,* vol. II (Part Two), p. 186, annex II, sect. A.7, I, para. 7.

cluded between States and international organizations or between international organizations, elaborated by the International Law Commission. Generally speaking, it endorses the Commission's method of maintaining the greatest possible parallelism and uniformity with the articles of the Vienna Convention on the Law of Treaties of 1969. It would thus be possible to avoid an excessive dualism of regimes and to facilitate the process of comparison. Having made this general observation, the Spanish Government wishes to comment specifically on a few articles.

1. Article 63 of the draft elaborated by the Commission refers to the severance of diplomatic or consular relations between States parties to a treaty between two or more States and one or more international organizations. The article affords a solution identical to the one contained in article 63 of the 1969 Vienna Convention: the severance of diplomatic or consular relations does not affect the legal relations established between those States by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

The Commission has also considered the situation in which the permanent delegation of a State to an international organization is recalled or the representatives of a State do not participate in the organs of the organization, and has noted that, since treaties establishing international organizations are treaties between States, such a situation concerns the regime of the treaties governed by the Vienna Convention. In addition, however, the Commission has taken into account the fact that in certain specific cases, treaties concluded between an organization and a non-member State or even one of its member States may establish obligations between the parties whose performance calls for the creation of such specific organic relations as the local appointment of representatives, delegations and expert commissions, possibly of a permanent kind. According to the Commission's report, "If these organic relations were severed, a principle analogous to that laid down in article 63 for diplomatic and consular relations would have to be applied."[8] While the Spanish Government endorses that conclusion, it believes that it should be embodied expressly and precisely in the articles now under consideration.

2. Article 65 lays down the procedure to be followed when a party impeaches the validity of a treaty, terminates it, withdraws from it or suspends its operation. The article also provides that objections may be raised within three months of the date of the relevant notification. The Spanish Government believes that such a time-limit is too short for international organizations, since, as the Commission noted in its commentary, "some of the organs competent to take such a decision meet only infrequently."[9] Nevertheless, the Commission preferred to retain the three-month time-limit in the knowledge that organizations might later decide to withdraw their objections. The Commission thus implied that international organizations might follow a policy of automatically raising provisional objections which could subsequently be withdrawn after in-depth consideration.

In that connection, it should be noted that the raising of an objection requires an express and formal act on the part of the competent organ of an international organization; that organ must be given an opportunity to meet and take a decision. It should also be borne in mind that the organ in question might not wish to follow a policy of raising automatic or provisional objections to claims by any other party affecting the validity, termination or suspension of a treaty. With a view to averting such difficulties, the Spanish Government believes that the time-limit for the raising of objections by international organizations should be extended.

3. The Spanish Government understands why article 66 had to be different from the corresponding article of the 1969 Vienna Convention with regard to the settlement of disputes concerning the application or the interpretation of articles 53 or 64 (*jus cogens*). Under Article 34 of the Statute of the International Court of Justice, international organizations do not have *jus standi* before the Court; it is therefore not possible to institute mandatory recourse to the jurisdiction of the Court in disputes to which an international organization is a party.

The Spanish Government believes, however, that it would be possible, in the case of disputes concerning *jus cogens* to which an international organization is a party, to institute mandatory recourse to arbitration, inasmuch as the parties could very well establish a means of arbitral jurisdiction to which the international organization would have access. Mandatory recourse to such jurisdiction, in the opinion of the Spanish Government, would be highly desirable, as a way of dispelling the uncertainty resulting from the present imprecision of many peremptory norms of international law.

4. The annex to the draft articles deals with "procedures established in application of article 66". Section I deals with the establishment of the Conciliation Commission. Paragraph 1 of that section refers to the list of conciliators to be drawn up and maintained by the Secretary-General of the United Nations.

As to the persons whose names should be on the list, there are square brackets around the text that would enable any international organization to which the articles have become applicable to nominate two conciliators. The square brackets were used because of some opposition to that provision within the Commission. The Spanish Government considers that the square brackets should be deleted and that international organizations should be given the opportunity to nominate conciliators for the list to be drawn up and maintained by the Secretary-General. The reason is that in the settlement of disputes it is essential to respect most scrupulously the principle of equality of parties; in the event of a dispute between a State and an international organization, both parties should be given an equal opportunity to have among the conciliators persons nominated by them.

9. Ukrainian Soviet Socialist Republic

[Original: Russian]
[25 May 1982]

In assessing the continued work of the International Law Commission on the question of treaties concluded between States and international organizations or between international organizations, the Ukrainian SSR notes with satisfaction that the draft articles prepared on this subject on the whole constitute an acceptable basis for the preparation of a corresponding international legal document.

However, a number of provisions in articles 61 to 80 give rise to separate comments and require some amplification.

1. In an endeavour to bring the content of the draft articles as close as possible to the 1969 Vienna Convention on the Law of Treaties, the Commission frequently reproduces the corresponding formulations without taking proper account of or duly reflecting in full the specific character of agreements to which international organizations are parties. Thus, automatically transferring provisions on the inadmissibility of terminating treaties establishing boundaries in the event of a fundamental change of circumstances to article 62, paragraph 2, cannot be regarded as justifiable in substance.

2. The question of the possibility of the judicial settlement of disputes concerning the existence, interpretation or application of imperative rules of public international law is not regulated with sufficient clarity. In article 66, which allows for this possibility, it should be clearly stipulated that the submission of any such dispute to the International Court of Justice for its consideration, or to arbitration, requires in each case the consent of all the parties to the dispute.

3. The conciliation procedures proposed by the Commission in the annex to the draft articles in application of this article also appear to be complicated and rather long. To ensure the effectiveness and facilitate the practical application of these procedures, they should be substantially simplified, in particular, by improving as far as possible the machinery for the establishment and functioning of the Conciliation Commission.

4. The question of the procedure for registering international treaties in which at least one of the parties is an international organization requires further study. In drafting the corresponding provisions during the second reading, it is essential to bear in mind that the State and the international organization cannot be placed on the same footing in this respect.

[8] *Yearbook ... 1980*, vol. II (Part Two), p. 84, para. (3) of the commentary to article 63.

[9] *Ibid.*, para. (4) of commentary.

10. Union of Soviet Socialist Republics

[Original: Russian]
[26 May 1982]

The draft articles on treaties between States and international organizations or between international organizations elaborated by the International Law Commission are capable of serving as an appropriate basis for the preparation of an international convention on that topic.

At the same time, account should be taken in the second reading of draft articles 61 to 80 of the following considerations in particular:

1. It would seem that, with regard to the carrying over into the draft of individual provisions of the 1969 Vienna Convention on the Law of Treaties, in a number of cases, the well-known specific features of treaties in which international organizations are participants, as compared with treaties concluded between States, have not been taken fully into account. In particular, the justification of the simple transfer into article 62, paragraph 2, of the provisions concerning a fundamental change of circumstances is open to question.

2. Article 66, subparagraph 1 (*a*), provides that any of the parties to a dispute may submit that dispute to the International Court of Justice for a decision. In keeping with the Soviet Union's position of principle, the competent Soviet organs consider it advisable for this subparagraph to be so worded as to make the consent of all paties to a dispute necessary for the submission of that dispute to the International Court of Justice or to abritration.

3. Draft article 80 provides for the transmission to the United Nations Secretariat, for registration and publication, of treaties, i.e. treaties between one or more States and one or more international organizations or between international organizations, which have entered into force. It is hardly appropriate to establish such an obligation for international organizations which are parties to treaties of the kind in question, since that is to overstep the bounds of article 102 of the Charter of the United Nations, which provides for the relevant action only on the part of States Members of the United Nations.

4. The annex to the draft articles contains provisions on conciliation procedures established in application of draft article 66. Those procedures are unnecessarily cumbersome, thereby making them extremely difficult both to understand and to apply. They should be made very much simpler. The URSS has, in particular, doubts concerning the procedure laid down in paragraph 1, section I of the annex, for the formation of a list of conciliators.

II. United Kingdom of Great Britain and Northern Ireland

[Original: English]
[8 June 1982]

1. In response to the Note from the Secretary-General dated 31 August 1981, the United Kingdom submits brief written comments on the second part of the International Law Commission's draft articles on treaties concluded between States and international organizations or between international organizations (comprising draft articles 61 to 80 inclusive and annex), provisionally adopted on first reading by the Commission in 1980. The present comments should be read as a supplement to the written comments submitted by the United Kingdom in 1981 on draft articles 1 to 60 inclusive,[10] the general comments in which are intended to apply equally to draft articles 61 to 80 as to the earlier articles. By the same token, it is not the United Kingdom's intention to comment separately on the draft articles already mentioned in the written comments submitted on behalf of the European Economic Community on 18 March 1982,[11] which the United Kingdom hereby endorses. The present written comments are confined to certain questions connected with the provisions for settlement of disputes incorporated in the draft articles.

2. The United Kingdom wishes to begin with the preliminary observation that draft article 66, and the associated annex, are predicated on the assumption that the Commission's draft will ultimately gain the form of an international convention. Since the jurisdiction of third party settlement procedures is established only through the formal consent of the parties, it is only in the context of a binding treaty instrument that the means of settlement provided for in draft article 66 and the annex can validly be established. Nevertheless, it should be noted that the question of the eventual form of the Commission's draft articles remains open, and will ultimately be a matter for the General Assembly to decide once the Commission has completed the second reading of the entire draft and forwarded it to the General Assembly with an appropriate recommendation. That said, and without prejudice to this ultimate decision, the United Kingdom welcomes (for reasons which will be stated below) the initiative of the Commission in including the provisions in question in its draft. The United Kingdom observes also that, on the assumption that any treaty instrument resulting from the Commission's proposals will be open to participation by international organizations having the necessary competence, it will be essential that the procedures for the settlement of disputes, no less than all other provisions, should take full account of the interests of such organizations; in particular, it must be an essential feature of any system for the settlement of disputes that it places all parties to an eventual dispute on a footing of equality.

3. The United Kingdom recognizes that the Commission is breaking new ground in incorporating, for the first time, provisions for the settlement of disputes in a set of draft articles. The United Kingdom's unreserved welcome for this initiative is born of two elements. The more general is the United Kingdom's firm attachment to clear and effective mechanisms for the binding settlement of disputes arising out of treaty obligations, including third party procedures. The United Kingdom notes in this connection that all the conventions adopted by plenipotentiary conferences on the basis of draft articles prepared by the Commission have included provisions of one kind or another for the settlement of disputes. To this is added a particular reason, duly recognized in paragraphs (1) to (4) of the Commission's commentary to draft article 66,[12] that Part V of the Vienna Convention on the Law of Treaties (dealing with the "Invalidity, Termination and Suspension of the Operation of Treaties") was considered at the United Nations Conference on the Law of Treaties to require adequate safeguards for its application, and that the settlement of disputes procedures in article 66 of the Convention accordingly have a substantive aspect. More particularly, articles 53 and 64 (dealing with the issue of *jus cogens*) were adopted only as part of a wider understanding amongst the negotiating States that their operation should be controlled by effective provisions for the binding settlement of disputes arising out of their interpretation or application. This fact alone would have rendered it impossible for the Commission to transpose the substance of articles 53 and 64 into the present draft, without at the same time proposing equivalent protection in the way of settlement of dispute procedures.

4. In its commentary to draft article 66, the Commission correctly points out that, under the Statute of the International Court of Justice, only States may be parties in contentious cases before the Court and that, in consequence, it is not possible to carry into the present draft the substance of article 66, subparagraph (*a*) of the Vienna Convention (which offers jurisdiction on the International Court of Justice over disputes relating to the issue of *jus cogens*), in so far as the dispute in question is one to which one or more international organizations is a party. Instead, the Commission proposes, in paragraphs 2 and 3 of draft article 66, that disputes of this kind should be referred to the conciliation procedure defined in the annex, in the same way as all other disputes relating to part V of the draft articles. It is clear that this would represent a major change of substance, by comparison with the system of the Vienna Convention, since the results of the conciliation procedure are in no sense binding on the parties to the dispute (para. 6 of the annex) and, indeed, the whole object of the conciliation procedure is not to reach a decision in accordance with the applicable rules of international law, but, in terms, to facilitate an amicable settlement of the dispute between the parties (paras. 5 and 6 of the annex).

5. It is evident that the Commission gave serious consideration, as an alternative to falling back on the weaker procedure of conciliation, to the possibility of a solution based on reference to the International

[10] *Yearbook ... 1981*, vol. II (Part Two), p. 190, annex II, sect. A.14.

[11] See below, sect. C.3 of the present annex.

[12] *Yearbook ... 1980*, vol. II (Part Two), pp. 86-87.

Court of Justice for an advisory opinion. The Commission appears to have rejected this possibility because the procedural and substantive problems were thought to render the advisory opinion procedure imperfect and uncertain. The United Kingdom questions whether, in reaching this conclusion, the Commission in fact gave sufficient weight to the consideration, which was evidently of considerable importance at the Conference on the Law of Treaties, that jurisdiction over *jus cogens* questions should specifically be conferred on the International Court of Justice, as the principal judicial organ of the United Nations, in view of the fundamental nature of *jus cogens* claims and the severe repercussions of claims to nullify treaty obligations on this ground. For this reason, the United Kingdom believes that further consideration should be given by the Commission to a solution by way of the advisory opinion procedure, associated with a suitable undertaking on the part of the international organizations and States parties to the dispute (which would no doubt have to be specified in the article itself) to abide by the terms of an advisory opinion delivered pursuant to the article in question. Models for a settlement of disputes procedure of this kind are to be found in numerous agreements between international organizations within the United Nations family. If the Commission felt able to follow this route, it would have the inestimable advantage of ensuring that one tribunal, and one tribunal only, was endowed with primary jurisdiction in relation to *jus cogens,* thus eliminating the possibility of a multiplicity of competences and the consequent risk of a widely diverging jurisprudence on a question of this importance. If, however, the Commission were nevertheless to arrive at the conclusion that the procedural obstacles were too great to enable it to recommend a solution of this type, the Commission ought in those circumstances to attach overriding importance to the need for disputes of this character to be subject not only to binding decision, but also to a decision based on law. In this perspective, a settlement of disputes provision based on binding arbitration would be greatly preferable to the conciliation procedure provided for, and the Commission might wish to give consideration to the drafting of a separate portion of the annex designed to lay down the details of a system of arbitration, and thus eliminating so far as possible the purely *ad hoc* element.

6. Finally, the United Kingdom considers it of overriding importance that nothing done in the context of settlement of disputes in the present draft articles should have the effect of undermining the protection offered to States parties to the Vienna Convention by article 66, suparagraph (*b*), thereof. The United Kingdom takes due note of the fact that, under the Commission's draft, disputes solely between States, even if arising under a treaty to which international organizations were also parties, would be subject to settlement procedures under draft article 66, paragraph 1, designed to be identical with their counterparts in the Vienna Convention. Nevertheless, the United Kingdom doubts whether any dispute raising issues of *jus cogens*, because of its fundamental character and profound effects, could in practice remain confined to a limited number of parties to a multilateral treaty: it is more than likely that any such dispute would rapidly pass outside the scope of paragraphs 1 and 2 of the Commission's draft article 66, and become one to be dealt with under paragraph 3. The United Kingdom fears that the procedural situation thus brought about would be sufficiently complex to cast unacceptable doubt on the compulsory jurisdiction of the International Court of Justice under article 66, subparagraph (*b*), of the Vienna Convention, bearing in mind the provisions of article 30 of that Convention (Application of successive treaties relating to the same subject-matter). This provides in itself an additional powerful reason for making every effort to direct the jurisdiction over *jus cogens* disputes to the International Court of Justice. In any event, however, both for the reason just given and for the wider reasons adverted to in paragraph 1 of the United Kingdom's written comments of 1981,[13] the United Kingdom would urge the Commission to consider the incorporation in its draft articles of a general provision based upon the concept underlying article 30, paragraph 2, of the Vienna Convention.

7. As already indicated, the above comments are predicated on the assumption that the Commission's draft articles will ultimately gain the form of an international convention. If that were not to be the case (if, for example, the Commission were in the event to recommend some lesser form of instrument, not of a treaty character), then the question of settlement of disputes procedures addressed above might not present itself in so acute a form, if at all. Conversely, however, if the Commission were to decide in favour of recommending the conclusion of a convention on the basis of its draft articles, then it would be right for the Commission to consider at the same time the means whereby international organizations might become parties to such a convention. For the reasons discussed above in connection with part V of the draft articles, if for no others, international organizations having the requisite capacity would have to be brought within the scope of any such Convention, with the full rights of parties. It would undoubtedly be useful for the Commission to consider this question and to incorporate into its recommendations to the General Assembly its proposals as to the modalities by which the desired result might be brought about.

[13] See footnote 10 above.

B. Comments and observations of the United Nations and the International Atomic Energy Agency

1. United Nations

[Original: French]
[14 April 1982]

The following preliminary comments and observations concern draft articles 61 to 80. The preliminary comments and observations by the United Nations on draft articles 1 to 60 will be found in the report of the International Law Commission on its thirty-third session.[14] As was the case of that series, the following comments and observations are of a preliminary character; the United Nations intends to submit its formal comments and observations after the Commission has completed its elaboration of the whole of the text.

Article 67, para. 2; article 77, subpara. 1 (a)

1. For the reasons already given in connection with article 2, subparas. 1 (*c*) and (*c bis*), article 7, para. 4 and article 11,[15] it would appear desirable to use the same term (probably "full powers") for representatives of States and representatives of international organizations.

Article 76, para. 1

2. The decision by the Commission not to mention in the draft articles the possibility of designating more than one international organization to serve as depositary of the same treaty is to be welcomed, in the view of the United Nations.

3. Apart from the reasons already mentioned by the Commission in its commentary,[16] it should be emphasized that the difficulties to which the multiple-depositary procedure has given rise in the case of States would be greatly compounded in the case of depositary international organizations. This is so because the practice of international organizations, whether depositary functions are entrusted to the organization as such or to its chief administrative officer, often derives, in part at least, from recommendations or decisions taken by one or more of the collective organs of the organization. Thus, the Secretary-General of the United Nations, in his capacity as the

[14] *Yearbook ... 1981*, vol. II (Part Two), p. 196, annex II, sect. B.1.

[15] *Ibid.*, p. 197, subsect. II, para. 3.

[16] *Yearbook ... 1980*, vol. II (Part Two), p. 95.

depositary of multilateral treaties, has to take into account the recommendations and requests of the General Assembly in such areas as reservations and participation.[17]

4. This circumstance makes it clear that, should two or more organizations be designated to serve as depositaries for the same treaty, the possible necessity for each of them to abide by or obtain decisions from collective organs that may be competent might result in legal situations that would be of great theoretical and practical complexity, if not completely insoluble, especially as concurrent decisions would have to be obtained from all the organizations involved.

5. This also holds true, albeit to a lesser extent, for the sharing of depositary functions, a fortunately rather rare procedure under which, typically, one organization serves as the depositary for the treaty itself while another organization performs depositary functions in respect of subsequent formalities (ratification, accessions, etc., and even amendments).[18]

Article 77, subparas. 1 (f) *and* (g) *and subparas. 2* (a) *and* (b)

6. Reference is made to the previous preliminary comments and observations, concerning article 14 and article 2, subpara. 1 (*b, bis*), with regard to the procedure of "formal confirmation".[19]

7. The provision of article 77, subpara. 1 (*g*), relating to registration is identical to the corresponding provision in the Vienna Convention on the Law of Treaties.

8. The obligation to register treaties is, of course, embodied in article 102 of the Charter of the United Nations. It consequently applies to States Members of the United Nations with respect to treaties entered into after the coming into force of the Charter. Additionally, the General Assembly of the United Nations has adopted "regulations to give effect to Article 102 of the Charter of the United Nations", which it has amended on various occasions.[20]

9. Apart from the formality of registration *stricto sensu*, that is, the mandatory formality deriving immediately from Article 102 of the Charter, the above-mentioned regulations of the General Assembly provide for a supplementary procedure; filing and recording (for treaties entered into before the coming into force of the Charter or to which no State Member of the United Nations is a party). Furthermore, the Secretariat of the United Nations has continued to inscribe in the register of the League of Nations subsequent actions (other than treaties), in respect of multilateral treaties formerly deposited with the Secretary-General of the League of Nations, and it also registers at the request of the parties concerned, in the same way, subsequent actions relating to all other treaties registered with the League of Nations (registrations in annex C of the *Treaty Series*). It is to be noted that the two supplementary procedures mentioned above are optional for States and international organizations other than the United Nations (see article 10 of the General Assembly regulations).

10. It may be unfortunate, as the Commission's commentary would tend to show,[21] that the wording of article 77 (Functions of depositaries) differs, as regards registration, from that of article 80 (Registration and publication of treaties), in that article 77, subpara. (*g*), refers to registration only while article 80, para. 1 refers explicitly to registration and filing and recording.

11. That being so, and considering that the Commission decided to retain the language of the Vienna Convention, it should be noted that the United Nations practice has consistently been to give the fullest effect to the provisions of the General Assembly regulations mentioned above. Consequently, the United Nations does not expect that the wording the Commission decided to retain will be a source of difficulties.

12. The Commission appears to have entertained some doubts as to article 77, subparas. 2 (*a*) and (*b*), the substance of which it nevertheless decided to retain as these provisions appeared in the Vienna Convention. The United Nations welcomes this decision, for the provisions concerned play an important role in its practice. While subparagraph (*a*) will cover the straightforward case of the depositary informing the signatories and contracting parties of the existence and the nature of a difference between two or more among them, subparagraph (*b*) provides a logical and very useful procedure in the case of a depositary organization which is not a signatory or contracting party but simply a *third party beneficiary under the treaty*. Thus, the Secretary-General of the United Nations, as the depositary for the Convention on the Privileges and Immunities of the United Nations[22] and the Convention on the Privileges and Immunities of the Specialized Agencies[23] may be confronted with instruments of ratification, accession, etc., accompanied by reservations the acceptability of which may appear doubtful in view of the goals of those conventions. In such cases, the practice of the Secretary-General has been to consult the organizations concerned before receiving the instrument in deposit, and it is naturally conceivable that certain organs of those organizations might express their views concerning the acceptability of the reservations. Since this procedure might be substituted, at least initially, for direct referral of the difference to the signatories and contracting parties—without excluding, incidentally, recourse to the latter procedure—the use of the conjunction "or" at the end of article 77, subpara. 2 (*a*) becomes entirely understandable.

Article 80

13. In general, reference should be made to the comments already included under article 77 (see paras. 7-11 above).

14. It may be useful to note that for the purpose of Article 102 of the Charter and the related regulations the Secretariat of the United Nations has consistently, for several years already, considered that the designation of a State, an international organization or the chief administrative officer of such an organization is tantamount to the authorization for the depositary to proceed with registration (or filing and recording) without any further formality being required. Accordingly, article 80, para. 2, as retained by the Commission does not raise any difficulty for the Organization.

2. International Atomic Energy Agency

[*Original: English*]
[*11 March 1982*]

The International Atomic Energy Agency has not recently furnished comments and observations on any of the draft articles. We have now had the benefit of considering the tenth report on the question by the Special Rapporteur, Mr. Paul Reuter,[24] made in the light of comments and observations submitted by several Governments and organizations. Our comments will therefore not be confined to articles 61 to 80. Rather, the following general comments apply to the whole of the draft articles, and more detailed comments are given in regard to particular articles.

I. General comments

1. The International Law Commission and, especially, the Special Rapporteur are to be complimented on the rigorously pursued logic, scholarship and fine draftsmanship with which they have adduced and displayed the differences between the law of treaties to which only States are parties and treaties to which organizations are parties. In the day-to-day legal practice of IAEA, resort is frequently had to the Vienna Convention on the Law of Treaties, which is treated as a "handy manual" of the law affecting the Agency's treaties with States

[17] With regard to reservations, see General Assembly resolutions 598 (VI) of 12 January 1952 and 1452 B (XIV) of 7 December 1959. With regard to participation in multilateral treaties deposited with the Secretary-General, see the decision taken by the General Assembly at its twenty-eighth session, on 14 December 1973, relating to the "all States" clause.

[18] This is the case for the first GATT agreements, for example.

[19] *Yearbook ... 1981*, vol. II (Part Two), p. 198, annex II, sect. B.1, subsect. II, para. 14.

[20] Resolution 97 (I), adopted by the General Assembly on 14 December 1946, modified by resolutions 364 B (IV) of 1 December 1949, 482 (V) of 12 December 1950 and 33/141 of 19 December 1978.

[21] *Yearbook ... 1980*, vol. II (Part Two), pp. 96 *et seq.*

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

[23] *Ibid.*, vol. 33, p. 261.

[24] *Yearbook ... 1981*, vol. II (Part One), p. 43, document A/CN.4/341 and Add.1.

and other organizations and other treaties of interest to it to which only States are parties. The Convention is also referred to as a paradigm for treaty drafting. We therefore fully endorse the working method of the Commission in basing the draft articles firmly on the format and texts of the Vienna Convention.

2. In earlier drafts of the draft articles, the drafting style adopted by the Commission maximized those differences which the Commission considered existed in comparison with the law of treaties between States. At its best, this displayed clearly the full rigour of the Commission's thinking; at times, however, as the Special Rapporteur has since recognized, it produced over-elaborate texts, with a loss of clarity of expression as compared with equivalent articles of the Vienna Convention. The suggestions for simplified drafting, aided by additional definitions of terms, made by the Special Rapporteur in his tenth report, are well conceived and helpful in simplifying the texts. This simplified drafting decreases the optical differences which had given a somewhat exaggerated emphasis to the substantive differences between the draft articles and the Vienna Convention.

3. The substantive differences which remain, some of which appear to stem from differing positions held within the Commission by members coming from different major legal systems of the world, are not numerous and in some cases might not justify the practical significance given to them. The single difference between States and organizations, which in effect has made the present topic a necessary one to be addressed by the Commission, is the derivative treaty-making capacity of international organizations as compared with the sovereign capacity of States, which is governed in each particular case by the relevant rules of the organization. Once this difference is provided for, as it is in article 6 of the draft articles, most other differences are both contingent and of lesser legal significance. Given that, according to its rules, it is within the capacity of a given organization to negotiate and conclude a particular treaty, then in principle, public international law should apply on a basis of equality to that organization and a State or other organization party to the same treaty. Both States and international organizations are subjects of international law, upon which the law bears in almost all respects equally, and it would not be helpful to introduce distinctions of terminology or practice other than ones which necessarily flow from general deficiencies of capacity in international organizations, as compared with the sovereign capacities of States.

4. In this regard, it is doubtful if the differential terminology "ratification/act of formal termination" and "full powers/powers" adopted by the Commission, is so necessitated. Ratification as used in the Vienna Convention is a concept of public international law taking effect internationally between States and is not to be confused with the legislative or governmental administrative act having effect in the national law of the State, by which authority is granted for the international act of ratification to be effected by the State. It would seem that in principle the international act of ratification of a treaty could be performed equally by an international organization as by a State. Similarly, the documents denoted respectively by the terms "full powers" and "powers" in the draft articles are the same in substance and effect, and there does not seem to be a practical reason to use different terminology.

5. When the Commission has completed its consideration of the draft articles and makes its final report on them, the similarities and differences between the law and practice affecting treaties to which organizations are parties and treaties to which only States are parties, will have been fully and extensively considered and will be succinctly displayed in the draft articles. States and organizations will then be able to judge the need for formalizing the codification of the differences. It may be that the members of the General Assembly might consider it preferable to rest on the work of the Commission, leaving the draft articles to stand as a valuable elicitation of what *mutatis mutandis* means in the application *mutatis mutandis* of the Vienna Convention to treaties between States and organizations, and between organizations. It may be doubted whether a diplomatic conference such as was convened to negotiate the Vienna Convention would improve significantly on the Commission's work. Indeed, subtleties of law and ideology which have been reconciled in the draft articles might be disturbed.

II. Comments on particular articles

1. *Article 2, subparas. 1* (b) *and* (b bis). See general comments (para.4). In IAEA's practice, its consent to be bound by treaty is normally given by signature alone, consequent on prior approval of the treaty and authorization of signature by its Board of Governors. It has not been the practice of the Agency to adhere to treaties by a two-step procedure of signature plus some further act of confirmation. Nothing in the relevant rules of the Agency would prevent such procedure. "Ratification" could appropriately apply to the second step if it should be necessary for the Agency to use such procedure.

2. The Convention on the Physical Protection of Nuclear Material,[25] of which the Director General of IAEA is depositary and which was opened for signature on 3 March 1980, has been signed by the European Atomic Energy Community (EURATOM) and it is expected that the Community will in due course deposit an instrument of ratification as provided in article 18, subpara. 4 (*b*) and para. 5 of the Convention.

3. *Article 2, subparas. 1* (c) *and* (c bis). See general comments (para.4). The IAEA's practice in regard to presentation to a treaty partner of a document designating a representative for the purpose of performing an act with respect to a treaty is undeveloped. Ostensible authority is normally sufficient for officials negotiating, adopting or authenticating a text, although within the organization responsibility for such treaty acts is often specifically allocated in writing by the Director General. The Agency has not to date communicated in a document the consent of the organization to be bound by a treaty, signature of the treaty having been the usual means of establishing consent. There is no support in the Agency's practice for the use of the term "powers" as opposed to "full powers".

4. *Article 4.* The text adopted by the Commission on first reading does not appear to include an equivalent to the qualifying phrase in article 4 of the Vienna Convention "which are concluded". Without this qualifying phrase, the article could apply retroactively to "such treaties" concluded before the "[entry into force] of the said articles".

5. *Article 6.* It is important (see the text adopted by the Commission on first reading) that the term used in respect of rules be the one defined in article 2, subpara.1 (*j*).

6. *Article 9.* The two-thirds majority rule is consistent with the statute of the IAEA, the rules of procedure of the General Conference and the provisional rules of procedure of the Board of Governors. Nevertheless, the working rule of the Agency, including in relation to negotiation of treaty texts, is consensus.

7. *Article 11, para. 2.* The Agency's consent to be bound by the Agreement on the privileges and immunities of the International Atomic Energy Agency[26] exemplifies consent "by any other means". A bilateral treaty relationship with a member State is constituted by the latter's deposit with the Director General of an instrument of acceptance; the Agency's consent to be bound is not actively expressed, being evidenced by the initial approval of the Agreement by the Board of Governors.

8. *Article 14.* See general comments above (para.4) and comment on article 2, subparas. 1 (*b*) and (*b bis*), above.

9. *Article 16.* As a drafting matter, both the wording adopted by the Commission on first reading and the simplified text suggested by the Special Rapporteur in his tenth report[27] suggest that a State may make formal confirmation and that an organization may establish consent to be bound by an instrument of ratification, interchangeably. The ambiguity would be avoided if the one term "ratification" were used.

10. *Article 17.* This article is consistent with the practice adopted in the Convention on the Physical Protection of Nuclear Material

[25] IAEA, *Convention on the Physical Protection of Nuclear Material*, Legal Series No. 12 (Vienna, 1982), p. 386.

[26] United Nations, *Treaty Series*, vol. 374, p. 147.

[27] *Yearbook ... 1981*, vol. II (Part One), p. 55, document A/CN.4/341 and Add.1, para. 50.

already mentioned, which in paragraph 4 (*c*) of article 18 requires an organization becoming party to the Convention to communicate to the depositary a declaration indicating which articles of the Convention do not apply to it.

11. *Article 19.* The Special Rapporteur's analysis regarding reservations in his tenth report[28] is especially helpful and persuasive. The draft article proposed in that report,[29] combining the former article 19 and 19 *bis* adopted in first reading, is a considerable improvement. It is noted that as compared with the former article 19, which referred to "a treaty between *several* international organizations", the new draft article would not exclude reservations to bilateral treaties; it is therefore more consistent with article 19 of the Vienna Convention. While it normally makes little sense to contemplate reservations to bilateral treaties, the Agreement on the Privileges and Immunities of IAEA does contemplate that member States may make certain reservations to it. As already indicated, (see para. 7 above), the treaty relationship here is a bilateral one, as between the Agency and each accepting member State. Where the Agency has objected to a reservation put forward by a member, it has sought withdrawal of the reservation and the deposit of a new instrument of acceptance. In more than one case, failure to resolve such a situation has resulted in non-acceptance by the Agency of the instrument of acceptance, and the Agreement has not come into force in those cases.

12. *Article 20.* The combination of the former draft articles 20 and 20 *bis* in one article as suggested by the Special Rapporteur in his tenth report[30] commends itself in the light of the preceding analysis of the Special Rapporteur. The new draft might now assume the same title as that of article 20 of the Vienna Convention; in addition, it would seem that it would benefit from completion with the final words of the latter, namely, "whichever is later". With regard to objections which have been indicated to the giving of tacit consent by organizations, it may be noted that such consent to a reservation need not entail passivity by the organization internally: the onus would be on the organization to take whatever measures were necessary according to its rules to actively consider whether or not the reservations were acceptable to it. In this way, the (non-) action of an international organization could still, if necessary, "be clearly and unequivocally reflected in the actions of its competent body".[31]

13. *Article 27.* This article, even as redrafted in the Special Rapporteur's tenth report,[32] does not appear to run entirely parallel to article 27 of the Vienna Convention. This is because of lack of equivalence between "the rules of the organization" as defined in article 2, subpara. 1 (*j*) of the draft articles, and the term "internal law" as used in article 27 of the Convention. The customary law rule reflected in article 27 of the Convention is that obligations in international law take priority over conflicting provisions of national law, the assumption being that the State will ensure at all times that its national law is such as to allow its international obligations to be fulfilled. This rule may well be valid also in respect of international organizations if limited likewise to the internal law of the organizations. The definition in draft article 2 subpara.1 (*j*), however, imports also the constituent instruments of the organization. These are of a different order from the internal law of a State. The statutes of organizations are notorious documents on the international plane and must be taken to be known to the treaty partners of the organizations. Furthermore, by action of international law, an act of the organization or a treaty obligation undertaken by it contrary to its statute will be invalid. It is difficult to see how such an invalid act or obligation can be enforced against the organization when it is *ultra vires* the organization *ab initio.* Putting aside the additional complication that a sovereign State can more easily ensure the compatibility with its international obligations of its internal law than can an organization, it may be desirable to achieve better equivalence between the concepts of internal law of States and of organizations. It may also be observed, in the light of the above comment, that there is a sense, with reference to draft article 27, paragraph 2, in which the performance of a treaty by an organization cannot be other than subject to the exercise of the functions and powers of the organization: the organization can only act according to its functions and powers.

14. *Article 36 bis.* This article appears to be virtually irrelevant to IAEA, but is unexceptionable in the new wording suggested by the Special Rapporteur in his tenth report.[33] It is suggested, however, that the words "for them" should be restored in the *chapeau* after "obligations arising"—otherwise the question is raised (wrongly) of States members assenting to obligations arising for the organizations. It may be noted that subparagraph (*a*) of the draft would not at present apply to the Agency, since its relevant rules do not provide that its members shall be bound by treaties which are concluded by the Agency but to which they are not parties. Further, it seems unlikely that subparagraph (*b*) would find application as regards the Agency.

15. *Article 39.* It is noted that the reference in paragraph 1 to part II of the draft articles has the effect of applying draft article 6 to the same effect as the second paragraph of article 39. The latter may therefore be redundant. It is not clear why the exception in the second sentence of article 39 of the Vienna Convention is not reproduced.

16. *Article 46.* Paragraph 3 of this draft article poses something of a dilemma for organizations and their members. A treaty which is *ultra vires* the statute of an organization may be valid as against the other parties to it according to paragraph 3, but would be invalid as against the member States of the organization if disowned by its competent organs. Moreover, the other parties to the treaty might be member States.

17. *Article 62, para. 2.* The possibility of IAEA being a party to a boundary treaty is likely to remain academic. We note, however, that it does not seem necessary to depart from the wording of paragraph 2 of article 62 of the Vienna Convention in order to cover the cases envisaged by paragraph (11) of the commentary.[34] Further, that wording would cover the hypotheses discussed in the preceding paragraphs 9 and 10, which after all might not be so remote.

18. *Article 65, para. 4.* This paragraph appears to be rendundant.

19. *Article 67, para. 2.* The mandatory provision "shall produce" applied by the last sentence to representatives of organizations contrasts with the permissive provision "may be called on to produce" applied to representatives of States in the preceding sentence and in article 67 of the Vienna Convention. While agreeing with the Commission that if stricter rules are to apply to the dissolution of a treaty, then "only one solution is possible",[35] we would consider it preferable to state the solution permissively, as for States, rather than mandatorily. In the case of IAEA, the authority for an act dissolving a treaty would be a decision of the Board of Governors, which would be evidenced definitively by the official records of the Board. It should not be necessary to produce a further document ("powers"), which would not add to the definitive statement of the official records. IAEA would therefore wish to take the position that the official record of a decision could be produced as "appropriate powers" for purposes of the provision in question, notwithstanding that this might not be fully consistent with a literal reading of article 3, subpara. 1 (*c bis*).

20. *Article 74.* Given, first, that even between States there is no legal nexus between treaty relations and diplomatic and consular relations, and, secondly, that as between organizations and States doctrines of diplomatic and consular relations do not apply,[36] then it may be questioned whether it is relevant or necessary to provide a draft article parallel to article 74 of the Vienna Convention. The Commission's draft article appears to be designed to knock down a straw man which would not have been set up except for reason of maintaining the appearance of a parallel with the Vienna Convention.

[28] *Ibid.*, pp. 56-60 , paras. 53-67.

[29] *Ibid.*, p. 60, para. 69.

[30] *Ibid.*, p. 63, para. 83.

[31] Written comments of the USSR (1981); see *Yearbook ... 1981*, vol. II (Part Two), p. 190, annex II, sect. A.13, para. 2.

[32] *Yearbook ... 1981*, vol. II (Part One), p. 65, document A/CN.4/341 and Add.1, para. 88.

[33] *Ibid.*, p. 69, para. 104.

[34] *Yearbook ... 1980*, vol. II (Part Two), p. 83.

[35] *Ibid.*, p. 89, para (3) of the commentary to art. 67.

[36] *Ibid.*, p. 94, paras. (1) and (2) of the commentary on art. 74.

21. *Annex.* It is noted that the annex, unlike the adjective law expressed in the draft articles, is executory. It could not be executed on the basis of a mere declaration of endorsement, for example, by the General Assembly of the validity of the draft articles, or other non-binding adoption of the draft articles. This would be one reason for adoption of the Commission's work as a convention.

C. Comments and observations of other international organizations

1. Council of Europe

[*Original: French*]
[*11 January 1982*]

Observations of the secretariat of the Council of Europe[37]
(November 1981)

This note contains the observations of the secretariat of the Council of Europe[38] concerning the above-mentioned draft articles as adopted by the International Law Commission, on first reading, at its thirty-second session, for articles 27 to 80, and on second reading, at its thirty-third session, for articles 1 to 26. These observations take into account, on the one hand, the practice of the Council of Europe with regard to agreements between States and international organizations or between international organizations and, on the other hand, the practice of the Secretary-General of the Council of Europe in his capacity as depositary of international agreements and conventions.

It may be recalled that already in *1968* the secretariat of the Council of Europe submitted observations concerning the draft articles on the law of treaties (which became the Vienna Convention).[39] The current draft articles on treaties between States and international organizations are adapted from the Vienna Convention and respect its spirit, form and structure as far as possible. To a great extent, therefore, they repeat the provisions of the Vienna Convention, with the result that many of the observations made in 1968 on the subject of treaties between States remain valid and apply to the current draft articles.

II. General observations

1. The practice of the Council of Europe with regard to agreements[40] between States and international organizations or between international organizations is limited. In the main, such practice relates to:

(*a*) *Treaties to which the Council of Europe is a party,* including, on the one hand, the Special Agreement relating to the Seat of the Council of Europe (ETS 3) and the Supplementary Agreement to the General Agreement on Privileges and Immunities of the Council of Europe (ETS 4), concluded between the Council and France, and, on the other hand, *co-operation agreements with other international organizations,* which usually make provision for the exchange of information, consultation on matters of mutual interest and the exchange of observers;

(*b*) *Multilateral treaties which were concluded within the Council of Europe and to which other international organizations are parties,* as in the case of a few conventions and agreements whose provisions allow the European Economic Community to become a party.[41]

2. As far as co-operation agreements are concerned, about twenty have been concluded to date. In many cases, such an agreement is in the form of an exchange of letters and in other cases, in the form of a single instrument signed by the representatives of the two parties. Such agreements are, as a rule, rather succinct and are confined to general questions (exchange of information, mutual consultation, and the like).

3. Although article 13 of the statute of the Council of Europe states that: "The Committee of Ministers is the organ which acts on behalf of the Council of Europe in accordance with Articles 15 and 16", nothing in the statute expressly establishes the capacity of the Council to conclude treaties, or specifies which organ is competent to assume obligations on behalf of the Council at the international level. Nevertheless, in a 1951 resolution, the Committee of Ministers declared itself competent to conclude with intergovernmental organizations agreements on matters within the competence of the Council.[42]

4. The actual procedure with regard to the conclusion of such agreements has varied so much that it is difficult to pin-point common rules underlying the procedure followed. It is possible, however, to identify three main groups:

(*a*) The first group includes agreements which are negotiated by the Secretary-General, and which enter into force subject to the subsequent approval of the Committee of Ministers of the Council (see, for example, the Agreement between the Council of Europe and UNESCO (1952), the Agreement concluded with the United International Bureaux for the Protection of Intellectual Property (1957), the Agreement concluded with the International Commission on Civil Status (1955) and the Agreement with FAO (1956));

(*b*) The second group includes agreements to which the Committee of Ministers gives prior approval in a decision (in some cases, in a resolution); the Secretary-General is responsible for transmitting the agreement to the other party (see, for example, the exchange of letters dated 15 November 1951 and 4 August 1952 constituting an Agreement between the Secretariat General of the Council of Europe and the Secretariat General of the Brussels Treaty Organisation, the Agreement of 8 December 1960 between ILO and the Council of Europe concerning the establishment and operation of the International Training Information and Research Centre, and the exchange of letters of 18 August 1959 constituting an Agreement between the Committee of Ministers of the Council of Europe and the Commission of the EEC.

(*c*) The third group includes agreements concluded by the Secretary-General acting either on instructions from the Committee of Ministers or with its authorization (see, for example, the exchange of letters dated 17 March and 22 May 1954, constituting an Agreement between the Council of Europe and the European Conference of Ministers of Transport, and the exchange of letters of 15 December 1951, constituting an agreement between the Secretariat General of the Council of Europe and the Secretariat of the United Nations, updated by the exchange of letters of 19 November 1971, constituting an Agreement).

The aforementioned agreements may therefore be in the form of an exchange of letters or that of a single instrument.

5. Some agreements, however, apparently do not follow the pattern of practice just outlined: agreements concluded by the Secretary-General solely on his own responsibility. Either an exchange of letters or a single instrument could constitute such an agreement. In either event, the Secretary-General's signature is an expression of consent to

[37] The Council of Europe also transmitted copies of two of its publications: *Statute of the Council of Europe (with Amendments),* European Treaty Series (ETS) No. 1, and "Model final clauses of conventions and agreements concluded within the Council of Europe", which were available for consultation by Commission members upon request.

[38] These observations reflect the views of the secretariat and are not to be interpreted as necessarily reflecting the views of every State member of the Council.

[39] A/CONF.39/7, pp. 14-37.

[40] The conventions and agreements concluded within the framework of the Council of Europe, numbered in chronological order according to the date of their signature, are published in the European Treaty Series (ETS).

[41] It should be noted that EEC has 10 member States: Belgium; Denmark; France; Germany, Federal Republic of; Greece; Ireland; Italy; Luxembourg; the Netherlands and the United Kingdom of Great Britain and Northern Ireland, which are also members of the Council of Europe. The Council has 21 member States.

[42] See appendix to the present comments for the relevant section of the resolution adopted by the Committee of Ministers at its eighth session, May 1951.

be bound by the treaty (see, for example, the Agreement of 12 January 1954 between the Council of Europe and UNIDROIT, the Agreement of 13 December 1955 between the Council of Europe and the Hague Conference on Private International Law, and the exchange of letters of 1 and 9 February 1960 between the Secretary-General of the Council of Europe and the Secretary-General of INTERPOL constituting an agreement between the two organizations.

6. The second category of agreements referred to above (subpara. 1(*b*)) includes a few multilateral treaties concluded within the Council of Europe and reflects recent changes in the Council's treaty practice. The question whether international organizations could become parties to conventions and agreements of the Council of Europe did not arise until 1974, in connection with the role of EEC with regard to the draft European convention for the protection of international watercourses against pollution.[43] Before then, only States, and in some cases only member States, could become parties to the European Treaties. The draft convention for the protection of international watercourses against pollution has not yet been adopted by the Committee of Ministers; however, since 1974, the provisions of several other instruments adopted by the Council have allowed EEC to become a party. They include: the European Convention for the Protection of Animals kept for farming purposes of 10 March 1976 (ETS 87); the European Convention for the Protection of Animals for Slaughter of 10 May 1979 (ETS 102); and the Convention on the Conservation of European Wildlife and Natural Habitats of 19 September 1979 (ETS 104).

These Conventions are *open for signature* by member States and by the *European Economic Community*. They are subject to ratification, acceptance or approval.

7. EEC also has the option of becoming a party to two other European Treaties, simply by signing them. However, since such an eventuality was not envisaged when the Treaties were adopted, *additional protocols* have had to be concluded. They are the Additional Protocol of 24 June 1976 (ETS 89) to the European Agreement on the Exchange of Tissue-typing Reagents of 24 June 1976 (ETS 84); and the Additional Protocol of 10 May 1979 (ETS 103) to the European Convention for the Protection of Animals during International Transport of 13 December 1968 (EST 65).

8. All these treaties therefore come within the scope of the draft articles prepared by the International Law Commission. The regime that applies to the treaties sometimes differs, as indicated below, from the regime of the Commission's draft.

9. Recently, EEC also asked to become a party to three Council agreements in the field of public health. Since the Council's Committee of Ministers has already agreed in principle, the text of the necessary instruments is being negotiated and drawn up.

II. Observations on the draft articles

Article 2 (Use of terms)

1. *Subparagraph 1* (b bis): "act of formal confirmation". This provision reserves the term "ratification" for the act of a State, while the corresponding act of an international organization is termed an "act of formal confirmation". This distinction is not found in the terminology used by the Council of Europe.

As far as the European Treaty Series is concerned, the European Convention for the Protection of Animals Kept for farming purposes (ETS 87), the European Convention for the Protection of Animals for Slaughter (ETS 102) and the Convention on the Conservation of European Wildlife and Natural Habitats (ETS 104) afford EEC the opportunity of becoming a party thereto and *signing, ratifying, accepting* or *approving* these instruments as if it were a member State.[44]

As to agreements concluded by the Council of Europe with other international organizations, the act whereby the Council establishes its consent to be bound by such an agreement usually takes the form of a *decision of approval* adopted by the Committee of Ministers or a *resolution* approving such an agreement (see the observations below concerning arts. 11 to 15).

The practice of the Council of Europe is therefore in line with the terminology used in subparagraph (*b ter*) rather than with the terminology used in subparagraph (*b bis*).

2. *Subparagraph 1* (j): "rules of the organization". With regard to the definition of the term "rules of the organization", it is worth recalling that, already in 1968,[45] the Council of Europe had, in connection with the draft articles on the law of treaties (which became the Vienna Convention), expressed the hope that amendments would be made to the text of draft article 4, dealing with "relevant rules of the organization", in order to specify that:

(*a*) the rules of the organization comprised both the already existing rules and *those which might be established in the future;* and

(*b*) the rules of the organization might consist of *practices* which, without being laid down in a legal instrument, guided the activity of the organs of the organization.

The question touched upon in the commentary to this provision, whether "the rules of the organization" do not also include *treaties concluded by the organization,* is quite pertinent. Such a question may even be raised with regard to *treaties to which the organization is not a party,* but which have been concluded within the organization and *confer on it a number of rights and obligations,* which it accepts, at least implicitly.

Article 6 (Capacity of international organizations to conclude treaties)

3. Nothing in the statute expressly establishes the capacity of the Council of Europe to conclude treaties. It may, however, be argued that such capacity derives implicitly from article 40, paragraph (*b*), of the statute, the final sentence of which reads:

> "In addition a special Agreement shall be concluded with the Government of the French Republic defining the privileges and immunities which the Council shall enjoy at its seat."

This reference to the Agreement relating to the seat, traditionally concluded by the organization in question with the host State, includes an implicit recognition of the Council's capacity to conclude treaties.

4. Similarly, article 20 of the General Agreement on Privileges and Immunities of the Council of Europe (ETS 2) provides that:

> "The Council may conclude with any Member or Members supplementary agreements modifying the provisions of this General Agreement, so far as that Member or those Members are concerned."

5. Finally, reference should be made to the aforementioned 1951 resolution of the Committee of Ministers, in which the Committee declared itself competent to conclude with other international organizations agreements on matters within the competence of the Council.[46]

Article 7 (Full powers and powers)

(a) *Deposit of instruments of ratification, acceptance, approval or accession*

6. According to this article, full powers are required, *inter alia*: "for the purpose of *expressing the consent* of the State to be bound by such a treaty".

Under articles 14 and 15, such consent may be expressed by means of ratification, acceptance, approval or accession. According to article 2, subparas. 1 (*b*) and (*b* ter), the acts designated by those terms mean in each case:

> "the international act so named whereby a State [or an international organization] establishes on the international plane its consent to be bound by a treaty".

If the act is signed by the head of State, the head of Government or the Minister for Foreign Affairs, no confirmation of their competence to

[43] See *Yearbook ... 1974*, vol. II (Part Two), pp. 346, document A/CN..4/274, paras. 376-377.

[44] See also the draft European convention for the protection of international watercourses against pollution (see footnote 43 above).

[45] See footnote 39 above.

[46] See the appendix to the present comments.

represent the State is required (art. 7, subpara. 1 (*a*)). Accordingly, the person depositing the above-mentioned instruments does not necessarily have to be invested with full powers. This rule is consistent with the practice followed with regard to States by the Secretary-General of the Council of Europe in his capacity as depositary of the European Treaties. On the other hand, full powers are required in the case of EEC acts.

(b) *Adoption of treaties concluded within an international organization*

7. As will be explained below in the observations relative to article 9, the adoption of the text of conventions elaborated within the Council of Europe, including those to which EEC is allowed to become a party, takes the form of a decision of the Committee of Ministers.[47] According to well-established practice, the representatives of States members of the Committee of Ministers do not have to produce full powers when decisions relating to the adoption of a convention are being taken. Yet article 7, subpara 2 (*d*), in stipulating that heads of permanent missions to an international organization, in virtue of their functions, are competent to represent their States for the purpose of adopting the text of a treaty, limits such competence to cases in which the treaty is concluded between one or more States and *that organization*. According to the practice of the Council of Europe, heads of permanent missions have also been considered competent to represent their States, without having to produce full powers, for the purpose of adopting the text of a (multilateral) treaty which has been drawn up within the Council *and to which certain other international organizations are parties* (as in the case of treaties to which EEC may become a party).

(c) *Signatures deferred subject to ratification*

8. The question of signatures deferred subject to ratification is not covered in article 7. The deferment of signature does not imply any of the acts referred to in that article, namely (*a*) adoption or authentication of the text of a treaty; or (*b*) expression of the consent of the State to be bound by such a treaty. In international practice as it relates to multilateral agreements, signatures are often deferred. Such a procedure is, for example, very much in evidence in the Council of Europe, where signature may be deferred before or after the entry into force of an agreement.

(d) *"Communication" of the consent of the organization to be bound by a treaty*

9. The use of the word "communicating" in article 7, paragraph 4, seems restrictive and apparently fails to cover all the cases in which the representative of an international organization concludes agreements with States or with other international organizations. Several co-operation agreements between international organizations are concluded by their Secretaries-General, on their own authority, on their own initiative and with due regard for their statutory functions. In such cases, not only do they communicate the consent of the organization to be bound by the agreement; they also *express* such consent.[48]

Article 9 (Adoption of the text)

(a) *Decision to adopt the text*

10. According to the commentary of the Commission to the draft articles on the law of treaties (which became the Vienna Convention), the term "*adoption*" signifies the "rules *by which the form and content of the proposed treaty are settled*"; it is specified that "At this stage, the negotiating States are concerned only by drawing up the text of the treaty as a document setting out the provisions of the proposed treaty ...".[49] Article 9 establishes the rule that the adoption of the text takes place by the *consent of all the participants* in its drawing up (or by a majority vote in the case of a treaty adopted at an international conference).

11. The practice of the Council of Europe requires a distinction to be made according to whether the instrument in question is a co-operation agreement with an international organization or a multilateral treaty to which EEC may become a party. In the case of a co-operation agreement, the application of article 9 would pose no special problem. The agreement would be bilateral and its terms would be agreed by the two parties. On the other hand, in the case of a multilateral treaty which is concluded within the Council and to which EEC may become a party, *the adoption of the text* of the treaty does not take place as a result of coinciding decisions reached individually by the negotiating parties, but *takes the form of a decision adopted by the Committee of Ministers*. This is the usual practice (not only of the Council of Europe, but also of other international organizations) with regard to treaties concluded beween member States. This practice has also been followed in the aforementioned cases of conventions which were concluded within the Council of Europe and to which EEC was allowed to become a party.

(b) *Applicable voting rule*

12. While this decision of the Committee of Ministers may be described as a decision to adopt the text within the meaning of the draft articles, the applicable *voting rule* is not the one set forth in draft article 9 (the unanimity rule), but the rule derived from the relevant provisions of the statute of the Council of Europe (art. 20) and the rules of procedure for meetings of the Ministers's Deputies (art. 8): adoption requires a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on the body in question. Once there is such a majority, the treaty is open for signature, unless there are clear signs of opposition on the part of a representative.

13. At the same time, such a decision by the Committee of Ministers to adopt a treaty may give rise to a situation in which States or international organizations *that participated in the drawing-up* of the text *are not called on to participate in adopting it* within the Committee of Ministers. That would be the case of States not belonging to the Council of Europe and of international organizations which have participated in the drawing-up of a treaty and are entitled to become parties to it, but *are not represented in the Committee of Ministers* and therefore do not participate in the adoption decision.

Article 10 (Authentication of the text)

(a) *Adoption as a means of authentication*

14. In its practice in treaty matters, the Council of Europe has no special procedure for the authentication of the text of a treaty concluded within its framework of the Council. When the Committee of Ministers has decided in favour of the text of a treaty, in the manner described in the observations on article 9 above, this is considered as a text *ne varietur*. Since this decision is the last stage in the process of drawing up the multilateral treaties concluded within the Council of Europe, authentication of the text is identical to its "adoption". In view of the fact that this practice is not peculiar to the Council of Europe, but is followed by other international organizations and at international conferences, it might be desirable *to include "adoption" among the means of authentication of the text of a treaty*.

15. However, the discovery, *before signature of the treaty*, of a *substantive error* in the text approved by the Committe of Ministers of the Council of Europe does not give rise to the correction procedure described in article 79 of the Commission's draft. Such an error is corrected, before the signature of the text, by a *decision of the Committee of Ministers* taken by the same procedure as the decision on the "adoption" of the text of the treaty. Thus "adoption" in this case does not have the implications for the correction of errors associated in the Commission's draft with authentication of the text.

(b) *Deferred signature*

16. Article 10, paragraph 2, cites signature as a means of authenticating the text of a treaty. In the case of multilateral treaties, signature does not have this meaning unless all the negotiating

[47] The only exception to date is the European Convention on the International Classification of Patents for Invention (ETS 17), which was submitted to a diplomatic conference.

[48] Agreements concluded by the Council of Europe with the Hague Conference on Private International Law (13 December 1955) and the Council of Europe with UNIDROIT (12 January 1954).

[49] *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. 14, para. (1) of the commentary to article 8 (Adoption of the text).

representatives sign the text immediately or shortly after its adoption. *A multilateral treaty which provides for deferred signatures could therefore not be authenticated* by this means, because it might enter into force even before signature by all the negotiating States.

Article 11 (Means of expressing consent to be bound by a treaty);

Article 12 (Consent to be bound by a treaty expressed by signature);

Article 14 (Consent to be bound by a treaty expressed by ratification, act or formal confirmation, acceptance or approval); *and*

Article 15 (Consent to be bound by a treaty expressed by accession)

(a) *Practice of the Council of Europe in treaty matters*

17. In connection with these articles, which contain provisions governing the means of expressing consent to be bound by a treaty, it is appropriate to summarize the relevant practice of the Council of Europe in treaty matters, while emphasizing that these observations relate only to the above-mentioned category of those multilateral treaties concluded within the Council of Europe in which EEC participates.

18. In considering this practice, a distinction has first to be made between *agreements*, which may be signed with or without reservation in respect of ratification or acceptance, and *conventions*, always subject to ratification, acceptance or approval (cf. "Model final clauses"). Furthermore, ratification, acceptance or approval must always be preceded by signature.

19. Secondly, a distinction is also made between the different means of expressing consent to be bound by a treaty from the point of view of the degree of entitlement of a State to become a party to the treaty. *Signature,* and thus ratification, acceptance and approval, are in principle restricted to *member States* of the Council of Europe, whereas *accession,* after the entry into force of the treaty, is in general open only to *non-member States.*

20. As noted above, this practice has recently undergone a degree of *evolution,* in that currently several conventions provide for the participation of *the European Economic Community, which is allowed to sign and ratify, accept or approve the conventions as if it were a member State* (although such ratification, acceptance or approval is not taken into account as regards the entry into force of these conventions, and only the ratifications of member States count for this purpose).[50]

21. The possibility of becoming a party to a convention or an agreement concluded within the Council of Europe by means of *accession* is in general governed by express provisions contained in the final clauses of those instruments. At present *this possibility exists only for non-member States,* and thus international organizations are not allowed to accede to these treaties. Furthermore, in every case accession is possible only *after the entry into force* of the convention or agreement, in accordance with the provisions relating to the number of ratifications or signatures without reservation in respect of ratification required for that purpose. The accession of non-member States thus has no effect on the entry into force of the treaties in question.

(b) *The draft articles of the International Law Commission*

22. By contrast with the practice of the Council of Europe, the Commission's draft articles draw no distinction between the different means of expressing the consent to be bound by a treaty from the point of view of the degree of entitlement of a State or organization to become a party to the treaty. Articles 12 and 14 concerning signature and ratification give no definition of those States or organizations which are entitled to become parties to the treaty by means of signature, ratification, act of formal confirmation, acceptance or approval. Article 15, relating to accession, merely stipulates that accession by a State or by an international organization has to be provided for in the case of "that State" or "that organization".

23. Articles 12 and 14 refer respectively to signature and ratification as means of expressing consent to be bound by a treaty when "the *negotiating* States or *negotiating* organizations were agreed that signature should have that effect/that ratification should be required". According to article 2, subpara.1 (*e*), the expression "negotiating States and negotiating organizations" is to be understood as meaning those States or organizations "*which took part in the drawing-up and adoption* of the text of the treaty".

24. As explained above in connection with the practice of the Council of Europe, it would be possible in certain cases for non-member States of the Council, or international organizations, which may have taken part in the drawing-up of the draft treaty or agreement, not to participate in the "adoption" of the text and hence not to be regarded as "negotiating" States or organizations within the meaning of the provisions drafted by the Commission.

25. As regards the rule set forth in draft article 15, subpara. (*c*), it should be made clear that this provision applies only when the treaty contains no clause expressly governing accession. Those agreements and conventions concluded within the Council of Europe which are not "closed", i.e. restricted to member States of the Organization, generally contain a clause setting forth the procedures for accession. A number of these clauses require a decision of the Committee of Ministers (invitation or prior agreement) as one of the conditions of such accession. It is thus evident that the rule contained in the aforementioned subparagraph (*c*) applies only in the absence of a clause expressly governing accession.

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

26. The practice of the Council of Europe in treaty matters contains no examples of treaties which permit a choice between differing provisions (paras. 3 and 4) or, in other words, the existence of alternative and mutually exclusive provisions.

27. However, as regards the possibility of being bound by part of a treaty there are five conventions concluded within the Council which permit only certain parts of their provisions (paras. 1 and 2) to be accepted as binding, namely: the European Convention for the Peaceful Settlement of Disputes (ETS 23); the European Social Charter (ETS 35); the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality (ETS 43); the European Code of Social Security (ETS 48); and the European Convention on the Control of the Acquisition and Possession of Firearms by Individuals (ETS 101). None of these conventions, however, is at present open to participation by EEC. The provision in article 17 of the draft of the International Law Commission is not therefore directly relevant to the practice of the Council of Europe in this area.

Article 19 (Formulation of reservations)

28. The practice of the Council of Europe in treaty matters follows the rules contained in this provision. Examples may be quoted in each of the three categories described in the subparagraphs of the draft article:

(*a*) Certain agreements and conventions concluded within the Council of Europe expressly state that *reservations are not permitted* or that ratification, acceptance, accession or signature without reservations as to ratification, etc. *automatically implies acceptance of all the provisions of the treaty* (subparas. 1 (*a*) and 2 (*a*)); such is the case, for example, of the European Agreement for the Prevention of Broadcasts transmitted from Stations outside National Territories (ETS 53) and of the European Agreement concerning Programme Exchanges by means of Television Films (ETS 27).

(*b*) In other cases, *specified reservations are expressly authorized by the text of the treaty* (subparas. 1 (*b*) and 2 (*b*)), as in the case, for example, of the European Convention for the Peaceful Settlement of Disputes (ETS 23). Certain conventions, such as the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS 5) and the European Convention on Establishment (ETS 19), permit a reservation only to the extent that a law in force in the territory of a party at the time of signature or of the deposit of its instrument of ratification is not in conformity with a particular provision of the Convention.

[50] The Convention on the Conservation of European Wildlife and Natural Habitats (ETS/104), however, specifies that it shall enter into force once it has been ratified, accepted or approved by five States, of which at least four shall be member States of the Council of Europe.

In this context it should be stressed that the recent practice of the Council of Europe tends towards the system of "negotiated" reservations; the text of *the only permissible reservations* is established during the drawing-up of the convention or agreement. These reservations then appear either in the actual text of the convention or agreement or, more frequently, in an annex of the text, and any contracting State may declare that it avails itself of one or more of these reservations.[51] This system of negotiated reservations is also provided for in the "Model final clauses", which nevertheless make it clear that such a system is only one example of the different arrangements possible for the formulation of reservations and, in particular, that the list of authorized reservations is not necessarily exclusive.

(*c*) When the text of a treaty says nothing about reservations (subparas. 1 (*c*) and 2 (*c*)), it is accepted that they may be formulated with respect to any of the provisions of the convention or agreement on condition that they are not incompatible with the object and purpose of the treaty. This applies, for example, to the European Convention for the Protection of Animals Kept for Farming Purposes (ETS 87) and the European Convention for the Protection of Animals for Slaughter (ETS 102). In order to clarify the situation, and in the absence of any established practice in the matter, the reservation is brought to the attention of the member States, all contracting parties, and also EEC when the Community is permitted to participate in the convention or agreement.

Article 21 (Legal effects of reservations and of objections to reservations)

29. This article specifies that the application of a reservation automatically brings into effect the rule of reciprocity in relations between the reserving State and the other parties.

30. The practice of the Council of Europe is different. The "Model final clauses for conventions and agreements concluded within the Council of Europe" contains the following provision:

> "*A contracting Party which has made a reservation** in respect of a provision of (this Agreement) (this Convention) *may not claim the application of that provision by any other Party**."

Nevertheless, *the other parties* have the option, in their relations with the party which has formulated the reservation, *to rely or not to rely* on the modification resulting from the reservation; in other words, they may accept "one-way" reservations.

31. According to this practice, the application of a reservation does not automatically modify the provisions of the treaty to which it relates, for the reserving State and for the other parties in their reciprocal relations; its effect is only to deprive the State which has formulated the reservation, on the one hand, of the right to claim application of the provision to which the reservation relates, in international relations and in relations with the other parties, and the other parties, on the other hand, of the right to invoke the treaty obligation covered by that reservation in relations with that State.

32. It should nevertheless be noted that the "Model final clauses" are in no way binding and that different solutions may be chosen in particular cases.

Article 22 (Withdrawal of reservations and of objections to reservations)

33. According to the practice of the Council of Europe, any contracting State (or organization) which has made a reservation may at any time wholly or partly withdraw it by means of a notification addressed to the Secretary-General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary-General (cf. "Model final clauses", art.(*e*), para. 2).

Article 23 (Procedure regarding reservations)

34. In the text of the articles concerning the communication of reservations and objections, it would be advisable to take account of the treaties which provide for a depositary other than the Government of a State entitled to become a party to the treaty. In such cases, the communication should be addressed to the depositary, which is responsible for bringing it to the attention of the other States concerned.

35. Under the terms of paragraph 1 of this article, the reservation must be communicated to international organizations and States "*entitled to become parties to the treaty*", a term which is not defined in article 2 of the Commission's draft. It would appear that in many cases this category of organizations and States is very difficult to define. In the circumstances, it might therefore be preferable to mention, in addition to the contracting States and organizations and the parties, *only the States and organizations which participated in the negotiation of the treaty.*

36. The rule contained in paragraph 2 of this article is in conformity with the practice of the Council of Europe. The "Model final clauses" specify that, when a reservation is formulated at the time of signing the treaty, it must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty.[52] In such a case, the reservation shall be considered as having been made on the date of its confirmation.

Article 24 (Entry into force)

37. The entry into force of the multilateral conventions and agreements concluded within the Council of Europe is governed by provisions incorporated in those instruments. The "Model final clauses" (which, it should be remembered, are intended to serve only as a guide) state that the conventions and agreements of the Council of Europe shall enter into force on the first day of the month following the expiration of a specified period after the date on which a given number of member States of the Council of Europe have expressed their consent to be bound by the convention or agreement in question. A similar rule applies to the entry into force of the treaty in respect of any State, or of EEC, which subsequently expresses its consent to be bound by it.

Article 25 (Provisional application)

38. Provisional application has already been provided for in a number of instruments drawn up within the Council of Europe,[53] all of which, however, are treaties concluded between States only.

Article 29 (Territorial scope of treaties)

(a) *Procedures provided for in the "Model final clauses"*

39. In the practice of the Council of Europe, a practice which is also followed in the case of treaties open to participation by EEC, any State may at the time of signature or when depositing its instrument of rafitication, acceptance, approval or accession, specify the territory or territories to which the convention or agreement shall apply (art.(d), para. 1, of the "Model Final Clauses").

40. Furthermore, any State may at any later date, by a declaration addressed to the Secretary-General of the Council of Europe, extend the application of the treaty to any other territory specified in the declaration (art.(d), para. 2). In addition, any declaration made by a State for the purpose of specifying the territory or territories to which the treaty shall apply may be withdrawn by a notification addressed to the Secretary-General (art.(d), para. 3).

(b) *Text proposed by the International Law Commission*

41. In comparison to the practice of the Council of Europe, the provision proposed by the Commission gives rises to certain reservations

[51] This is the case, for example, of the European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles (ETS 29), the European Convention on the Punishment of Road Traffic Offences (ETS 52), the Convention on the reduction of cases of Multiple Nationality and on Military Obligations in cases of Multiple Nationality (ETS 43) and the European Convention providing a uniform Law on arbitration (ETS 56). Of the conventions which provide for accession by EEC, the Convention on the Conservation of European Wildlife and Natural Habitats (ETS 104) falls into this category, but it does not provide for reservations on the part of EEC, that possibility being confined tc "States" (art. 22, para. 1).

[52] Of the European treaties which provide for the participation of EEC, only the Convention on the Conservation of European Wildlife and Natural Habitats (ETS 104) contains a clause relating to reservations, which specifies that only States may formulate reservations; the same option is not available to EEC.

[53] General Agreement on Privileges and Immunities of the Council of Europe (ETS 2); Third Protocol to that General Agreement (ETS 28); Convention on the elaboration of a European Pharmacopeia (ETS 50).

(which had already been formulated in 1968 in the context of the draft articles on the law of treaties),[54] in that it has not been clearly determined whether the words "Unless a different intention appears from the treaty or is otherwise established" also refer to *unilateral declarations* of the parties concerned. Indeed, it is uncertain whether these words "give the necessary flexibility to the rule to cover all legitimate requirements in regard to the application of treaties to territory", which was the view of the Commission in its commentary to the draft articles on the law of treaties.[55]

Article 39 (General rule regarding the amendment of treaties) *and*

Article 40 (Amendment of multilateral treaties)

42. Here too, in the practice of the Council of Europe a distinction must be drawn between:

(*a*) The co-operation agreements concluded by the organization with other international organizations, these being bilateral agreements in relation to which the rule in article 39 does not give rise to problems, since any alteration must necessarily be subject to an agreement between the parties; and

(*b*) The multilateral agreements which are concluded within the Council of Europe and which are open to participation by EEC. It has been observed that there are few such treaties. They include the folowing, which contain provisions in respect of amendments: European Convention for the Protection of Animals Kept for Farming Purposes (ETS 87); European Agreement on the Exchange of Tissue-typing Reagents (ETS 84); Convention on the Conservation of European Wildlife and Natural Habitats (ETS 104).

These treaties clearly illustrate the different solutions which are applied in the treaty practice of the Council of Europe when amending clauses are provided for in European treaties. Thus,

(i) The European Convention for the Protection of Animals Kept for Farming Purposes provides for the Committee of Ministers to have the last word as the organ competent to amend the Convention. The proposal for amendment, however, comes from a Standing Committee composed of the contracting parties and established under the Convention itself.

(ii) The European Agreement on the Exchange of Tissue-typing Reagents makes the Contracting Parties solely responsible for amendments.

(iii) The Convention on the Conservation of European Wildlife and Natural Habitats, while leaving the last word to the contracting parties, none the less provides for intervention by the Committee of Ministers, which may in certain circumstances give preliminary approval to the proposed amendment.

43. In the light of these different solutions and the experience of the General Secretariat of the Council of Europe, it seems that the general rule contained in article 39, which stipulates that "A treaty may be amended by the conclusion of an agreemen between the parties", is formulated in too categorical and rigid a fashion. According to the specific provisions of certain treaties, the amendment is subject to a decision in which not only the parties to the treaty participate but also other States (meeting in the Committee of Ministers of the Council of Europe). In cases where the agreement of these other States is required for adoption of the amendment, the agreement will not have the effect accorded to it by the general rule in article 39 unless these other States concur in the decision.

44. According to article 40, paragraph 2, "Any proposal to amend a multilateral treaty ... must be notified *to all the contracting States and organizations* or, as the case may be, *to all the contracting organizations*, each one of which shall have the right to take part ...". In this connection it should be noted that, where the treaty has been drawn up within an organ of an international organization, such as the Council of Europe, not only the contracting States and organizations but also the other member States of the organization may have a legitimate interest in being informed of the proposed amendments and in participating in the decisions thereon, without it being necessary to make a specific stipulation to that effect in the treaty concerned. It might therefore be advisable to mention in this context either the *States and organizations which have participated in negotiation of the treaty* (thus including the member States of the organization within which the treaty was drawn up), or *the organ within which the treaty was drawn up.*

Article 56 (Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal) *and*

Article 65 (Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty)

(a) *Procedure for denunciation established by the treaty itself*

45. Article 56 states the conditions under which a party may denounce a treaty. it does not give rise to problems in relation to the practice of the Council of Europe, in that it excludes the case in which the treaty provides "for denunciation or withdrawal".

46. Article 65, on the other hand, which establishes the procedures to be followed with respect to the withdrawal of one party from a multilateral treaty, has no such exclusion with respect to the provisions of the treaty itself regarding the procedure for denunciation. In particular, article 65 states that the party wishing to withdraw from a treaty should first express its claim in writing, giving reasons ("shall indicate ... the reasons therefor").

47. In the practice of the Council of Europe, as embodied in the "Model final clauses" any party to a treaty may at any time denounce the convention or agreement binding on it by means of a notification addressed to the Secretary-General without adducing the reasons for which it is denouncing the treaty. In addition, such denunciation shall become effective automatically on the first day of the month following the expiration of a specified period after the date of receipt of the notification by the Secretary-General (art.(*f*)). It is thus effective from that date and, in this respect, the practice of the Council of Europe also differs from the solution envisaged in article 65, which provides for a period (three months, except in cases of special urgency) during which a party may not carry out its proposed measure. The Secretary-General, for his part, is required to communicate the denunciation to all the member States of the Council of Europe and to any State which has acceded to the convention or agreement (art.(g) of the "Model final clauses") and to EEC if the convention or agreement is open to the latter's participation.

(b) *Notification of the denunciation to the depositary*

48. Article 65 also states that the notification should be addressed solely to *"the other parties"*. It would seem desirable to take into account those treaties for which provision has been made for a depositary other than the Government of a party and to stipulate that the parties should address the notification required in article 65, paragraph 1, *to that depositary also.*

Article 77 (Functions of depositaries)

(a) *Obligation to transmit the texts of the treaty and to inform of certain acts relating to the treaty*

49. Draft article 77 obliges the depositary to transmit to the *States entitled to become parties to the treaty* a copy of the original text and of any further text of the treaty (art. 77, subpara. 1 (*b*)) and to inform those States of certain acts relating to the treaty (subparas.1 (*e*) and (*f*)). As mentioned above (para. 35), in connection with article 23, the scope of the term "States ... entitled to become parties to the treaty" may be difficult to define. It would therefore be preferable to restrict the depositary's obligation to the *States and organizations which have participated in the negotiation of the treaty, to the contracting States and organizations and to the parties,* within the meaning of the definitions given in article 2 of the Commission's draft.

50. In the case of the conventions and agreements concluded within the Council of Europe, the notifications must be addressed, as a general rule, to the member States of the Council and to any State

[54] See footnote 39 above.

[55] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* ..., p. 33, para. (4) of the commentary to art. 25 (Application of treaties to territory).

which has acceded to the convention or agreement (cf. art. (g) of the "Model final clauses") and must also be addressed to EEC if the Community is permitted to participate in the convention or agreement. It goes without saying that a State or an organization which is entitled to become a party to the treaty and which is not included among the States or organizations mentioned above may at any time apply to the depositary for any information regarding the treaty to which it may become a party.

(*b*) *Registering the treaty with the Secretariat of the United Nations*

51. Co-operation agreements concluded by the Council of Europe with other international organizations are not subject to any registration. For multilateral treaties concluded within the Council of Europe (and particularly those open to participation by EEC), see below, the commentary to article 80.

Article 78 (Notifications and communications)

52. In the practice of the Council of Europe, the date on which a notification takes effect is generally determined on the basis of its receipt by the Secretary-General of the Council (cf. art. (d), paras. 2 and 3, of the "Model final clauses": declaration concerning the territories to which the convention or agreement shall apply and withdrawal of such a declaration; art. (e), para. 2: withdrawal of reservations; art. (f), para. 2: denunciation).

Article 79 (Corrections of errors in texts or in certified copies of treaties)

53. In respect of conventions and agreements concluded within the Council of Europe, the practice regarding correction of errors is as follows: if the text of a convention or an agreement contains a substantive error, the Committee of Ministers corrects the error and authorizes the Secretary-General to certify the correction. Thus authorized, the Secretary-General prepares and signs a procès-verbal of the rectification, a copy of which is transmitted to each member State of the Council and to any State which has acceded to the treaty concerned. The question has not been raised in connection with treaties which provide for the accession of EEC. The procès-verbal of rectification is also transmitted for registration to the Secretariat of the United Nations (cf. the observations above regarding article 10).

Article 80 (Registration and publication of treaties)

54. After their entry into force, conventions and agreements concluded within the Council of Europe are subject to registration with the Secretariat of the United Nations through the good offices of the Secretary-General of the Council of Europe as depositary of those treaties. The European Conventions on the Protection of Animals Kept for Farming Purposes and for the Protection of Animals for Slaughter were submitted for registration in 1979 and 1982 respectively.

Appendix

RESOLUTION ADOPTED BY THE COMMITTEE OF MINISTERS AT ITS EIGHTH SESSION, MAY 1951[56]

Relations with Intergovernmental and Non-governmental International Organizations

(i) The Committee of Ministers may, on behalf of the Council of Europe, conclude with any intergovernmental organization agreements on matters which are within the competence of the Council. These agreements shall, in particular, define the terms on which such an organization shall be brought into relationship with the Council of Europe.

(ii) The Council of Europe, or any of its organs, shall be authorized to exercise any functions coming within the scope of the Council of Europe which may be entrustred to it by other European intergovernmental organizations. The Committee of Ministers shall conclude any agreements necessary for this purpose.

(iii) The agreement referred to in paragraph (i) may provide, in particular:

(*a*) that the Council shall take appropriate steps to obtain from, and furnish to, the organizations in question regular reports and information, either in writing or orally;

(*b*) that the Council shall give opinions and render such services as may be requested by these organizations.

(iv) The Committee of Ministers may, on behalf of the Council of Europe, make suitable arrangements for consultation with international non-governmental organizations which deal with matters that are within the competence of the Council of Europe.

[56] "Texts of a Statutory Character", annexed to *Statute of the Council of Europe (with Amendments)* (ETS 1).

2. Council for Mutual Economic Assistance

[*Original: Russian*]
[*16 November 1981*]

... The secretariat of the Council for Mutual Economic Assistance notes with satisfaction the considerable work done by the International Law Commission on the preparation of the second part of the draft articles on treaties concluded between States and international organizations or between international organizations.

As the CMEA secretariat stated in the comments it submitted in 1980,[57] with regard to articles 1 to 60 of the draft, articles 61 to 80 on the whole appear to deserve approval and can provide a sound basis for the preparation of final draft articles on this matter by the Commission.

At the same time, some articles, in the CMEA secretariat's view, need to be made more precise.

1. This applies in particular to article 80 of the draft, which should be made optional both as regards the registration of treaties by the parties and as regards the obligation of the Secretariat of the United Nations to register the treaties concerned. For this reason it would be appropriate to state in this article that treaties may be transmitted to the Secretariat of the United Nations for possible registration and publication.

2. In article 65, paragraph 2, it would seem appropriate, taking account of the specific situation of international organizations, to allow international organizations a period of more than three months to raise any objections.

3. European Economic Community

[*Original: English/French*]
[*18 March 1982*]

I. GENERAL

The Community congratulates the International Law Commission and its eminent Special Rapporteur, Mr. Paul Reuter, on having considerably simplified, on second reading at the thirty-third session, the draft of articles 1 to 6 which had been adopted on first reading.

This simplification is particularly applicable in the present case since it arose from the recognition that treaties to which international organizations are party differ in law hardly at all from treaties between States. The Community considers that the spirit, if not the letter, of most of the rules established in the Vienna Convention on the Law of Treaties applies fully to both types of treaties; in other words, treaties concluded between States and treaties to which one or more international organizations are contracting parties. Thus, in the Community's view, it is important that international organizations, which increasingly participate in treaty relations, should be placed on the same footing as States as regards the conclusion and implementation of treaties, in so far as the subject matter can justify this.

II. COMMENTS AND OBSERVATIONS ON THE VARIOUS DRAFT ARTICLES

As in its previous comments and observations on draft articles 1 to 60, the Community will confine itself to a number of articles which are of particular interest to it. These comments must be seen in the light of the statement contained in its above-mentioned comments

[57] *Yearbook ... 1981*, vol. II (Part Two), p. 201, Annex II, sect. C.1.

[58] *Yearbook ... 1981*, vol. II (Part Two), p. 201, Annex II, sect. C.2.

concerning the international legal personality of the European Economic Community and its capacity to conclude treaties in areas where the member States have transferred to it their competences to act on both the internal and the external levels.

These comments and observations, which follow the order of the articles, are as follows:

Article 63 (Severance of diplomatic or consular relations)

1. The text adopted by the Commission is based on the idea that diplomatic and consular relations can only exist between States. However, as the Commission so well expressed "relations between international organizations and States have, like international organizations themselves, developed a great deal, particularly, but not exclusively, between organizations and their member States".

2. The Community would also like to point out that, in order to take account of the *sui generis* nature of its relations, and to some extent taking as basis the diplomatic and consular relations between States, there have been established, on a permanent basis, both the Community's own representations to third countries and international organizations and representations of many third countries to these institutions.

Article 66 (Procedures for judicial settlement, arbitration and conciliation)

3. The Community welcomes the fact that the Commission's draft contains provisions on the settlement of disputes even though these provisions, like the Vienna Convention, only cover part V of the draft dealing with invalidity, termination and suspension of the operation of treaties.

4. The Community considers here that the text cannot pass over the more general problems raised by the interpretation of provisions such as articles 53, 64 or 71. For instance, the Community notes that the definition of the concept: "new imperative standard of general international law" has still not been clarified.

5. The Community has noted that paragraphs 2 and 3 of article 66 refer to *any* of the articles in part V of the draft articles. This means that paragraphs 2 and 3 provide for mandatory recourse to conciliation in the case of dispute involving any article in part V, including disputes relating to the application or interpretation of articles 53 or 64. The Community considers that, in addition to the conciliation procedure provided for in paragraphs 2 and 3, article 66 should provide for compulsory arbitration.

6. In the Community's view, the establishment of procedures for the settlement of disputes must be based on the principle of equality between the parties concerned. The Community therefore deems it essential for the international organizations, in particular the Community, to be authorized to nominate the same number of candidates as States for the list of qualified conciliators which, pursuant to the annex, should be drawn up and held by the Secretary-General of the United Nations. The current version of the annex appears to indicate some hesitation over this point, since this provision has been placed in square brackets. The Community encourages the Commission to withdraw this reservation.

Article 73 (Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of the participation by a State in the membership of an organization)

7. This draft article concerns legal problems of considerable complexity and importance:

First: the establishment of the consequences of the international responsibility of an international organization towards its member States and towards third countries and the other organizations with which it has concluded a treaty;

Secondly: the consequences of the termination of the existence of an international organization;

Thirdly: the consequences of the termination of the participation of a State as a member of an organization.

8. The Community agrees with the view expressed by the Commission in its commentary that the provisions of this draft article deal with very delicate matters. The draft of article 73 as it stands provides in particular a general reservation as to the possible legal effect of the occurrence of a situation referred to in the article's provisions, and it would seem adequate at present to maintain the position now adopted by the Commission.

Article 74 (Diplomatic and consular relations and the conclusion of treaties)

9. The Community would refer to the comments it made above, paras. 1 and 2, on draft article 63 and would point out again that it maintains representation with many third countries and organizations. It should be recognized that the severance of such relations between the Community and third parties has in itself no legal effect on treaty relations, unless the application of the treaty expressly requires the existence of such relations.

III

To conclude, the Community welcomes the extent to which the international organizations to which the draft articles are to apply have been given the opportunity to play an active role in the elaborating of the present draft. The Community looks forward to the continuation of an equally active role of full participation in this process through the final elaboration of the draft articles and subsequent procedures for transforming them into a suitable international instrument, which may take the form of an international treaty.

[59] *Yearbook ... 1980*, vol. II (Part Two), p. 83, para. (2) of the commentary to art. 63.

[60] *Ibid.*, pp. 91 *et seq.*