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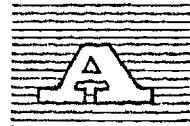


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UNITED NATIONS CONFERENCE ON
THE LAW OF TREATIES

WRITTEN STATEMENTS SUBMITTED BY SPECIALIZED
AGENCIES AND INTERGOVERNMENTAL BODIES
INVITED TO SEND OBSERVERS TO THE
CONFERENCE

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A. NOTE BY THE SECRETARIAT

In pursuance of Rule 60 of the Rules of Procedures of the Conference, the Secretariat circulates herewith written statements submitted by Specialized Agencies and Intergovernmental Bodies invited to send observers to the Conference.

B. WRITTEN STATEMENTS

1. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

Transmitted by a letter dated 30 January 1968 from the
Secretary of the Committee

INTERIM REPORT OF THE COMMITTEE

The Draft Articles on the Law of Treaties as provisionally drawn up by the International Law Commission at its Fifteenth Session were placed before the Asian-African Legal Consultative Committee at its Sixth Session held in Cairo in 1964 under the provisions of Article 3(a) of the Committee's Statutes read with clause 5(a) of Rule 6 of the Statutory Rules. After a general discussion on the Draft Articles, the Committee at that Session had decided that the Secretariat should prepare a Study on the Law of Treaties including the question of accession to general multilateral conventions taking into account the specific questions that were raised by the Delegates in the course of deliberations at that Session. The Committee further decided to request the Governments of the participating countries to communicate their views on the Draft Articles on the Law of Treaties drawn up by the International Law Commission to the Secretariat of the Committee. The Committee also decided that priority should be given to this subject and that the same should be placed on the agenda of its next Session.

2. In accordance with the aforesaid directive, the subject was placed on the agenda of the Seventh Session of the Committee held in Baghdad in 1965. At that Session the Committee appointed a Special Rapporteur to prepare a report for consideration of the Committee. It was decided that the subject be taken up at its next Session with a view to formulating proposals and suggestions from the Asian-African viewpoint for consideration of the International Law Commission. The Special Rapporteur of the Committee (Dr. Hasan Zakaria) was requested to prepare a report on the specific points arising out of the International Law Commission's Draft on the subject which required consideration

from the Asian-African viewpoint. The Special Rapporteur of the Committee attended the Seventeenth Session of the International Law Commission where the Draft Articles on the Law of Treaties were finally drawn up.

3. The Report prepared by Dr. Hasan Zakaria, Special Rapporteur of the Committee, was placed before the Committee at its Eighth Session. The Committee was informed at that Session that the Commission had concluded its work on the Law of Treaties and that the United Nations was considering the question of convoking a Conference of Plenipotentiaries to meet in the year 1968 with a view to drawing up a multilateral convention on the subject of the Law of Treaties. The President of the International Law Commission (H.E. Dr. H.K. Yasseen) who attended the Eighth Session stressed the need for the Committee to consider the subject urgently and formulate its views before the Conference of the Plenipotentiaries met to consider the question. Taking note that the provisions of Article 3(2) of the Statutes of the Committee contemplated that the Committee should consider the reports of the Commission and make recommendations thereon to the Governments of the participating countries, it was decided that the Committee would take up this question as a priority item during its Ninth Session. It also appointed Dr. Sompong Sucharitkul (Thailand) as Special Rapporteur to prepare a report for consideration of the Committee.

4. The Report of the Special Rapporteur together with a Brief prepared by the Secretariat has been placed before the Committee for consideration at this Session. In the Brief prepared by the Secretariat, the relevant background material, including the evolution of the Draft Articles from its earliest to the final stages in the International Law Commission has been set out. The views expressed by Asian-African Members of the Commission, during consideration of the law of treaties by the International Law Commission itself and the opinions of the Delegates of Asian-African countries to the Sixth Committee of the General Assembly of the United Nations have also been made available to

this Committee. The Secretariat in its Brief has indicated as many as 35 points which require consideration of the Committee with regard to the Draft Articles drawn up by the International Law Commission. The Delegates present at this Session have also brought up certain other points for consideration of the Committee.

5. The Committee at this Session has given consideration to this subject and has decided to focus attention on certain questions with the object of assisting the Governments of the participating countries to formulate their views on the subject.

6. Due to lack of time at its disposal it has not been possible for the Committee to examine all the aspects of the various Draft articles. Having regard to the urgency of the matter and its importance to the countries of the Asian African region, however, the Committee has decided to draw up this Interim Report and to submit the same for consideration of the Governments confining itself to some of the more important issues.

7. It has generally been agreed that the Committee in drawing up its Report should indicate in a general manner the points which require consideration of the Conference of Plenipotentiaries and that it would refrain from suggesting any text by way of amendment to the Articles as that would be really a matter for the Drafting Committee appointed by the Conference of Plenipotentiaries.

8. The Committee's comments on the Draft Articles prepared by the International Law Commission are given in Annexure I to this Report.

9. The Committee had the advantage of the presence of H.E. Dr. M.K. Yasseen, Member of the International Law Commission who rendered great assistance to the Committee in its discussion on the subject not only by explaining the object behind the particular articles which were under discussion in the Committee but also by expressing his personal views as an expert on the points which required clarification. The Committee wishes to place on record its deep appreciation and thanks to H.E. Dr. M.K. Yasseen for his assistance in the deliberations of the Committee on this subject.

10. The Committee wishes to take this opportunity to express its deep appreciation of the monumental work done by the International Law Commission on this complex subject and to state that the few comments which the Committee has made are to express the views of the members of the Committee on some of the aspects.

(C.K. DAPHTARY)
President

Annex I

Comments on the draft articles prepared by
the International Law Commission

Participation on general multilateral treaties

The majority in the Committee considers that the right of every State to participate in general multi-lateral treaties is of vital importance to the progressive development of international law. General multi-lateral treaties concern the international community as a whole. If international law is to be in keeping with the real interest of the international community and if universal acceptance of the progressive development of this legal order is desirable, then the participation of every member of the community is essential. The majority in the Committee, therefore, considers that the Articles on the Law of Treaties should contain a provision regarding participation in general multi-lateral treaties.

One Delegate, however, holds that in view of the principle of freedom of contract and the existing practice of the international conferences held under the auspices of the United Nations and the possible complications that it may imply, it would be better that the draft articles be silent on this point.

Article 5

The Committee is of the opinion that paragraph 2 of this article requires reformulation to include within its scope not only the units of a federation but all kinds of unions of States. It, therefore, suggests that paragraph 2 should incorporate the following principle:

In case of union between States, the capacity of Member States as well as the capacity of the units of a Federal State to conclude treaties will be subject to the respective constitutional provisions of that union or the Federation.

Article 7

The majority in the Committee is of the opinion that this article should be amended so as to include a provision to the effect that confirmation of the act performed without authority should be made within a reasonable time. This is suggested with a view to reducing any possibility of abuse. The minority has, however, no objection to retention of the present text of article 7 of the International Law Commission's Draft.

Articles 10 and 11

The majority in the Committee considers that there is a lacuna in these provisions as no provision has been made to cover cases which do not fall either within article 10 or within article 11. It is felt that such cases are considerable and that a provision should be made, if possible, by linking up the two articles to cover cases which are not covered by the present text of these articles.

The majority is also in favour of the deletion of the words "or was expressed during the negotiation" in article 10.1(c).

The minority in the Committee is in favour of retention of the present text of the Draft Articles.

Article 15

The Committee considers this article to contain a new norm of international law which could be supported as progressive development of international law.

The majority in the Committee is, however, in favour of deletion of clause (a) of this article as in its view the object of a proposed treaty might not be clear during the progress of negotiations. Some of the delegations are of the view that a provision like clause (a) of this article may hamper negotiations for a treaty.

Some members, however, are in favour of the retention of the present text.

Articles 27 and 28

The Committee discussed the provisions of these two articles in great detail. There was some difference of opinion in the Committee in regard to how the question of interpretation of treaties should be approached. There was on the one hand those who considered the task of interpretation to be the elucidation of the text of a treaty and on the other those who hold the view that the discovery of the true intention of the parties to be the paramount function of interpretation. One view expressed was that the provisions of these articles do not sufficiently take into account that the main aim of interpretation is to look for the real intention of the parties and that these articles should be suitably modified to bring out that position. Another view that "preparatory work" as a source of determination of real intention of the parties should be included in Article 27 so as to make it a primary means of interpretation and

that this source should not be assigned a secondary place in Article 28. A suggestion was, therefore, made for assimilation of Article 28 to Article 27 as a new sub-clause (d) to clause 3 of Article 27.

The majority whilst appreciating that it is basic to the whole process of interpretation that the goal should be the ascertainment of the true intention of the parties concludes that the primary emphasis should be placed on the intention as evidenced by the text, that is to say, the actual terms of the treaty and that it would not be either necessary or desirable to state specifically in Article 27 that the object of interpretation is the discovery of the intention of the parties. According to the majority view, this is manifest from the formulation of the general rule in clause (1) which is a succinct statement of the essential rule. They feel that by the further elaboration of what is meant by the expression "the text" in clause (2) and by the indication of additional sources of interpretation in clauses (3) and (4), the International Law Commission's draft has taken full account of the paramountcy of the element of intention. The majority, therefore, is of the opinion that the draft rules of interpretation as formulated by the International Law Commission are quite adequate to the ascertainment of intention and are an inherent body of rules emphasizing the unitary character of the interpretative process. The majority is also of the view that the distinction contemplated in Articles 27 and 28 should be maintained. They feel that a formulation of the rule which does not stress sufficiently the primacy of the text in relation to the extrinsic sources of interpretation would tend to considerable uncertainty and that there should be no room for recourse to preparatory material if the textual reading establishes a clear meaning in accordance with the rules specified in Article 27. The majority is further of the view that though no rigid distinction is possible and that a nexus exists between the several sources, it is unable to accord preparatory material a parity of status with the primary criteria mentioned in Article 27 and is of the opinion that the two articles should be separate and distinct.

Articles 30, 31, 32 and 33

The Committee considered the provisions of this group of articles which deal with the rights and obligations of third States. The majority in the Committee is of the view that Article 32 be amended by deletion of the words "and the State assents thereto. Its assent shall be presumed so long as the

contrary is not indicated" and substitution therefor of the words "and the State has expressly consented thereto". The majority is also of the opinion that Article 30 be amended by interpolation of the word "express" before the word "consent". The majority is of the opinion that as in the case of obligations the express consent of such third State should be a condition precedent to the creation of a right also. Whatever may be the true position in regard to stipulations for the benefit of a third party in systems of municipal law, in International relations, the express consent of such third State should be required even in the case of the conferment of rights consistently with the principle of sovereign equality of States. The majority feels that such a requirement would also reduce any uncertainty in regard to the question whether a third State has assented to the conferment of the right and insistence of such consent by the third State or States would in the case of multilateral treaties tend to the effective participation of all States in treaties of a law-making character. The majority is also of the view that if express consent of the third State is stipulated as a requirement it would help to reduce the danger of the creation of rights which carry with them contingent obligations to which such third State may well be deemed to have assented by its silence.

The minority, however, is of the view that the draft articles as drawn up by the International Law Commission are adequate.

Article 37

A view was expressed in the Committee that the modifications contemplated in Article 37 should be in writing so as to obviate any uncertainty. The majority, however, was in favour of the provision as in the draft articles.

Article 38

A view was expressed in the Committee that this article should be deleted as subsequent practice was too vague and uncertain a criterion for modification of a treaty. Another view is that there could be no objection to accepting this article as in the present draft with the clarification that the "parties" in this Article meant all the parties to a treaty. A third view was that there was no objection to the present text as in the International Law Commission's draft.

Article 39

The principles contained in this article was generally found to be acceptable to the majority. A delegation was, however, of the view that the word "only" in paragraphs 1 and 2 of this article should be deleted.

Article 43

The Committee considered the provisions of this article in some detail. The majority was in favour of retaining the article as it is. A view was however expressed that the provision of Article 43 as drafted might lead to practical difficulties, and therefore should be brought in consonance with the principle embodied in Article 110 of the United Nations Charter. Moreover, it was suggested that if the Committee retains the principle adopted in Article 43, the expression "constitutional law" be substituted in place of the words "internal law".

Articles 46 and 47

One delegation was in favour of deletion of these articles as in its view the provisions of these articles bring in an element of doubt in the legal security and order. In the view of the delegation the provisions of Article 47 in regard to the concept of corruption were too vague.

Article 49

The majority in the Committee is in favour of the addition of the words "or by economic or political pressure" at the end of the article. The minority is, however, in favour of the retention of the article as in the draft.

Article 50

Whilst the majority had no objection to the present draft being retained, one delegation expressed the view that this is one of the concepts which may cause dispute in its application. In the view of the delegation it was desirable to designate or establish a body which is invested with standing competence to pass objective and purely legal judgments upon such disputes when they have not been solved through diplomatic negotiations or some other peaceful means.

Articles 58 and 59

One delegation was of the view that these articles should be so formulated as to provide a safeguard against situations in which the destruction of the object or a change in the fundamental circumstances is brought about by the voluntary act of the party itself.

Article 60

The majority in the Committee is in favour of the addition of the words "suspension or" before the word "sovereignty". A minority of one is of the opinion that the addition of these words is superfluous.

NOTE:

A general comment on the draft articles made by one delegation is that there are quite a few provisions in the draft articles which contained as is admitted by the commentary of the International Law Commission certain concepts which may cause disputes in their application. The delegation considered it desirable to designate or establish appropriate bodies or authorities invested with standing competence to resolve such disputes in a purely objective and legal manner.

(C.K. DAPHTARY)

29-12-1967.

Annex II

Resolution No. IX(15) adopted at the ninth session of the
Asian-African Legal Consultative Committee

CONSIDERING THAT under Article 3(a) of its Statutes one of the functions of this Committee is to consider the reports of the International Law Commission and to make recommendations thereon to the Governments of the participating countries:

CONSIDERING THAT the International Law Commission at its Eighteenth Session had finalized its report on the Law of Treaties:

CONSIDERING THAT the Committee at its Eighth Session had decided that it should consider the draft articles on the subject of the Law of Treaties, as adopted by the Commission, with a view to formulating proposals and suggestions from the Asian-African point of view for consideration of the Governments of the participating countries:

CONSIDERING THAT the United Nations have taken a decision to convene a Conference of Plenipotentiaries to meet in March 1968 and also during the early part of 1969 to draw up a multilateral convention on the subject of the Law of Treaties on the basis of the draft articles prepared by the International Law Commission:

AND CONSIDERING that it is of importance to the Governments of the participating countries to formulate their views on the draft articles prepared by the International Law Commission before the Conference of Plenipotentiaries is held and that it is desirable for this Committee to assist the Governments in this matter by expressing its considered views on the subject:

AND CONSIDERING the urgency of the matter:

THE COMMITTEE DECIDES to draw up an interim report in the form of comments on such of the articles drawn up by the International Law Commission as in the Committee's view require special consideration of the Governments of the participating States:

THE COMMITTEE DIRECTS the Secretariat to submit the Interim report of the Committee to the Governments of the participating countries and also to place the report at the disposal of the delegates of the Asian-African countries attending the Conference of Plenipotentiaries on the Law of Treaties:

THE COMMITTEE ALSO DIRECTS that a copy of this report be sent to the United Nations under Article 3(d) of the Statutes of the Committee with the request that it be placed before the Conference of Plenipotentiaries:

THE COMMITTEE DECIDES that this subject be placed on the agenda of its next Session as a priority item for its final consideration particularly on the points that may arise in the course of deliberations in the Conference of Plenipotentiaries during its 1968 Session so as to enable the Committee to consider and recommend on those points for consideration of the Governments before the second part of the Conference of Plenipotentiaries is held in 1969:

THE COMMITTEE FURTHER directs the Secretary in consultation with the Liaison Officers to take appropriate steps to nominate an Observer on behalf of the Committee to attend the Conference of Plenipotentiaries.

2. COUNCIL OF EUROPE

Transmitted by a letter dated 21 February 1968 from
The Secretary-General of the Council

This memorandum contains the observations of the Secretariat General of the Council of Europe on a certain number of Articles of the draft on the Law of Treaties, drawn up by the International Law Commission of the United Nations (Ref. A/6309/Rev.1). These observations take into account both the practice of the Council of Europe concerning the elaboration of Conventions and Agreements between its member States and the practice of the Secretariat General of the Council of Europe as depositary of the said Conventions and Agreements.

Article 4. Treaties which are constituent instruments of international organizations or which are adopted within international organizations

1. As regards the scope of application of this provision, no problem seems to arise concerning the constituent instruments of international organizations. However, this is not the case with respect to the "treaties which are adopted within international organizations". The International Law Commission declares in point 3 of its commentary ad Article 4, that these terms are intended "to exclude treaties merely drawn up under the auspices of an organization or through use of its facilities and to confine the reservation to treaties the text of which is drawn up and adopted within an organ of the organization".

Nevertheless, neither Article 4 nor Article 8 of the draft, which lays down voting rules applicable to the adoption of a text of a treaty, contain a definition of the term "adopted". The commentary of the Commission concerning Article 8 specifies that it concerns a decision "by which the form and content of the proposed treaty are settled", without implying the consent of the States concerned to be bound by the treaty (cf. Observations ad Article 8 below).

In this connexion, it should be noted in the first place that the practice of international organizations in matters concerning treaties between States concluded within their framework is varied due to the different legal structures of these organizations. Consequently, supposing even that the terms employed in Article 4 of the draft of the International Law Commission clearly express the meaning attributed to them by the commentary of the Commission, the application of Article 4 to a certain category of treaties might always be doubted. Thus, the Conventions and Agreements concluded within the Council of Europe, numbering at present fifty-four, are in general elaborated by Committees of experts established by the Committee of Ministers by virtue of Article 17 of the Statute of the Council of Europe, and are the subject of a decision taken by the Committee

of Ministers and aimed at settling the text no variatur of the instrument and at opening it to the signature by member States of the Council. These Conventions and Agreements are thus certainly elaborated within organs of the Council of Europe; however, the final decision taken by the Committee of Ministers is not expressly termed "adoption". Nevertheless, as the scope and the meaning of this decision seems to correspond exactly to the signification given by the International Law Commission to the term "adoption" (cf. Observation ad Article 8 below), the observations of the Secretariat General of the Council of Europe concerning the following draft Articles of the Commission are based on the hypothesis that the said decision can be assimilated to an "adoption" in the meaning of the draft.

In the second place, it should be pointed out that the present wording of Article 4 limits its application to treaties adopted within the organization and excludes treaties which have been elaborated under the auspices of the organization without being drawn up and adopted by an organ of the organization, for instance, by an international conference convoked by the organization. According to the commentary of the International Law Commission (point 3, ad Article 4), this limitation aims at excluding the treaties which have only been drawn up within an international organization because of the convenience of using the services and facilities provided by the organization. But it seems to be difficult to delimit precisely the treaties distinguished in this way by the Commission. Furthermore, this distinction has some drawbacks, particularly as regards the rules applicable to the carrying out of the work of the said international conference, rules which it should be possible to establish by the competent organ of the organization which has convoked the conference; similarly, the functions of the depositary should be governed by the same rules, to be established by the competent organ of the organization, whether the treaty has been elaborated within the organization or only deposited therewith.

In conclusion, it seems advisable to clarify the provision of Article 4, particularly in order to define the term "adopted" (a definition which could eventually be included in Article 2 of the draft), it being understood that the new wording should take into account the different legal structures of international organizations as well as the need to ensure a certain uniformity of the rules governing the treaties concluded within their framework and deposited therewith.

2. As regards the "relevant rules of the organization", to which, under the terms of Article 4 the application of the Articles drawn up by the International Law Commission is subject, the following comments might be made:

- (a) The wording of this provision implies a subsidiary application of the articles of the draft of the International Law Commission in all cases which are not covered by a rule of the organization. It should however be specified that the "relevant rules of the organization" comprise both the already existing rules and those which might be established in the future.
- (b) The majority of international organizations apply, in addition to the constitutional rules and regulations governing the treaties concluded within their framework, a certain number of rules and practices which, without being laid down in a legal instrument, have guided in the past the activity of their organs in elaborating, administering and implementing those treaties. As the scope of Article 4 in its present form is not clear, it might be advisable either to specify that it covers only legally binding rules which are adopted and applied in conformity with the constitutional rules and regulations of the organization, or preferably to modify its wording in order to take into account in an explicit way the practice of international organizations.

In the case of the Council of Europe, the Conventions and Agreements concluded within its framework are at present governed by the following constitutional rules and regulations:

- (i) Statute of the Council of Europe, Chapter IV (Committee of Ministers: composition, powers, voting rules);
- (ii) Resolution of a statutory character, adopted by the Committee of Ministers in May and August 1951 (powers of the Committee of Ministers, Partial Agreements);
- (iii) Rules of Procedure of the Committee of Ministers and for meetings of the Ministers' Deputies (voting rules), in the light of the subsequent practice of the Committee of Ministers.

Furthermore, it is advisable to mention the "Model Final Clauses of Agreements and Conventions elaborated within the Council of Europe", approved by the Committee of Ministers in 1962 and containing the texts of the final clauses of the Agreements, which can be signed without reservation as to ratification or acceptance, and of the Conventions requiring ratification or acceptance. As these clauses are destined to be incorporated within the Conventions and Agreements concluded within the Council of Europe, they will rule out by this fact the application of contrary provisions of the draft of the International Law Commission. Therefore, the model clauses are not, properly speaking, "relevant rules of the organisation". However, they might give an indication of an established practice of the Council of Europe, which in certain respects is not in conformity with the solutions proposed by the draft of the Commission.

Article 6 Full powers to represent the State in the conclusion of treaties

1. Under the terms of this Article, full powers are necessary, amongst others, "for the purpose of expressing the consent of the State to be bound by a treaty". As regards ratification, acceptance, approval and

accession, mentioned in Articles 11 and 12, as means of expressing this consent, it has to be taken into account that these acts do not signify the deposit of the instrument in which they are contained, but mean, in conformity with paragraph 1 (b) of Article 2, "the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty". If this act has been signed by the Head of State, the Head of Government or the Minister for Foreign Affairs, no confirmation of their capacity to represent the State is necessary [Article 6, paragraph 2(a)]. Consequently, the person who deposits the above-mentioned instrument does not need to be invested with full powers. This rule is in conformity with the practice of the Secretary General of the Council of Europe as depositary of the European Treaties.

2. As regards the signature of a treaty, Article 6 contains rules on full powers only with regard to the expression of the consent to be bound by the treaty (Article 10), and to the authentication of the text of the treaty (Article 9). The signatures which have neither of these two meanings, that is to say, deferred signatures with reservation in respect of ratification, and which make up the large majority of the cases within the practice of the Council of Europe, are not covered by the said Article 6. This lacuna is the consequence of the decision taken by the International Law Commission, not to deal separately with the institution of the signature with reservation in respect of ratification etc. (cf. Commentary of the Commission ad Article 10, point 2, in fine). It might be advisable to review this decision in the light of the fact that this practice, especially in the case of deferred signature, might not be assimilated to the authentication of the text of the treaty (cf. Observations ad Article 9 below).

3. The rule laid down in paragraph 2 (c) of Article 6 corresponds to the practice of the Council of Europe, according to which the Permanent Representatives to the Committee of Ministers need not show

full powers for the decision relating to "adoption" (and authentication) of the Conventions and Agreements concluded within the Council of Europe. However, as is stated in the observations ad article 4 above, it would be advisable to include in Article 2 of the draft a definition of the term "adoption".

Article 8 Adoption of the text

1. According to the commentary of the International Law Commission, the term "adoption" signifies "settling the form and content of the proposed treaty"; it is specified that "at this stage, the negotiating States are concerned only with drawing up the text of the treaty as a document setting out the provisions of the proposed treaty and their votes, even when cast at the end of the negotiations in favour of adopting the text as a whole, relate solely to this process. A vote cast at this stage, therefore, is not in any sense an expression of the State's agreement to be bound by the provisions of the text, which can only become binding upon it by a further expression of its consent (signature, ratification, accession or acceptance)".

Taking into account this definition, it seems possible to regard as an "adoption of the text" the decision taken by the Committee of Ministers of the Council of Europe concerning the draft Conventions and Agreements elaborated and submitted by the Committees of experts. Indeed, this decision is the outcome of an examination of the text proposed by a Committee of experts; in authorizing the text to be opened for signature by the member States of the Council and in fixing, as a general rule, the date of this opening for signature, it implies the agreement of the Committee of Ministers to consider the text of the instrument concerned as definitive with regard to its form and contents, without, however, entailing the consent of the member States to be bound by the treaty. In the light of the observations ad Articles 4 and 6 above, it would however be advisable to include in Article 2 of the draft, a definition of the term "adoption", with a view to avoiding any doubt as to the meaning and scope of this act.

2. In accordance with Article 4 of the draft of the International Law Commission, the decision so defined of the Committee of Ministers of the Council of Europe is governed not by the voting rules laid down in Article 8 of the draft, but rather by those which the Committee of Ministers apply in this matter and which are determined by the provisions of the Statute of the Council of Europe (Article 20) and of the Rules of Procedure for meetings of the Ministers' Deputies (Article 8), as they are interpreted by the subsequent practice of the Committee in their application.

Article 9 Authentication of the text

1. In the practice of the Council of Europe in treaty matters, there is no special procedure for the authentication of the text of a Convention or an Agreement concluded within its framework. When the text of a treaty has been positively decided upon by the Committee of Ministers, in conformity with the observations on Article 8 above, it is considered as the text ne varietur. This decision being the last stage in the procedure of the elaboration of the European Treaties, the authentication of the text is identical to its "adoption". Considering that this practice is not peculiar to the Council of Europe, but is followed by other international organizations and in international conferences, it might be advisable to include "adoption" amongst the means of authentication of the text of a treaty.

2. Nevertheless, the discovery of an error in the text as approved by the Committee of Ministers of the Council of Europe, before the signature of the treaty, does not give rise to the procedure of correction provided for in Article 74 of the draft of the International Law Commission. The correction of such an error before the signature of the text is accomplished by a decision of the Committee of Ministers under the same conditions as the decision concerning the "adoption" of the text of the treaty. Thus, the "adoption" does not have the consequences attached by the Commission to the authentication of the text with regard to the correction of errors.

3. Paragraph 2 of Article 9 mentions signature as a means of authenticating the text of a treaty. In the case of multilateral treaties, the signature does not have this meaning unless all the representatives having participated in the negotiation have signed the text, immediately or shortly after its adoption. A multilateral treaty which provides for deferred signatures could not be authenticated by this means, because it might enter into force even before signature by all the negotiating States.

On the other hand, as a deferred signature cannot imply authentication of the text, it is not covered by any provision of the draft of the International Law Commission, unless it is made without reservation in respect of ratification etc. and falls for this reason within the scope of Article 10 of the draft. The signature subject to reservation in respect of ratification etc. has, however, a proper legal meaning (for instance: obligations in contrahendo of signatories; rights of signatories; provisional entry into force of a treaty which has been signed but not yet ratified etc.), which it would be worthwhile to cover by a special provision of an international Convention on the law of treaties (cf. observations ad Article 6, point 2 above).

Article 10 Consent to be bound by a treaty expressed by signature.

Article 11 Consent to be bound by a treaty expressed by ratification, acceptance or approval.

Article 12 Consent to be bound by a treaty expressed by accession.

1. In the practice of the Council of Europe in treaty matters a distinction is made between Agreements which can be signed with or without reservation as to ratification or acceptance, and Conventions requiring ratification or acceptance (cf. "Model Final Clauses"). Furthermore, ratification and acceptance (or approval) must always be preceded by signature. As this practice is expressly provided for by clauses included in the Conventions and Agreements, no problem will arise in this respect from the draft of the International Law Commission.

Nevertheless, in contradiction to the draft of the Commission where no distinction is made between the different means of expressing the consent to be bound by a treaty with regard to the qualifications of a State to become a party to the treaty, the practice of the Council of Europe confines the signature and consequently ratification and acceptance (and approval) to the member States of the Council, whereas accession after the entry into force of the treaty is, in general, open only to non-member States of the Council. According to the terminology used in the draft of the Commission, this means that signature and ratification are confined to "negotiating States"; this expression means by virtue of paragraph 1 (c) of Article 2 of the draft, the States "which took part in the drawing up and adoption of the text of the treaty". Indeed, "the adoption" of Conventions and Agreements concluded within the Council of Europe is decided by the Committee of Ministers of the Council in which only member States are represented; other States which might have taken part in the work of committees called upon to draw up the draft Conventions and Agreements, do not take part in this "adoption" and are consequently not to be considered as "negotiating States".

Furthermore, with the exception of a small number of treaties which are opened only to the signature by member States of the Council of Europe (Convention for the Protection of Human Rights and Fundamental Freedoms and Additional Protocols, European Social Charter, European Convention on Establishment, European Convention for the Peaceful Settlement of Disputes, European Convention on the Establishment of Companies), the possibility of becoming a party by way of accession to a Convention or an Agreement concluded within the Council of Europe is in general determined by provisions contained in the final clauses of the said instruments which lay down the conditions and procedures of such an accession. According to these provisions the Conventions and Agreements concluded within the Council of Europe might be classified in the following way:

(i) Conventions and Agreements which are open to accession by non-member States which are invited to accede by the Committee of Ministers, or which have obtained the previous agreement of this Committee. In certain cases this possibility is limited to European non-member States, in other cases it is extended to all the non-member States whatever their geographic situation may be. In the latter case some instruments, however, raise a supplementary condition, such as the participation of the State concerned to another instrument.

- The decision of the Committee of Ministers is, in principle, taken by a two-thirds majority; in some cases it has to be taken by a unanimous vote by the Committee or requires the unanimous agreement of the member States which are already parties to the Convention or Agreement concerned.

(ii) Conventions and Agreements which are open to the accession of the non-member States which comply with certain material criteria (European States, participation in another treaty or in another international organisation, etc.), without requiring a decision of the Committee of Ministers.

Finally, it should be noted that in all cases accession is possible only after the entry into force of the Convention or Agreement in conformity with its provisions concerning the number of ratifications or signatures without reservation required to this effect. Therefore, the accession of third States cannot influence the entry into force of the treaties concerned.

2. It results from the preceding considerations that the practice of the Council of Europe has established a complete system of rules governing the possibility for States to become parties to Conventions and Agreements concluded within its framework and the extension of this possibility to States other than those which have taken part in the

negotiation of the said texts. The draft of the International Law Commission does not contain any rule to this end (cf. Commentary of the Commission ad Article 12: Question of participation in a treaty), with the exception of Article 12 relating to accession, which, without limiting this procedure to States not having taken part in the negotiation of the treaty concerned, requires, however, that accession by a given State has to be provided for as regards "that State" either by the treaty or the negotiating States or the parties to the treaty. Thus, Articles 10 and 11 relating to signature and to ratification, acceptance or approval do not contain any definition of the States which have the possibility of becoming parties to a treaty by means of signature, ratification, acceptance or approval. Nevertheless, it is not likely that one might set up this lacuna against the express terms of the Conventions and Agreements concluded within the Council of Europe which are only open to signature by member States of the Council. Moreover, this lacuna could easily be eliminated either by an analogous formula to that used in Article 12 or by adding the term "negotiating" to the word "State" in the first sentence of Article 10 and 11.

3. Under the terms of paragraph (c) of Article 12 of the draft of the International Law Commission, "the consent of a State to be bound by a treaty is expressed by accession when ... all the parties have subsequently agreed that such consent may be expressed by that State by means of accession". This provision might conflict with the clauses of some Conventions and Agreements concluded within the Council of Europe governing the procedure of accession. The question is thus raised whether the provision quoted above has an independent value besides the pertinent clauses of the treaties [paragraph (a)]. A positive answer to that question would enable the parties to over-rule a negative decision of the organ which by virtue of the treaty is competent to decide upon accession. Therefore, it should be emphasised that paragraph (c) applies only in the absence of a clause of the treaty governing accession.

Article 14 Consent relating to a part of a treaty and choice of differing provisions

The practice of the Council of Europe in treaty matters does not contain examples of Conventions which permit a choice between differing provisions (paragraph 2), i.e. between alternative provisions which are mutually exclusive. However, in the case of four Conventions concluded within the Council certain parts only of their provisions need be accepted obligatorily (paragraph 1), that is to say, the European Convention for the Peaceful Settlement of Disputes, the European Code of Social Security, the European Social Charter and the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in cases of Multiple Nationality. The provisions of Article 14 of the draft of the International Law Commission are not therefore of direct relevance so far as concerns the practice of the Council of Europe in treaty matters.

Article 16 Formulation of reservations

The practice of the Council of Europe in treaty matters does not differ from the rules contained in this provision. It contains examples to be found in each of the three items stated in the article proposed by the International Law Commission.

(i) Certain Conventions and Agreements concluded within the Council of Europe expressly provide that reservations are not permitted or that ratification, acceptance or adhesion, or signature without reservation as to ratification, implies the legal acceptance of all the provisions of the treaty (item a); that is, for example, the case of the European Agreement for the Prevention of Broadcasts Transmitted from Stations outside national territories and of the European Agreement concerning Programme Exchanges by means of Television Films.

(ii) In other cases, specified reservations are expressly authorised by the text of the treaty (item b), for example, the European Convention for the Peaceful Settlement of Disputes. Certain Conventions such the Convention for the

Protection of Human Rights and Fundamental Freedoms and the European Convention on Establishment only permit a reservation to the extent that a law in force in the territory of a party at the moment of signature or of the deposit of the instrument of ratification is not in conformity with a particular provision of the Convention. In this context it should be stressed that the recent practice of the Council of Europe is in the direction of a system of reservation known as "negotiated reservation": the texts of the reservation which are alone to be permitted are drawn up during the drafting of the Convention or the Agreement. These reservations appear either in the actual text of the Convention or Agreement or more often in an Annex thereto, and each Contracting Party may declare that it will make use of one or other of these reservations. This is the case, for example, of the European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles, of the European Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, and of the European Convention providing a uniform Law on Arbitration. This system of negotiated reservation is also provided for in the "Model Final Clauses" [cf. Article (e) relating to Agreements, and (d) relating to Conventions].

- (iii) When the text of the Convention is silent on the question of reservations (item c), it is accepted that they may be made with respect to any of the provisions of the Convention or of the Agreement on condition, however, that these reservations are not incompatible with the object and purpose of the treaty. In order to clarify the matter in each particular case, the reservation is brought to the attention of the other Contracting Parties.

Article 17 Acceptance of and objection to reservations

In the practice of the Council of Europe, a reservation expressly or impliedly authorised by the text of a Convention does not have to be specially accepted by the other parties to it.

Article 18 Procedure regarding reservations

(1) As regards the communication of reservations and objections thereto, it would be desirable to take into account, in the text of Article 18, the treaties for which a depositary other than the Government of a State entitled to become a party to the treaty has been provided for. In these cases, the communication should be transmitted to the depositary who shall forward it to the other interested States.

(2) By virtue of paragraph 1 of Article 18, the communication shall be transmitted to "the other States entitled to become parties to the treaty". This expression has not been defined in Article 2 of the draft of the International Law Commission. In many cases, it seems that it would be very difficult to delimit the set of States belonging to this category. Under these conditions it might be preferable to mention the negotiating States only and the other parties to the treaty. This is also the practice of the Council of Europe in this matter [cf. "Model Final Clauses", Article (f) relating to Conventions: "The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention"]⁷.

(3) In the practice of the Council of Europe and in contradiction to paragraph 2 of Article 18, a reservation made when signing a treaty need not be confirmed when ratifying, accepting or approving the treaty.

Article 19 Legal effects of reservations

Under the terms of the "Model Final Clauses" of the Conventions and Agreements concluded within the Council of Europe, a party which has made a reservation in respect of a provision of the Convention or Agreement concerned "may not claim the application of that provision by another party" [Article (d) 3 relating to Conventions]⁷. Nevertheless, the other parties have the possibility, in their relations with the party which has formulated the reservation, not to rely on the modification resulting from this reservation.

According to the present practice of the Council of Europe, the application of a reservation does not thereby entail the automatic intervention of the rule of reciprocity, but only deprives, on the one hand, the State which has formulated the reservation of the right to claim on the international level and in relation to the other parties the application of the provision to which the reservation refers, and on the other hand, the other parties of the right to raise against this State the treaty obligation covered by the said reservation.

Article 20 Withdrawal of reservations

According to the practice of the Council of Europe, any party may at any moment wholly or partly withdraw, by means of a declaration addressed to the Secretary General, a reservation it has made. This declaration becomes effective as from the date of its receipt by the Secretary General [cf. "Model Final Clauses", Article (d) 2, relating to Conventions].

Article 21 Entry into force

The entry into force of the Conventions and Agreements concluded within the Council of Europe is determined by the dispositions contained in these instruments. Thus, according to the "Model Final Clauses", Article (a) 2, relating to Conventions "the Convention shall enter into force three months after the date of the deposit of the third instrument of ratification or acceptance".

Article 22 Entry into force provisionally

The provisional application is at present provided for by three instruments drawn up within the Council of Europe - i.e. the General Agreement on Privileges and Immunities of the Council of Europe (Article 22), the Third Protocol to this General Agreement (Article 16) and the Convention on the elaboration of a European Pharmacopoeia (Article 11). The first two of these instruments have been put into provisional application following signature, in conformity with the constitutional requirements of the signatory States, whereas the Convention on the elaboration of a European Pharmacopoeia has been put into

provisional application after signature by all the States which have taken part in the negotiation following the procedure applicable to Partial Agreements, such as provided for by the Statutory Resolution of August 1951.

Article 24 Non-retroactivity of treaties

Amongst the Conventions and Agreements concluded within the Council of Europe, only the European Convention for the Peaceful Settlement of Disputes contains an explicit clause concerning this question. This clause states that "the provision of the Convention shall not apply to disputes relating to facts or situations prior to the entry into force of the Convention as between the parties to the dispute" [Article 27, paragraph (a)]. Moreover, it might be useful to confirm the commentary of the International Law Commission (ad Article 24, points 2 and 3), concerning the practice of the European Commission on Human Rights in the application of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Article 25 Application of treaties to territories

(1) According to the practice of the Council of Europe, any party may at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory or territories to which the Convention or Agreement shall apply. In some cases, it is explicitly laid down that the treaty shall apply to the metropolitan territory of each party. Moreover, any party may, when depositing its instrument of ratification, acceptance or accession or, at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend the treaty to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings. Furthermore, such a declaration may, in respect of any territory mentioned therein, be withdrawn by declaration addressed to the Secretary General which shall take effect six months after the date of its receipt by the Secretary General [cf. "Model Final Clauses", Article (c) relating to Conventions].

(2) Compared with this practice of the Council of Europe, the provision proposed by the International Law Commission is not clear. Indeed, the definition of "the entire territory of each party" might encounter some difficulty in the case of a territory for whose international relations the State concerned is responsible, etc. Furthermore, it is not fully clear whether the terms "unless a different intention ... is otherwise established" cover also unilateral declarations by the interested parties.

Article 26 Application of successive treaties relating to the same subject-matter

Taking into account the attempts made by some international organizations to establish special procedures in this matter, it might be advisable to specify that Article 26 only contains subsidiary rules (cf. also observations ad Article 36, point 4 below).

Article 35 General rule regarding the amendment of treaties

Article 36 Amendment of multilateral treaties

(1) It seems that the general rule according to which "a treaty may be amended between the parties" (Article 35) has been worded too absolutely. Indeed, under the terms of special provisions of some treaties, the amendment shall be the subject of a decision in which not only the parties to the treaty, but also other States shall take part. In cases where the agreement of these other States is necessary for the adoption of the amendment, the agreement of the parties may not have the effect attributed to it by the general rule of Article 35, if these other States refuse to support the decision concerned.

In the practice of the Council of Europe, a similar situation might occur concerning the European Social Charter, Article 36 of which provides that "any amendments ... proposed ... shall then be considered by the Committee of Ministers and submitted to the Consultative Assembly for opinion. Any amendments approved by the Committee of Ministers shall enter into force as from the thirtieth day after all the Contracting Parties have informed the Secretary General of their acceptance ...".

(2) As regards the Statute of the Council of Europe (Article 41), no problem arises from the draft of the International Law Commission; for the special provisions relating to the amendment of this Statute fall within the scope of the general reservation laid down in Article 4 of the draft.

The same applies to the European Convention on Establishment (Article 24) and to the European Convention on the International Classification of Patents for Invention (Article 2). Indeed, these provisions only concern special amendment procedures, which are covered by the reservation laid down at the beginning of Article 36.

(3) Under the terms of Article 36, paragraph 2 "any proposal to amend a multilateral treaty ... must be notified to every party, each one of which shall have the right to take part in ...". As regards this point, it should be noted that in case the treaty has been drawn up within an organ of an international organization, not only the parties to the treaty but also the other member States of the organization might have a legitimate interest in being informed about the propositions to amend the treaty and in taking part in the decisions thereon, without it being necessarily stipulated in the treaty concerned. Consequently, it might be advisable to mention in this context either the negotiating States or the organ within which the treaty has been drawn up.

(4) Article 36, paragraph 4, which refers to Article 26, paragraph 4 (b), concerning the maintenance of the unamended treaty, raises the problem of the advisability of the survival of the former treaty in cases where a very small number of States remain parties only to this unamended treaty, forcing the parties to the amended treaty to maintain between themselves treaty relations which they consider out of date. The problem is particularly pressing if it arises out of a treaty having instituted organs and procedures for its implementation, which have been the subject of the amendments made in the new treaty. In this context, it must also be taken into account that under the terms of Article 52 of the draft of the International Law Commission a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 37 Agreements to modify multilateral treaties between certain
of the parties only

(1) The notification provided for in paragraph 2 of Article 37 should also be addressed, as the case may be, to the depositary of the treaty, if he is not a party thereto.

(2) An example of a treaty falling under Article 37 of the draft of the International Law Commission is given by the Agreement relating to Application of the European Convention on International Commercial Arbitration. This Convention, which had been concluded under the auspices of the United Nations Economic Commission for Europe, provides in Article X, paragraph 7 that its provisions do not affect the validity of multilateral or bilateral agreements concluded, or to be concluded, by the contracting parties in matters concerning arbitration. On the basis of this provision of Article X, paragraph 7, the above mentioned Agreement has been concluded within the Council of Europe. It derogates, in the relations between its parties, from the provisions of Article IV, paragraphs 2-7, of the European Convention on International Commercial Arbitration.

Article 44 Specific restrictions on authority to express the consent
of the State

The communication of the specific restrictions on the authority to express the consent of the State should also be addressed, as the case may be, to the depositary of the treaty, if this function is entrusted neither to a State organ nor to a negotiating State.

Article 52 Reduction of the parties to a multilateral treaty below the
number necessary for its entry into force

Amongst the Conventions and Agreements concluded within the Council of Europe, only the European Social Charter (Article 37) and the European Code of Social Security (Article 81), determine the number of parties necessary for their remaining in force (5 and 3 respectively). (Cf. also observations ad Article 36, point 2 above).

Article 55 Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only

Because of the analogy with the subject of Article 37 above, the intention to suspend temporarily the operation of a multilateral treaty as between certain parties only should be communicated to the other parties and, as the case may be, to the depositary of the treaty (cf. observations ad Article 37 above).

Article 62 Procedure to be followed in cases of invalidity, termination, withdrawal from, or suspension of the operation of a treaty

(1) The draft of the International Law Commission contains no reservation concerning the provisions of the treaty itself relating to the procedure of denunciation etc. It seems that this lacuna should be rectified, possibly by adding the words "unless the treaty otherwise provides". As regards the Statute of the Council of Europe, Article 7 relating to withdrawal, and Article 8 concerning suspension and expulsion of a member from the organization, might be mentioned in this context. It is indeed true that the application of these provisions is covered by the general reservation of Article 4 of the draft of the Commission regarding "any relevant rules of the organization". However, this might not apply to provisions relating to denunciation, which are inserted in the Conventions and Agreements concluded within the Council of Europe and under the terms of which the denunciation has to be notified to the Secretary General of the Council and shall take effect six months after the date of its receipt by the Secretary General, who in turn shall communicate the denunciation to all member States of the Council and to any State which has acceded to the treaty concerned [cf. "Model Final Clauses", Articles (e) and (f) relating to Conventions].

(2) Furthermore, it seems desirable to take into account the treaties for which a depositary other than the Government of a party has been provided for, and to envisage that the parties shall address the notification required by Article 62, paragraph 1, also to this depositary [cf. also Article 63, paragraph 1].

Article 66 Consequences of the termination of a treaty

It is not without reason that, in contradiction to the preceding Article concerning the invalidity of a treaty, Article 66 contains a reservation in favour of the provisions of the treaty itself governing the consequences of its termination. Thus, some Conventions and Agreements concluded within the Council of Europe provide that the denunciation shall not have the effect of releasing the party concerned from its obligations under the treaty in respect of any situation or fact constituted or performed before the date at which the denunciation becomes effective and falling within the scope of application of the treaty [Convention for the Protection of Human Rights and Fundamental Freedoms, (Article 65, 2), European Convention for the Peaceful Settlement of Disputes (Article 40, 2) European Convention on Establishment (Article 33, 3)]. In some other instruments of the Council of Europe, it is stipulated that in case of denunciation by any of the parties, all rights acquired by virtue of the provisions of the treaty shall be maintained [European Interim Agreements on Social Security Schemes (Article 12)].

Article 71 Depositaries of treaties

The depositary of the Conventions and Agreements concluded within the Council of Europe is the Secretary General of this organization. Thus, the depositary is neither a State nor an international organization, neither is it a "statutory organ" properly speaking, of the Council of Europe. Accordingly

- (i) the words "which may be a State or an international organization" in paragraph 1, should be deleted;
- (ii) or alternatively, the words "or the head of the Secretariat of such an organization" should be added.

Article 72 Functions of depositaries

(1) The draft drawn up by the International Law Commission imposes upon the depositary the obligation to communicate to the States entitled to become parties to the treaty the texts of the treaty [Article 72, paragraph 1(b)] and to inform the same States of certain acts relating to the treaty [paragraph 1(e) and (f)]. According to the observation ad Article 18 (point 2)

above, it is often difficult to delimit the set of the States belonging to the category of "States entitled to become parties to the treaty"; in other cases, this set might be so large that the obligation of the depositary would be too heavy in comparison with the interest of these States to be informed of the situation of the treaty concerned. It would therefore be preferable to limit this obligation to the negotiating States, to the contracting States and to the parties, within the meaning of the definitions given in Article 2 of the draft of the Commission.

In the case of the Conventions and Agreements concluded within the Council of Europe, the notifications shall, as a general rule, be addressed to the member States of the Council and to any State which has acceded to the Convention or Agreement [cf. "Model Final Clauses", Article (f) relating to Conventions], which is in conformity with the solution proposed above.

It goes without saying that a State entitled to become a party to the treaty and which is not comprised within the States enumerated above, has at any moment the possibility of applying to the depositary with a view to obtaining any information on the treaty to which it can become a party.

(2) As concerns the differences which might appear between a State and the depositary (Article 72, paragraph 2), it seems advisable to restrict even more the set of States which the depositary must inform of the difference. Thus, this obligation of the depositary might be limited to the "interested States"; this expression could be interpreted, in the case of a treaty which has already entered into force, as meaning only the parties to the treaty and the signatories, excluding the States which although having taken part in the negotiation have not shown their intention to become parties to the treaty.

Article 73 Notifications and communications

The draft of the International Law Commission does not lay down any general rule as to the date on which a notification becomes effective. It only indicates the dates on which the notification shall be considered as having been made or as having been received. As regards the date on which it becomes effective, reference has to be made to the specific dispositions

relating to the notification concerned (Article 17, paragraph 5: reservations; Article 62, paragraph 1; invalidity, termination and suspension), which determine this date as a general rule according to the receipt of the notification by the State for which it was intended, were it transmitted or not by a depositary. Under these circumstances, one might question whether the provisions of Article 73 have a proper value which justifies their being retained in a Convention on the law of treaties.

As regards the practice of the Council of Europe, the date on which a notification becomes effective is in general determined according to its receipt by the Secretary General of the Council [cf. "Model Final Clauses"; Article (d) 2, relating to Conventions: withdrawal of reservations; Article (e) 3; denunciation].

Article 74 Corrections of errors in texts or in certified copies of treaties

As regards the Conventions and Agreements concluded within the Council of Europe, the practice in matters of correction of errors is as follows: whenever the text of a Convention or Agreement contains an error, the Committee of Ministers rectifies this error and authorizes the Secretary General, to certify this rectification. The Secretary General, invested with this authorization, draws up and signs a procès-verbal of rectification copy of which will be communicated to each member State of the Council and to any State which has acceded to the treaty concerned. The procès-verbal of rectification will also be communicated to the Secretariat of the United Nations Organization for registration, cf. also the observations ad Article 9, point 2 above.

Article 75 Registration and publication of treaties

It might be advisable to provide for an obligation of the depositary to have registered with the Secretariat of the United Nations Organization, the treaties which are deposited with him. Thus, the Secretary General of the Council of Europe, acting as mandatory of the member States of the Council parties to the Conventions and Agreements concluded within this organization is authorized to have registered the said Conventions and Agreements with the Secretariat of the United Nations Organization.

3. INTERNATIONAL CIVIL AVIATION ORGANIZATION

Transmitted by a letter dated 14 February 1968 from the
Director of the Legal Bureau of the Organization

In Article 2, paragraph 1 (f), the expression "Contracting State" is defined as a State which has consented to be bound by the treaty, whether or not the treaty has entered into force. Such meaning, however, appears to be contrary to the meaning assigned to the term "Contracting State" in several international agreements. For example, in the Convention on International Civil Aviation (Chicago, 1944), to which 116 States are parties, the term "Contracting State" is used to denote "party", i.e., a State for which the Convention is in force. Examples of other international agreements are ...provided in the Attachment hereto.

It appears that the State intended to be described in Article 2, paragraph 1(f), of the Draft Articles could well be described by employing some other expressions, for example "ratifying State"⁽¹⁾, "acceding State" or "signatory State": and in fact all of these kinds of States could even be described by some convenient, single expression such as "consenting State".

It seems unnecessary and undesirable to use the term "Contracting State" in a sense contrary to current usage, and contrary to many international agreements, including some which were concluded at international conferences convened by the International Civil Aviation Organization, and it is suggested that some other convenient expression might be used in Article 2, paragraph 1(f), and in the other related Articles, namely, 13, 14, 17 and 22 in the proposed Law of Treaties.

(1) For example, in the Charter of the Organization of American States, a State which has deposited its ratification but in respect of which the Charter has not entered into force is not described as "Contracting State" but on the contrary is described as "ratifying State": Article 109 "The present Charter shall enter into force among the ratifying States when two-thirds of the signatory States have deposited their ratifications".

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Attachment

1. In the following international agreements the term "Contracting State" means only a State which is bound by the provisions of the Convention or Agreement:

- (i) Convention on International Civil Aviation (Chicago, 7 December 1944);
- (ii) International Convention concerning the Carriage of Passengers and Luggage by Rail (CIV) of 25 October 1952, of which Article 65 reads "The duration of this Convention shall be unlimited. Any Contracting State may, however, withdraw subject to the following conditions";
- (iii) International Convention Concerning the Carriage of Goods by Rail (CIM) of 25 October 1952, of which Article 67, paragraph 1, reads "Delegates of the Contracting States shall meet to revise the Convention";
- (iv) Convention on the International Recognition of Rights in Aircraft, signed at Geneva on 19 June 1948;
- (v) Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome on 7 October 1952;
- (vi) Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe, signed at Paris on 30 April 1956;
- (vii) Multilateral Agreement Relating to Certificates of Airworthiness for Imported Aircraft, signed at Paris on 22 April 1960;
- (viii) Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier, signed at Guadalajara on 18 September 1961;
- (ix) Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963.

2. In the following Conventions, the expression "Contracting Governments" is synonymous with "Party".

- (a) Agreement on North Atlantic Ocean Stations, signed at Paris on 25 February 1954;
 - (b) Agreement on the Joint Financing of Certain Air Navigation Services in Iceland, signed at Geneva on 25 February 1956;
 - (c) Agreement on the Joint Financing of Certain Air Navigation Services in Greenland and Faroe Islands, opened for signature at Geneva on 25 February 1956.
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4. ORGANIZATION OF AMERICAN STATES

Transmitted by a letter dated 18 March 1968 from the
Secretary-General of the Organization

The observations of the General Secretariat of the Organization of American States concerning Articles 72 and 75 of the Draft Articles on the Law of Treaties, prepared by the International Law Commission of the United Nations, on the subject of Registration of Treaties are as follows:

1. The General Secretariat of the Organization of American States (OAS) wishes to clarify its position regarding the registration of treaties (in the broad acceptance of the term), with a view to the possibility of introducing certain minor modifications in Articles 72 and 75 of the Draft Articles on the Law of Treaties prepared by the International Law Commission (I.L.C.) for consideration by the United Nations Conference on the Law of Treaties, meeting in Vienna from 26 March through 24 May 1968.
2. The General Secretariat is of the opinion that the pertinent provision as embodied in the I.L.C. draft might go farther in regulating the procedures of registration under Article 102 of the United Nations Charter, and the corresponding duties of depositaries; the General Secretariat further believes that it would be in the interest of the international community in general to adopt at this time some procedures which, while aiming at lessening the burdens incumbent upon States parties to international agreements, would nevertheless contribute to expedite the registration of such agreements with the United Nations Secretariat.
3. The Pan American Union, General Secretariat of the OAS, has a direct interest in this matter in view of the provision in Article 83(e) of the Charter of the Organization, wherein it is stated that the Pan American Union shall, among the performance of other functions, "Serve as depositary of the instruments of ratification of inter-American agreements". The Protocol of Buenos Aires of 1967, which amends the Charter, while not yet in force, contains a substantially identical provision (Article 118(f)).

4. On the subject of registration of treaties, the Charter of the United Nations contains the following provision:

Article 102

(1) Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

(2) No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

5. The General Assembly of the United Nations, by virtue of Resolution 97 (I) of 14 December 1946 (subsequently amended by Resolutions 364 B (IV) of 1 December 1949, and 482 (V) of 12 December 1950), adopted Regulations containing rules for the application of Article 102 of the Charter. According to these Regulations, treaties and other international agreements, having come into force between two or more parties thereto, shall be registered with the Secretariat of the United Nations and subsequently published in the United Nations Treaty Series.
6. The question is, who should register such treaties? The Regulations are clear on this point, stating that "registration may be effected by any party" (Article I (3)), or ex officio by the United Nations where it is a party or where it has been authorized by the treaty or agreement to effect registration (Article 4 (1)), or by a specialized agency of the United Nations where its constituent instrument so provides or authorizes, or "where the specialized agency has been authorized by the treaty or agreement to effect registration" (Article 4 (2)). In any event, registration by a party, by the United Nations or by a specialized agency, effected in accordance with Articles 1 and 4 of the Regulations, relieves the other parties of the obligation to register (Article 3).

7. Nowhere in these Regulations is there a provision contemplating registration of treaties by an inter-governmental organization (other than the United Nations or its specialized agencies), even if the latter acts as depositary, as is the case with the OAS in respect of certain inter-American agreements.
8. Nevertheless, on several occasions the General Secretariat of the OAS registered with the Secretariat of the United Nations treaties in respect of which it discharged the functions of a depositary, when the treaties themselves authorized this procedure. In a single instance, the General Secretariat of the OAS transmitted for purposes of registration under Article 102 the text of a treaty where no such explicit authorization was given in the instrument itself; this was a constituent instrument of an international organization, namely, the Agreement Establishing the Inter-American Development Bank, done at Washington on 8 April 1959. It may be helpful, in this connexion, to quote from the letter on the subject addressed to the Secretary-General of the OAS by the then Director of the General Legal Division, Office of Legal Affairs, United Nations Secretariat, on 30 August 1960:
"I wish to refer to the Registration Regulations established by the General Assembly which govern the Secretariat in the discharge of its functions under Article 102 of the Charter. Pursuant to these Regulations, registration may be effected by any party to the treaty or international agreement. In certain specified cases the Regulations authorize registration by the United Nations or by specialized agencies but do not expressly provide for such action by any other inter-governmental organization. However, a practice has developed whereby the Secretariat has accepted for registration multilateral agreements submitted by an inter-governmental organization, other than a specialized agency, in cases where such organization in its capacity as depositary of the agreements was authorized by the Contracting Parties, either in the agreement itself or in some other form, to effect their

registration. The acceptability of this procedure, within the terms of the existing Regulations, has been based on the view that such authorization allows the Secretary-General to treat the submission of an agreement by the inter-governmental organization as being tantamount to registration by the States parties themselves."

9. It appears obvious, from the foregoing, that the obligation to register a treaty with the United Nations Secretariat, under Article 102 of the Charter, should be incumbent upon its depositary, irrespective of whether such depositary is a State, a specialized agency of the United Nations or any other inter-governmental organization. Likewise, the registration with the United Nations Secretariat of "certified statements regarding any subsequent action which effects a change in the parties to a treaty or international agreement already so registered, or the terms, scope or application thereof", as stipulated in the above-mentioned Regulations, should similarly be the responsibility of the depositary.
10. This would not be incompatible, in any way, with either the wording or the spirit of Article 102 of the United Nations Charter; as to the Regulations approved by the General Assembly for registration and publication of treaties, they have already been repeatedly amended by subsequent Resolutions of the same body and in any case would in all likelihood have to be reformulated as an outcome of the Conference on the Law of Treaties.
11. Article 75 of the I.L.C. Draft now reads as follows:
"Treaties entered into by parties to the present articles shall as soon as possible be registered with the Secretariat of the United Nations. Their registration and publication shall be governed by the regulations adopted by the General Assembly of the United Nations".
The Conference might give consideration to the adoption of language that would authorize or require the depositaries of treaties to register them, possibly by modifying the present draft Article 75 to read as follows:

Article 75. "Treaties entered into by parties to the present articles shall be registered with the Secretariat of the United Nations, either by the depositaries of such treaties, or, if no depositary is designated, by any party to the treaty. Their registration and publication shall be governed by the regulations adopted by the General Assembly of the United Nations. (Underlining added.)

12. If this proposal is accepted it would become necessary to modify the text of Article 72 of the I.L.C. Draft regarding the functions of depositaries, so as to insert, between items (f) and (g) of section 1, the following new provision, to become item (g). (The present item (g) would as a result be labelled as (h)):

"(g) Transmitting to the United Nations Secretariat, for purposes of registration under Article 102 of the Charter, a certified copy of the treaty".

The entire first section of the Article would then read, as amended, as follows:

"1. The functions of a depositary, unless the treaty otherwise provides, comprise in particular:

(a) Keeping the custody of the original text of the treaty, if entrusted to it;

(b) Preparing certified copies of the original text and any further text in such additional languages as may be required by the treaty and transmitting them to the States entitled to become parties to the treaty;

(c) Receiving any signatures to the treaty and any instruments and notifications relating to it;

(d) Examining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present articles and, if need be, bringing the matter to the attention of the State in question;

(e) Informing the States entitled to become parties to the treaty of acts, communications and notifications relating to the treaty;

(f) Informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, accession, acceptance or approval required for the entry into force of the treaty have been received or deposited;

(g) Transmitting to the United Nations Secretariat, for purposes of registration under Article 102 of the Charter, a certified copy of the treaty.

(h) Performing the functions specified in other provisions of the present articles".

13. The General Secretariat of the OAS is of the opinion that acceptance of these suggestions, which are admittedly elementary in character, would contribute towards a more logical and less burdensome procedure for registration of international agreements with the United Nations under Article 102 of the Charter.

5. UNITED INTERNATIONAL BUREAU FOR THE PROTECTION
OF INTELLECTUAL PROPERTY

Transmitted by a letter dated 28 February 1968 from the
Director of the Bureau

1. In its comments^{2/} on article 26 of the draft articles on the law of treaties prepared by the International Law Commission of the United Nations, concerning the "application of successive treaties relating to the same subject-matter", the Government of Israel refers to BIRPI's experience in this sphere and expresses the view that a memorandum by BIRPI on the question might be of interest for the proposed diplomatic Conference. This note has been prepared in the light of these remarks.

2. The International Law Commission of the United Nations incorporated in draft article 26 rules long established in fact and generally accepted.

Paragraph 4 of this article, to which the Government of Israel refers more particularly, provides, in essence, that in the case of successive treaties States parties to one or the other of those treaties are bound, as between themselves, only by the last treaty to which both the States concerned are parties.

As the Commission states in its commentary on this article, what is involved here is the rule Pacta tertiis nec nocent nec prosunt, which is also to be found in article 30, under which a treaty does not create either obligations or rights for a third State without its consent. The Commission rightly stresses that "in international law ... the justification for the rule does not rest simply on this general concept of the law of contract but on the sovereignty and independence of States".

3. Between two States which are not parties to the same treaties, there can, of course, be no legal relations under the general principles of international law arising out of those treaties.

4. However, a special situation exists in international Unions such as those administered by BIRPI, the most important of which are those instituted by the Paris Convention for the Protection of Industrial Property of 20 March 1883 and the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886. Various revisions of these Conventions have been adopted by diplomatic Conferences convened at the invitation of the

^{2/} See A/CONF.39/6

Government of one of the countries which are parties to them. The Paris Convention was revised at Brussels on 14 December 1900, at Washington on 2 June 1911, at The Hague on 6 November 1925, at London on 2 June 1934, at Lisbon on 31 October 1958 and at Stockholm on 14 July 1967. The Berne Convention of 9 September 1886, completed at Paris on 4 May 1896, was revised at Berlin on 13 November 1908, and the Berlin text, completed at Berne on 20 March 1914, was revised at Rome on 2 June 1928, and subsequently at Brussels on 26 June 1948 and at Stockholm on 14 July 1967. These diplomatic revising Conferences did not adopt new Conventions. They merely produced different versions of an original Convention which continue to exist - the Paris Convention in the case of the protection of industrial property, and the Berne Convention in the case of the protection of literary and artistic works. Article 1 of the original Acts of these Conventions had expressly instituted Unions for the protection of industrial property and for the protection of literary and artistic works respectively, and article 1 of the subsequent Acts of the Conventions kept the Unions in existence.

5. It follows from the foregoing that there is only one Union constituted by each of the (Paris and Berne) Conventions, but that this Union expresses itself through successive diplomatic Acts. While it is true that these diplomatic Acts are self-contained treaties in that they were adopted and ratified independently of each other and the countries which are parties to one Act are completely free to accede or not to accede to the subsequent Act, they are nevertheless treaties of a special kind in that the countries which are parties to one of these Acts are all members of the same Union. This is not the place to discuss the legal character of such a Union, which is a Vereinbarung and not a Vertrag, to use the German legal terminology. Suffice it to say that the Union's indivisibility finds outward expression in the indivisibility of its Administration. Because of this indivisibility, each country party to an Act of the Union must stand in some relationship to the countries parties to another Act. What is this relationship?

6. Where a country already party to an Act of the Union accedes to a later Act, or where a country outside the Union accedes to the most recent Act of the Union in force, declaring that its accession shall also be valid for the

previous Acts, the general principles of the law of treaties, as stated in article 26 of the International Law Commission's draft, of course apply. . The acceding country is bound in its relations with the other countries of the Union by the most recent Act to which it and those other countries are parties, and there is no need to bring in the notion of the indivisibility of the Union.

7. The case is different where a country accedes to the most recent Act of the Union without declaring that its accession shall also be valid for the previous Acts. In such a case, the acceding country is undoubtedly bound by its accession in its relations with other countries which are already parties to the most recent Act, but what is its position in relation to countries which are parties only to the previous Acts? It is here that the indivisibility of the Union should be taken into account.

While under the general principles of the law of treaties the position would be that referred to in paragraph 3 above, namely, that there would be no legal relation between the acceding country and the other countries concerned, the position cannot be the same where the treaties in question are the successive Acts of one and the same Union.

In that case, a country which accedes to the most recent of those treaties but not to the previous treaties nevertheless becomes a member of the Union recognized by the treaty to which it accedes, and this means that it also tacitly assumes an obligation towards all the member countries of the Union, including the tacit assumption of obligations, where appropriate on the basis of the previous texts. This solution has been the one traditionally adopted for the purpose of the application of the texts of the Paris and Berne Conventions, and it has given rise to no difficulties in practice. The justification for this system of presumed accession to the previous texts of the Conventions upon accession to the most recent text has been the fact that each revision has marked an advance in the protection of industrial property and copyright. It could thus be legitimately assumed that a State agreeing to the higher level of protection provided for in the most recent text, to which it was acceding, was also tacitly agreeing to the lower levels established in the previous texts.

8. However, at the Stockholm Conference which revised the Paris and Berne Conventions on 14 July 1967, the relation between a country which, having been outside the Union, accedes to the most recent Act of the Union and the countries of the Union which are parties only to the previous Acts was sought in another direction that would make it unnecessary to have recourse to the notion of tacit accession to the previous Acts. It became clear that this notion might give rise to certain legal difficulties, and also that some countries which were prepared to accede to the most recent Act of the Union might have reasons for not recognizing certain provisions of the previous Acts. Hence, in the case under discussion here, the relation that would exist among the States members of the Union concerned was laid down in the following terms, which were agreed to by the Conference: a country outside the Union which accedes to the most recent Act of the Union is entitled to apply that Act even in its relations with other countries of the Union which are parties only to the previous Acts, but it also recognizes that those other countries of the Union may apply to it, in their relations with it, the previous Acts to which they themselves are parties.

The provisions on this point which were inserted in the Paris and Berne Conventions by the Stockholm Conference are reproduced as an annex to this note.

9. These are the points to which BIRPI considers it useful to draw attention in connexion with article 26 of the draft articles on the law of treaties prepared by the International Law Commission of the United Nations.

Annex

Paris Convention for the Protection of Industrial Property
of 20 March 1883, as revised most recently at Stockholm on 14 July 1967

.....
Article 27

(3) Countries outside the Union which become party to this Act shall apply it with respect to any country of the Union not party to this Act or which, although party to this Act, has made a declaration pursuant to Article 20 (1) (b) (i).^{3/} Such countries recognize that the said country of the Union may apply, in its relations with them, the provisions of the most recent Act to which it is party.

Berne Convention for the Protection of Literary and Artistic Works
of 9 September 1886, as revised most recently at Stockholm on 14 July 1967

.....
Article 32

(2) Countries outside the Union which become party to this Act shall, subject to the provisions of paragraph (3),^{4/} apply it with respect to any country of the Union not party to this Act or which, although party to this Act, has made a declaration pursuant to Article 28 (1) (b) (i).^{5/} Such countries recognize that the said country of the Union, in its relations with them:

- (i) may apply the provisions of the most recent Act to which it is party, and
- (ii) has the right to adapt the protection to the level provided for by this Act.

^{3/} Article 20 (1) (b) (i) relates to the option given to a country not to accede to the substantive articles of the Convention as revised at Stockholm.

^{4/} Paragraph (3) relates to the Protocol Regarding Developing Countries.

^{5/} Article 28 (1) (b) (i) relates to the option given to a country not to accede to the substantive articles of the Convention, as revised at Lisbon.