Department of External Affairs

CLASSIFIED

File No. 20-3-1-6

Subject: POLITICAL AFFAIRS - ~~TREATIES & AGREEMENTS~~ - TREATY MAKING POWERS - LAW OF TREATIES - I.L.C. CODIFICATION PROJECT

(including League of Nations Treaties)

Vol. 2
From May 1/65
To June 30/66

REPLACES FILE 5475-AX-8-40

References to Related Files

File No.	Subject
20-3-2-2	I.L.C. —

File No. 20-3-1-6

PAC

PUBLIC RECORDS ORDER
P.C. 1966 - 1749 - AUTHORITY
PUBLIC ARCHIVES APPROVALS
NOS 68/001 & 69/063

RETENTION PERIOD AND DISPOSITION
10 yrs 2A-8D
AND...
THEN TRANSFER TO P.A.C.
FOR SELECTIVE RETENTION

DIVISIONAL SYMBOL

000475

Clean Law of Treaties
I.L.C. file

COPY

ALL SOULS COLLEGE,
OXFORD.

9th November 1965.

Dear Wattles,

I enclose two copies of the first instalment of my Fifth Report. I am sending a further copy as usual under separate cover.

This instalment contains the Introduction; Section 1, comprising Articles 30, 49, 47, 46; and most of Section 2 - i.e. Articles 31-35. You are anxious to get the translation started, and therefore I thought it better to let you have this instalment, even although two articles of Section 2 are still incomplete. I will send these - Articles 36 and 37 - together with further articles from Section 3 concerning termination, as soon as I have a substantial block.

You will see that I have not kept strictly to the existing order of the articles, as I have brought forward Articles 49, 47 and 46 to Section 1. I have also incorporated by reference the three articles which I had already revised at the last session and submitted to the Commission as Addendum 2 to my Fourth Report.

Yours sincerely,

(Signed) HUMPHREY WALDOCK.

This cover

Mr. Gurdon W. Wattles,
Assistant Director,
Codification Division,
Office of Legal Affairs,
United Nations,
NEW YORK, N.Y.

PERMANENT MISSION OF CANADA TO THE UNITED NATIONS
MISSION PERMANENTE DU CANADA AUPRÈS DES NATIONS UNIES

New York, November 12, 1965.

Dear Sirs,

ILC - Law of Treaties

As arranged by Mr. Robertson with Mr. Wattles of the Secretariat, the latter privately lent me today a copy (just received) of the first instalment of Waldock's 5th Report. We made one photocopy which is enclosed herewith.

Please treat your possession of this copy as confidential until the report is officially circulated.

When the remainder of the report arrives we will repeat this procedure.

Enclosure with AWJR

Yours sincerely,

M.H. Wershof.

Legal Division,
Department of External Affairs,
Ottawa, Canada.

Attention: Mr. A.E. Gotlieb or
Mr. A.W.J. Robertson

Lois. please do

ACTION COPY

CORR 20-3-1-6
20-5-2-2

25 43/45

E file

FM CANDELNY NOV12/65 RESTR

TO EXTERNAL 2320

ILC:LAW OF TREATIES

FOLLOWING FROM WERSHOF FOR ROBERTSON(LEGAL DIV)

PART OF WALDOCKS 5TH REPORT REACHED SECRETARIAT TODAY. I HAVE MADE ONE PHOTOCOPY AND AM SENDING IT REGISTERED AIRMAIL TO LEGAL DIVISION. PLEASE CHECK MON WITH MAILROOM.

O A

OTT089

20-3-1-6

ACTION COPY

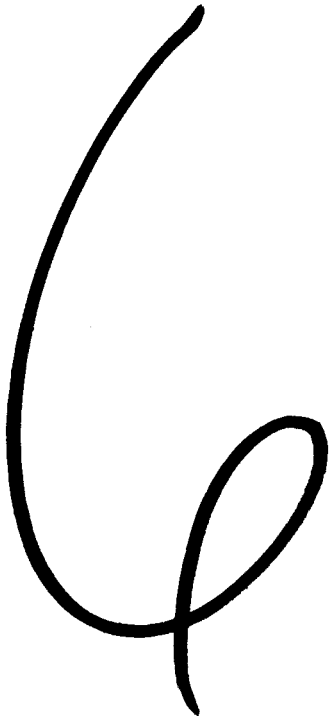
EN61

FM CANDELNY NOV5/65

TO EXTERNAL 2203

REF OURTEL 1959 OCT21

20TH UNGA: PLENARY: AGENDA ITEM 88: LEAGUE OF NATIONS TREATIES DRAFT RESLN ADOPTED BY 6TH CTTEE OCT20 WAS SUBMITTED TO PLENARY TODAY IN RAPPORTEURS REPORT(A/6088). NO RPT NO AMENDMENT WAS TABLED. RESLN WAS ADOPTED ON SHOW OF HANDS VOTE 82-0-21. THE 21 ABSTAINERS INCLUDED COMMUNIST GROUP SOME OF WHOM EXPLAINED THEIR VOTE IN FAMILIAR TERMS.



DEPARTMENT OF EXTERNAL AFFAIRS

CROSS REFERENCE SHEET

Security ...Unclassified... RL

20-3-1-6		
25	—	

Type of Document...I.L.C. REPORT - Letter... No...503...Date...Nov. 2, 1965...

From...PERMIS - GENEVA...

To...E.A.:...

Subject:

Report of the Int'l Law Commission;
General report - with section covering
Law of Treaties

Original on File No...20-5-2-2...

Copies on File No.....

Other Cross Reference Sheets on...20-5-2-2-1...

Prepared by.....

Ext. 308

NOV 10-1965

20-3-1-6

L'Accord culturel comporte aussi un échange de lettres entre le Secrétaire d'Etat aux Affaires extérieures et l'Ambassadeur de France. Cet accord complémentaire sous forme d'échange de lettres a pour but de faciliter la conclusion d'ententes entre les provinces et la France dans le cadre de l'Accord culturel. L'échange de lettres prévoit en effet que les provinces seront habilitées à conclure des ententes directement avec la France dans le domaine de l'éducation et des relations culturelles, scientifiques, techniques et artistiques, soit du fait qu'elles se seront référées à l'Accord culturel et à l'échange de lettres en date de ce jour, soit par l'assentiment que leur aura donné le Gouvernement fédéral. Par exemple, les références à l'éducation, contenues dans l'échange de lettres et dans l'Accord culturel lui-même, permettront aux provinces qui désireraient le faire, de conclure directement avec la France une entente dans le domaine de l'éducation comme l'a déjà fait le Québec en février dernier, sans qu'il soit nécessaire d'avoir recours à un échange de lettres dans chaque cas entre le Gouvernement fédéral et le Gouvernement français comme ~~ce fut~~ on l'a fait pour ~~sur~~ l'entente sur l'éducation entre le Québec et la France. Dans le cas où une province désirerait mettre à profit la procédure ~~suivie~~ prévue par cet échange de lettres cette province informerait le Gouvernement fédéral de son intention de le faire et tiendrait le Gouvernement fédéral au courant de la nature et de la portée de l'entente projetée afin de permettre au Gouvernement fédéral de juger de la compatibilité de l'entente projetée avec la politique extérieure canadienne. Il est évident que le Gouvernement fédéral n'a nullement l'intention de s'arroger, par le truchement de cet Accord, des pouvoirs qu'il ne posséderait pas en vertu de la constitution, plus spécialement dans le domaine de l'éducation.

L'Accord culturel comporte aussi un échange de lettres entre le Secrétaire d'État aux Affaires extérieures et l'Ambassadeur de France. Cet accord complémentaire sous forme d'échange de lettres a pour but de faciliter la conclusion d'ententes entre les provinces et la France dans le cadre de l'Accord culturel. L'échange de lettres prévoit en effet que les provinces seront habilitées à conclure des ententes directement avec la France dans le domaine de l'éducation et des relations culturelles, scientifiques, techniques et artistiques, soit du fait qu'elles se seront référées à l'Accord culturel et à l'échange de lettres en date de ce jour, soit par l'assentiment que leur aura donné le Gouvernement fédéral. Par exemple les références à l'éducation, contenues dans l'échange de lettres et dans l'Accord culturel lui-même, permettront aux provinces qui désireraient le faire, de conclure directement avec la France une entente dans le domaine de l'éducation comme l'a déjà fait le Québec en février dernier, sans qu'il soit nécessaire d'avoir recours à un échange de lettres dans chaque cas entre le Gouvernement fédéral et le Gouvernement français comme ~~ce fut~~ ou l'a fait sur l'entente sur l'éducation entre le Québec et la France. Dans le cas où une province désirerait mettre à profit la procédure ~~suivie~~ prévue par cet échange de lettres cette province informerait le Gouvernement fédéral de son intention de le faire et tiendrait le Gouvernement fédéral au courant de la nature et de la portée de l'entente projetée afin de permettre au Gouvernement fédéral de juger de la compatibilité de l'entente projetée avec la politique extérieure canadienne. Il est évident que le Gouvernement fédéral n'a nullement l'intention de s'arroger, par le truchement de cet Accord, des pouvoirs qu'il ne posséderait pas en vertu de la constitution, plus spécialement dans le domaine de l'éducation.

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TRANSMITTAL SLIP

TO: [redacted] J. A. Beesley,
First Secretary,
The Permanent Mission of Canada to the European
Office of the United Nations, Geneva.

FROM: The Under-Secretary of State for External
Affairs, Ottawa.

The documents described below are for your information.

Despatching Authority: A. E. G.

Security: RESTRICTED

Date: December 9, 1965

Air or Surface: Air

No. of enclosures: 2

20-3-1-6
25

Copies	Description	Also referred to:
	Re: ILC - Documentation for Winter Session. Attached are the copies referred to in our Telegram No. L-464 of December 7, 1965.	

000485

Ext. 250 (Rev. 10/51) *(Instruction on Reverse Side)*

INSTRUCTIONS

1. This form may be used in sending material for informational purposes from the Department to posts abroad and vice versa.

2. This form should *NOT* be used to cover documents requiring action.

3. The name of the person responsible for authorizing the despatch of the material should be shown opposite the words "Despatching Authority". This may be done by signature, name stamp or by any other suitable means.

4. The form should bear the security classification of the material it covers.

5. The column for "Copies" should indicate the number of copies of each document transmitted. The space for "No. of Enclosures" should show the total number of copies of all documents covered by the transmittal slip. This will facilitate checking on despatch and receipt of mail.

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary of State for External Affairs, Ottawa
Attention: Legal Division

FROM / De: The Canadian Delegation to the 20th Session of the United Nations General Assembly

REFERENCE / Référence: Your telegram L-463 of Dec.6

SUBJECT / Sujet: International Law Commission: Documentation for January Session

SECURITY / Sécurité: Unclassified

DATE: December 10, 1965

NUMBER / Numéro: 1076

FILE / DOSSIER
OTTAWA 20-3-1-6
MISSION 25/45-

ENCLOSURES / Annexes: 2

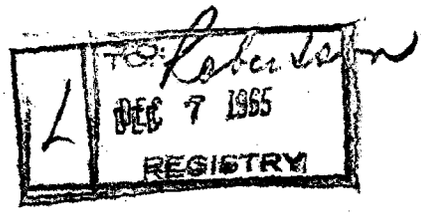
DISTRIBUTION

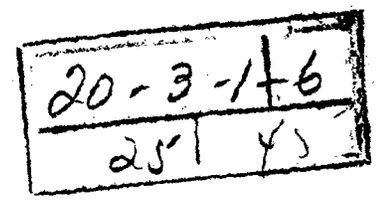
Geneva

Enclosed are two copies of document A/CN.4/183, containing the first portion of the 5th Report on the Law of Treaties by Sir Humphrey Waldock.

Ext. 407B/Bil.
(Admin. Services Div.)

Secret Rec'd RA cc UN Division file
ACTION COPY





FM GNEVA DEC7/65 RESTR

TO EXTERNAL 1358 IMMED

INFO TT PERMISNY DE OTT

REF YOURTEL L463 DEC6

ILC:DOCUMENTATION FOR WINTER SESSION

WE ARE RELUCTANT TO REQUEST PHOTOCOPYING OF BULKY REPORTS IN QUESTION,BUT ON BASIS OF TIMING GIVEN IN YOUR REFTEL AND OUR PAST EXPERIENCE ON LENGTH OF TIME IT TAKES DOCUS TO REACH GNEVA SECRETARIAT FROM NY,WE THINK IT UNLIKELY THAT WE WOULD RECEIVE ATHEM IN TIME TO MAKE EFFECTIVE PREPARATION FOR WINTER SESSION. (IT IS EVEN POSSIBLE THAT THEY WILL NOT RPT NOT ARRIVE HERE UNTIL AFTER JAN3 OPENING DATE,GIVEN POSTAL DELAYS OF XMAS PERIOD.) ON THE OTHER HAND,IF ROBERTSON IS ABLE TO PREPARE BRIEF SIMILAR TO VERY HELPFUL COMMENTARY PREPARED FOR LAST SESSION IN TIME FOR US TO RECEIVE IT PRIOR TO DEPARTURE FROM GNEVA JAN2,THIS WOULD OBVIATE OUR DIFFICULTIES CONSIDERABLY.WE WOULD PREPARE TO RECEIVE PHOTOSTATS AS SOON AS POSSIBLE BUT LEAVE DECISION TO YOU IN LIGHT OF FOREGOING.

2.FOLLOWING FOR NY:

WE HAVE RECEIVED ENQUIRY FROM USSEA ABOUT HOTEL ARRANGEMENTS.WE HAVE BEEN PRESSING LOCAL ILC SECRETARIAT REP HERE FOR THREE WEEKS FOR SUCH INFO,WITHOUT RESULTS THUS FAR.GRATEFUL FOR ANY INFO YOU CAN PROVIDE(ON BASIS ON CIRCULAR WHICH,WE UNDERSTAND,NY SECRETARIAT MAY NOW HAVE PRODUCED),ON MTG FACILITIES,HOTEL ACCOMMODATION AND OTHER ADMIN ARRANGEMENTS.''''''''

File
Diary
Div . Diary
Tel. File

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
DEC7/65	20-3-1-6	RESTD
	25 45	

FM/DE EXTERNAL OTT

TO/A	NO	PRECEDENCE
GENEVA	L-464	ROUTINE
INFO PERMISNY		

REF YOURTEL 1358

SUB/SUJ ILC: DOCUMENTATION FOR WINTER SESSION

FOLLOWING FOR BEESLEY:

WE HAVE NOW RECEIVED TEXT RELATING TO ADDITIONAL ARTICLES PREPARED BY WALDOCK AND WILL AIRMAIL TO YOU PHOTOCOPIES OF MATERIAL SO FAR AVAILABLE.

2. USSEA HAS BOOKED ACCOMMODATION FOR HIMSELF AT HOTEL DE ROME, MONTE CARLO, JAN3 TO 17 INCLUSIVE. YOU WILL SHORTLY RECEIVE LETTER FROM HIM CONFIRMING THIS TOGETHER WITH COPY OF ADMIN CIRCULAR NO. 90 PROVIDING INFO REFERRED TO IN YOUR SECOND PARA WHICH WAS FOR THE ATTENTION OF NY.

3. YOU ~~XXXXXXX~~ BEESLEY WILL PRESUMABLY MAKE SIMILAR ARRANGEMENTS FOR ~~XXX~~ YOUR OWN ACCOMMODATION.

DISTRIBUTION
LOCAL/LOCALE NO STANDARD

cc: USSEA
U.N. Division (Done in Div.)

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG ~~A.W.J.Robertson/rh~~	Legal	2-2104	SIG A. E. GOTLIEB ~~A. E. Gotlieb~~

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

Diary
Div. Diary
Tel. File
File

MESSAGE

DATE	FILE/DOSSIER		SECURITY SECURITE
DEC 6, 1965	20-3-1-6		
	25	45	RESTR

FM/DE EXTERNAL OTT

NO	PRECEDENCE
L-463	

TO/A GENEVA

INFO PERMIS NY

REF URTEL 1347 DEC 3/65

SUB/SUJ ILC: DOCUMENTATION FOR WINTER SESSION

THE RESOLUTION WHICH EMERGED FROM THE DEBATE IN THE 6TH CTTEE ON REPORTS OF THE 16TH AND 17TH SESSIONS OF THE ILC IS SUCH THAT ONLY PART 2 OF THE LAW OF TREATIES AND THOSE ARTICLES IN PART 1, FURTHER CONSIDERATION OF WHICH WAS DEFERRED UNTIL LATER, WILL BE DISCUSSED BY THE ILC AT THE FORTHCOMING JANUARY SESSION.

2. ROBERTSON HIMSELF HAS ONLY RECENTLY RETURNED FROM SIX WEEKS WITH CANDEL NY AND HAS NOT YET HAD TIME TO PREPARE THE COMMENTARY FOR THE FORTHCOMING SESSION.

3. MOREOVER, NO NEW DOCUMENTATION RELATING SPECIFICALLY TO THE SECOND PART OF THE 17TH SESSION OF THE ILC IS YET AVAILABLE. WALDOCK ONLY COMPLETED FIRST INSTALLMENT OF HIS FIFTH REPORT ON NOVEMBER 9 AND IT DID NOT REACH THE U.N. OFFICE OF LEGAL AFFAIRS UNTIL THE FOLLOWING WEEK. WE UNDERSTAND THAT THIS MAY BE AVAILABLE IN ENGLISH AFTER THE MIDDLE OF ~~JANUARY~~ DECEMBER. WE WERE IN ANY EVENT ABLE TO BORROW THE ONLY COPY FOR 24 HOURS

DISTRIBUTION
LOCAL/LOCALE No Std. (Done in Div.) cc: U.N. Div.

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG..... A.W.J.Robertson/mh	Legal	2-2104	SIG..... A.E. GOTLIEB A.E. Gotlieb

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

AND MADE A PHOTOSTAT COPY WHICH IS AVAILABLE IN OTTAWA. A FURTHER SECTION DEALING WITH ARTICLES 36 TO 39 INCLUSIVE WAS RECEIVED BY THE U.N. ON DEC 4/65, A PHOTOCOPY OF WHICH HAS ALSO BEEN OBTAINED AND IS EN ROUTE FROM NEWYORK TO OTTAWA. IN VIEW OF POSSIBILITY OF HAVING PRINTED TEXT IN TWO WEEKS TIME WE WILL NOT RECOPY THESE BULKY PHOTOSTATS FOR YOU UNLESS YOU SPECIFICALLY REQUEST THEM.

BEST COPY AVAILABLE

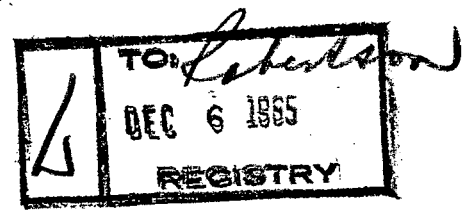
File

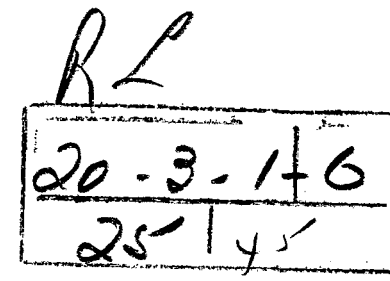
ACTION COPY

HW ZDK EN48

OTT31

EN48





FM CANDELNY DEC4/65

TO EXTERNAL 2705

ROBERTSON LEGAL DIVISION DE WERSHOF

ILC LAW OF TREATIES

WATTLES HAS RECEIVED FURTHER BATCH OR ARTICLES(36 37 38 AND 39) FROM WALDOCK AND I AM SENDING ONE PHOTOCOPY BY MAIL TO YOU TODAY.

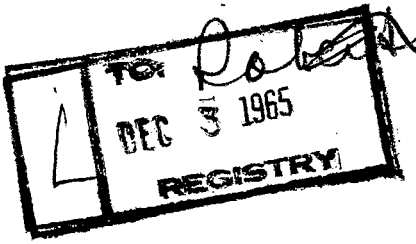
2. SECRETARIAT IS PESSIMISTIC ABOUT DATE OF ISSUING OF OFFICIAL COPIES OF 5TH REPORT. FIRST SECTION OF IT IN ENGLISH MAY BE AVAILABLE HERE ABOUT DEC16.

3. I ASSUME YOU WILL ANSWER GNEVA TEL 1347 DEC3 WITH COPY TO US. IF YOU WANT PERMISNY TO DO ANYTHING FOR GNEVA PLEASE ADVISE.

cc

Action Copy

OTT048



PAR63/3

OO NYK RR OTT

DE GVE

O R 031620Z

FM GNEVA DEC3/65

TO PERMISNY 1347 IMMED

INFO EXTERNAL

ILC: DOCUMENTATION FOR WINTER SESSION

GRATEFUL FOR ANYTHING YOU CAN DO TO EXPEDITE RECEIPT BY US OF COPIES OF DOCUMENTATION FOR WINTER SESSION OF ILC.

Re on I.L.C file on Law of Treaties

22.IX.66

COPY

ALL SOULS COLLEGE,
OXFORD.

29th November 1965.

Dear Wattles,

As promised, I am sending off to-day four more articles, Nos. 36, 37, 38 and 39. I am hoping to let you have another four or five articles within the next ten days.

Yours sincerely,

Humphrey Waldock

Mr. Gurdon W. Wattles,
Deputy Director,
Codification Division,
Office of Legal Affairs,
United Nations,
NEW YORK, N.Y.

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: Sous-secrétaire
(Par l'intermédiaire de M. D'I. Fortier
Dir. des Affaires de Presse)

FROM / De: Direction de l'Information

REFERENCE / Référence:

SUBJECT / Sujet: Préparatifs en vue de la signature de l'accord culturel franco-canadien

SECURITY / Sécurité: CONFIDENTIEL

DATE: Le 10 novembre 1965

NUMBER / Numéro:

FILE / DOSSIER: 20-3-1-6

OTTAWA: ~~20-3-1-3-1965~~

MISSION:

ENCLOSURES / Annexes:

DISTRIBUTION

Dir. Européenne
Dir. Juridique
M. Hardy,
Conseil Privé

Vous trouverez ci-joint un mémoire au Ministre au sujet des arrangements à faire en vue de la signature de l'Accord culturel le 15 novembre à 11:00 heures. Vous voudrez bien le signer si vous êtes d'accord.

E. R. BELLEMARE

Direction de l'Information

Ext. 407C/Bil.
(Admin. Services Div.)

cc: Dir. Européenne
Dir. Juridique
M. Hardy, Conseil Privé

Tofiel

CONFIDENTIEL

Le 10 novembre 1965.

20-3-1-6

~~20-3-1-2~~	QUE
NK	

MEMOIRE AU MINISTRE

Entente France - Québec

L'Ambassadeur de France nous a fait savoir qu'il était d'accord pour procéder à la signature de l'Accord culturel le lundi 15 novembre à 11:00 heures du matin. Désirez-vous que la cérémonie ait lieu dans votre bureau ou dans un endroit plus solennel comme le Commonwealth Room dans l'édifice de l'ouest?

Pourriez-vous également nous indiquer quel genre de publicité vous désirez donner à l'événement? Il serait à mon avis souhaitable d'inviter quelques photographes à la cérémonie pour en assurer le reportage photographique dans la presse et à la télévision. Pourriez-vous nous laisser savoir si vous souhaitez également la présence de quelques journalistes de la presse écrite?

M. CADIEUX

M.C.

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: Under-Secretary of State for External Affairs, Ottawa

FROM / De: Office of the High Commissioner for Canada, Nicosia

REFERENCE / Référence:

SUBJECT / Sujet: Cyprus: Law of International Treaties

SECURITY / Sécurité: Unclassified

DATE: October 27, 1965

NUMBER / Numéro: 207

FILE	DOSSIER
OTTAWA	
20-3-1-6	
MISSION	
20-3-CYP	25/45

cc 24-12-7-20 pt. 6

ENCLOSURES / Annexes: ...

DISTRIBUTION

Attached for the record is a Public Information Office Press Release of October 26, 1965 reporting the intervention made by the Cypriot representative in the 6th Committee under the item "Report of the International Law Commission on the Law of International Treaties".

2. As you will notice he took that opportunity to express - and in terms of the draft articles to attempt to justify - the Government's view that the Treaty of Guarantee and the Treaty of Alliance have ceased to be binding on Cyprus.

for Office of the High Commissioner

Ext. 407A/Bil.
(Admin. Services Div.)

ΓΡΑΦΕΙΟΝ ΔΗΜΟΣΙΩΝ ΠΛΗΡΟΦΟΡΙΩΝ
ΑΝΑΚΟΙΝΩΘΕΝ

PUBLIC INFORMATION OFFICE
PRESS RELEASE

26th October, 1965.

No. 2

REPORT OF INTERNATIONAL LAW COMMISSION ON THE LAW OF INTERNATIONAL TREATIES

The first item on the Agenda of the United Nations General Assembly 6th (Legal) Committee under the title "Report of International Law Commission on the Law of International Treaties" afforded an opportunity to the Cyprus Republic's Delegate, Mr. Andrew Jacovides, Foreign Ministry Counsellor, to set out his Government's views on the subject under discussion, which is directly related to the Cyprus cause.

Mr. Jacovides, advancing strong legal arguments, made a successful and modern analysis of the draft article proposed by the International Law Commission which attempts the formulation of the rule on the binding character of treaties in legal force.

The Cypriot Delegate, invoking the developing principles of International Law, which are day by day gaining general acceptance and approval, underlined the importance of the term "in legal force", observing that treaties which are invalid from the start such as those which violate the United Nations Charter (vide Article 103 of the Charter) or those which have been denounced and terminated in due form in view of the substantial violation of their provisions by one of the parties, are naturally excluded from the rule on the binding character of treaties as this has been worded and submitted to the 6th Committee.

Mr. Jacovides says argumentation, which received widely favourable approval, was an indirect yet clear contribution to the further legal annihilation of the Treaty of Guarantee and the Treaty of Alliance.

Below is the text of Mr. Jacovides's address to the 6th Committee:-

/.....

Mr. Jacovides congratulated the International Law Commission on having made of its labour of codification something better than a sterile compilation and having worked on the progressive development of international law on lines which took due account of the political, economic and social developments and the creation of many newly independent States. It was with this in mind that the Commission had rightly decided to give the codification of the law of treaties the form of a multilateral convention which would give all the new States the possibility of participating directly in the formulation of the Law and thus place the law of treaties on a wider and more solid foundation. The existence of those new States also imposed upon the Commission the duty of studying as soon as possible the question of the succession of States and Governments, although it must be approved for having kept that question and the responsibility of States outside the draft articles before the Committee.

The Cypriot Government would submit its observations on the draft articles as soon as possible and he would therefore confine himself to a few general remarks.

The Commission had been quite right in specifying in article 55 that the rule pactasunt servanda should apply to treaties "in force". That rule must be interpreted bearing in mind all the draft articles according to which a treaty might not "be in force" and in particular those draft articles which referred to the invalidity of treaties and their termination.

That stipulation was in agreement with paragraph 2 of Article 2 of the Charter according to which obligations assumed by Member States were "in accordance with the present Charter". Thus a treaty could not come into force nor establish obligations within the meaning of draft Article 55 nor within the meaning of Article 2 of the Charter if it had been concluded under the threat or use of force in violation of the principles of the Charter. In such a case it was for the State concerned to decide freely, once it had attained complete equality with all other States, if it intended to continue to observe the treaty in question. That was even more true in cases where the treaty had been imposed upon a people in circumstances which excluded all liberty of decision on its part, before its accession to independence and as the price for such accession.

The same applied to treaties which were incompatible with an imperative rule of general international law, for example,

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a treaty which provided for the unlawful use of force contrary to the principles of the Charter or which contained provision intended to deprive a State of its sovereignty and of its independence, for such provisions rendered the whole treaty invalid.

Likewise a treaty could not come into force within the meaning of draft Article 55 if one of the parties had terminated it in good and due form on grounds of the substantial violation of its provisions by the other party.

The Cypriot delegation approved the wording of Articles 58 and 59 but wished to point out that the essential rule was that the parties to a treaty could not impose an obligation on a third State without its consent. In other words, the notion of constraint and the doctrine concerning unjust treaties applied equally in the case where a State, without any real liberty of choice found itself forced to assume an obligation derived from an agreement to which it was not a party and a fortiori when the third State in question had not yet achieved the capacity of a State and still found itself under a colonial regime.

With regard to Article 63, the Cypriot delegation approved the Commission for having insisted on the over-riding character of Article 103 of the Charter and went so far as to consider that, if the case should arise, the competent organs of the United Nations should be guided by andapply Article 103 unreservedly.

In Articles 69, 70 and 71 relating to the interpretation of treaties, it would have been preferable to attach more weight to the maxim ut res magis valeat quam pereat.

The Cypriot delegation was glad to note the co-operation established between the International Law Commission and other bodies such as the Asian-African Legal Consultative Committee and the Inter-American Council of Jurists and hoped that those ties would be strengthened and increased.

The organisation of a Seminar of International Law by the European Office of the United Nations was an excellent thing and he approved the proposal to organise new seminars during the future sessions of the Commission, provided that the participants were chosen on an equitable geographical basis and with regard to the needs of the developing countries.

The Cypriot delegation also appreciated the need to hold a winter session in 1966 and if necessary to prolong the summer session by a fortnight.

Cyprus approved the draft resolution submitted by Lebanon and Mexico and the amendment proposed by Ghana and Rumania.

/TH

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ACTION COPY

TO: Miller
OCT 22 1965
REGISTRY

20-3-1+6
25 | 25

cc 24-12-7-20th 6th
9-17

FM CANDELNY OCT21/65 RESTR

TO EXTERNAL 1959

REF YOURTEL L415 OCT19

20TH UNGA:6TH CTTEE:AGENDA 88:LEAGUE TREATIES

IN OURTEL1905 OCT18 WE HAD SENT YOU TEXT OF PROPOSED 6 COUNTRY AMENDMENT A/C.6/L.566 TO DRAFT RESLN A/C.6/L.563 OF OCT14 WHICH WAS ITSELF SLIGHTLY REVISED THEREAFTER(A/C.6/L.465 REV 1 OCT18). YOUR REFTEL WAS RECEIVED BY US ONLY WED MORNING.IN MEANTIME WE HAD DECIDED PROPOSED AMENDMENT(BY PUTTING QUESTION OF POSSIBLE NEED TO AMEND TREATIES CONCERNED INTO OPERATIVE PARA INSTEAD OF POINTING OUT IN IT WHICH TREATIES MIGHT BE OF POTENTIAL INTEREST TO NEW STATES)CHANGED WHOLE EMPHASIS OF DRAFT RESLN L.465: MOREOVER ITS CONCLUDING SECTION QUOTE IF STATES ACCEDING TO THEM SHOULD SO REQUEST UNQUOTE WE THOUGHT WRONG IN LAW(SINCE ONLY PARTIES TO THESE TREATIES ARE ENTITLED IN ACCORDANCE WITH RELEVANT SECTIONS PROVIDIVNG FOR THEIR REVISION TO SEEK TO AMEND THEM).

2.TUE MORNING THEREFORE SAW ACTIVE LOBBYING BY INTERESTED PARTIES INCLUDING OURSELVES TO REMEDY THESE DEFECTS.THIS LED TO AGREEMENT BETWEEN TWO SPONSORING GROUPS ON REVISED FORMULATION(A/C.6/L.466 REV 1 OCT19)WHICH WAS MOVED BY MALI TOWARDS END OF TUE PMS DEBATE.AS ACCEPTED BY SPONSORS OF L563 AND COMMINGLED WITH THEIR ORIGINAL RESLN REVISED TEXT L563 REV2 OCT19 IS SET OUT IN IMMED FOLLOWING TEL.IT HAD BEEN HOPED TO VOTE ON THIS REVISED RESLN ON TUE BUT REMAINDER OF PROLONGED MTG DEGENERATED INTO PARTIALLY PROCEDURAL WRANGLE.FURTHER TO QUOTE ALL STATES UNQUOTE

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ARGUMENT GHANA PROPOSED SEPARATE VOTE ON THAT PART OF OPERATIVE PARA1 QUOTE WITHIN TERMS OF UNGA RESLN 1903 /;888 OF NOV18/63 AND UKRAINE WENT ON TO PROPOSE ADDITIONAL SEPARATE VOTES ON FIRST PREAMBULAR PARA WHICH REFERS TO RESLN 1903 XVIII AND ON WORDS IN THIRD PREAMBULAR PARA QUOTE SECGEN HAS ALREADY ISSUED INVITATIONS FOR ACCESSION TO THOSE INSTRUMENT UNQUOTE.ARGENTINA SUPPORTED BY FRANCE AND LATINAMERICAN COUNTRIES MOREOVER PROPOSED SEPARATE VOTE ON OPERATIVE PARA2 AS IT CONSIDERED THAT IT WAS NOT RPT NOT FOR UNGA AS THIRD PARTY TO INDICATE TO PARTIES TO TREATIES ANY KIND OF ACTION WHICH THEY SHOULD TAKE ON THEM.

3.BECAUSE MANY DELS HAD BY THAT TIME LEFT MTG AND IF VOTING WERE TO TAKE PLACE THOSE OPPOSED TO REFS TO RESLN 1903 XVIII MIGHT BE IN MAJORITY NZ PROPOSED THAT MTG ADJOURN AND IT DI SO.

4.FURTHER LOBBYING TOOK PLACE WED AM AND ENTIRE WED PM MTG WAS ALSO DEVOTED TO THIS ITEM.ARGENTINA AFTER WESTERN PRESSURES AND WITH AGREEMENT OF LATINAMERICAN GROUP WITHDREW ITS OPPOSITION TO OPERATIVE PARA2;MOVE INTENDED TO PLACATE AFRICAN OPINION AND THUS SECURE THEIR SUPPORT FOR REST OF RESLN.

5.THEN SECGEN IN RESPONSE TO QUESTION FROM DENMARK EXPLAINED THAT EMASCULATED RESLN WHICH DID NOT RPT NOT REFER TO RESLN 1903 XVIII WOULD CREATE PROBLEMS SIMILAR TO ONE CONTAINING AN QUOTE ALL STATES UNQUOTE FORMULATION AND COULD LEAD TO DIFFICULTIES SUCH AS THOSE TO WHICH SECGEN HAD REFERRED IN PLENARY IN HIS STATEMENT 1258 ON NOV18/63.

6.CDA UK AND OTHER WESTERN DELS AGAIN SPOKE IN SUPPORT OF RESLN

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AND OTHERS AGAINST IT.CLOSURE WAS FINALLY MOVED BY SENEGAL TOWARDS END OF AFTERNOON AND ROLLCALL VOTES ON EACH OF DISPUTED 3 PARAS OF RESLN THEN TOOK PLACE.

7.VOTING ON FIRST PREAMBULAR PARA WAS 67(CDA)IN FAVOUR 10 AGAINST 11 ABSTENTIONS.VOTING ON WORDS IN THIRD PREAMBULAR PARA WAS 65(CDA)IN FAVOUR 9 OPPOSED 14 ABSTENTIONS.VOTING ON OPERATIVE PARA1 WAS 52(CDA)IN FAVOUR 17 OPPOSED 17 ABSTENTIONS.

8.ON RESLN AS WHOLE VOTING WAS 69(CDA)IN FAVOUR NONE OPPOSED 17 ABSTENTIONS.

9.THUR AM MTG WILL HEAR EXPLANATIONS OF VOTE.

ACTION COPY

file SR

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TO: Miller
OCT 22 1965
REGISTRY

20-3-1-6
251 25

cc 24-12-7-20th-6th

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OTT085

RR OTT
DE NYK
R 211826Z
FM CANDELNY OVT21/65
TO EXTERNAL 1967
REF OURTEL1959 OCT21
20TH UNGA:6TH CTTEE:AGENDA 88:LEAGUE TREATIES FOLLOWING IS TEXT OF A/C.6/L.563 REV2.
TEXT BEGINS:
THE UNGA
RECALLING ITS RESLN 1905(XVIII)OF NOV18/63 ON PARTICIPATION IN GENERAL MULTILATERAL TREATIES CONCLUDED UNDER THE AUSPICES OF THE LEAGUE OF NATIONS,
HAVING CONSIDERED THE REPORT OF SECGEN(A/5759 AND ADD.1)SUBMITTED IN ACCORDANCE WITH OPERATIVE PARA3(D)OF THAT RESLN,
NOTING THAT SINCE THERE WAS SUFFICIENT EVIDENCE THAT THE INTERNTL CONVENTION ON THE SUPPRESSION OF COUNTERFEITING CURRENCY AND THE OPTIONAL PROTOCOL THERETO BOTH DONE AT GNEVA ON APR20,1929, WERE STILL IN FORCE AND WERE OF INTEREST FOR ACCESSION BY ADDITIONAL STATES THE SECGEN HAS ALREADY ISSUED INVITATIONS FOR ACCESSION TO THOSE INSTRUMENTS,
FURTHER NOTING THE RESULTS OF SECGENS CONSULTATIONS IN REGARD TO THE OTHER NINETEEN TREATIES DEALT WITH IN ABOVE-MENTIONED REPORT,
NOTING IN PARTICULAR THE OPINIONS STATED IN REPORT OF SECGEN THAT SOME OF THESE TREATIES MAY NEED TO BE ADAPTED TO CONTEMPORARY CONDITIONS,
1. RECOGNIZES THAT FROM AMONG THE NINETEEN TREATIES MENTIONED ABOVE THOSE LISTED IN ANNEX TO PRESENT RESLN MAY BE OF INTEREST

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File
Tel File
Diary
Div. Diary

MESSAGE

DATE	FILE/DOSSIER		SECURITY SECURITE
OCT. 19	20-3-1-6/		
	25	43	RESTRICTED

FM/DE EXTERNAL

	NO	PRECEDENCE
TO/A PERMISNY	L-415	PRIORITY
INFO		

REF YOURTEL 1905 OF OCT 18

SUB/SUJ 6TH CTTEE AGENDA ITEM 88

SIR KENNETH BAILEY HAS EXPRESSED SOME CONCERN TO US ABOUT AMENDMENT L566 OF DRAFT RESOLUTION L563. HE HOPED THAT YOU WOULD KEEP IN TOUCH WITH AUSTRALIAN DELEGATION ABOUT THIS MATTER.

2. WE AGREE THAT THE AMENDMENT IS PROBABLY NOT AN IMPROVEMENT BUT DOUBT WHETHER IT WOULD BE WORTHWHILE TO SEEK ACTIVELY TO CHANGE OR BLOCK IT UNLESS THERE WERE WIDESPREAD DISSATISFACTION WITH ITS TERMS.

DISTRIBUTION NO STD
LOCAL/LOCALE U. N. DIVISION (DOUG IN DIV.)

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG. G.Hammond/efg	Legal	2-5406	SIG. A. E. GOTLIEB

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

ACTION COPY

TO
OCT 29 1965
REGISTRY

20-3-1-6
25 | 25

cc 24-12-7-20th - 6th

FM CANDELNY OCT18/65 RESTR

TO EXTERNAL 1904

REF OURTEL1862 OCT15

6TH CTTEE:AGENDA ITEM NUMBER 88;LEAGUE TREATIES

THE QUOTE ALL STATES UNQUOTE VS QUOTE MEMBER STATES ETC.UNQUOTE ARGUEMENT RECEIVED A GOOD AIRING IN OCT15 AND 18 MTGS OF 6TH CTTEE WITHOUT HOWEVER ANY SUBSTANTIVE CHANGES BEING PROPOSED TO THE RELEVANT SECTIONS OF SWEDISH/NORWEGIAN DRAFT RESLN A/C. 6/L563(OUR REFTEL REFERS).MANY STATES HAVE STATED THEIR PREFERENCES FOR AN QUOTE ALL STATES UNQUOTE FORMULATION BUT XAJORITY OF THOSE WHICH HAVE DONE SO SO FAR SEEM PREPARED TO GO ALONG WITH DRAFT RESLN INSTEAD OF TRYING TO REOPEN SUBSTANTIVE DEBATE WHICH LED UP TO UNGA RESLN 1903(SVIII).IT MAY THEREFORE STILL PROVE POSSIBLE FOR 6TH CTTEE TO ADOPT DRAFT RESLN MORE OR LESS IN ITS PRESENT FORM.SOME QUESTION AS TO SUITABILITY OF CERTAIN OF ANNEXED TREATIES TO CONTEMPORARY CONDITIONS IS ALSO BEING DISCUSSED AND IS REFLECTED IN AN AMENDMENT TO DRAFT RESLN PROVIDED BY ALGERIA GUINEA AND OTHER STATES AND SET OUT ENCLAIR IN OUR IMMEDLY FOLLOWING TEL.

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TO: Pitfield
OCT 19 1965
REGISTRY

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20-3-1-6
25 | 25

cc 24-12-7-20th-6th

OTT003

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FM CANDELNY OCT18/65

TO EXTERNAL 1905

REF OURTEL1904 OCT18

6TH CTTEE:AGENDA ITEM NUMBER 83;LEAGUE TREATIES

FOLLOWING IS TEXT OF DOCU A/C/6/L.566 OF OCT18 TO AMEND DRAFT RESLN L.563.BEGINS:

1.DELETE THE FIFTH PARA.

2.IN THE SIXTH PARA REPLACE THE WORD QUOTE RECOGNIZES UNQUOTE BY THE WORD QUOTE RECOGNIZING UNQUOTE.

3.ADD A NEW PARA READING AS FOLLOWS:QUOTE TAKES NOTE OF THE DESIRABILITY EXPRESSED IN THE REPORT OF THE SECGEN OF ADAPTING SOME OF THESE TREATIES TO CONTEMPORARY CONDITIONS IF STATES ACCEDING TO THEM SHOULD SO REQUEST UNQUOTE.TEXT ENDS.

OTT046

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HW AMENDED VERSION OUR 1889 OCT18/65

J-16

cc 24-12-7-20th. 6th

ACTION COPY

This seems to be a repeat

FM PERMISNY OCT18/65

TO EXTERNAL 1889

INFO LEGAL DIV OTT UN DIV OTT DE OTT — done in Comserve

REF OURTEL 813 OCT12

6TH CTTEE:AGENDA ITEM 88;GENERAL MULTILATERAL TREATIES

TRANSMITTAL SLIP DATED OCT13 COVERING COPIES OF YOURLET L418 SEP2 AND CDN COMMENTS FOR SECRETARIAT RECEIVED.

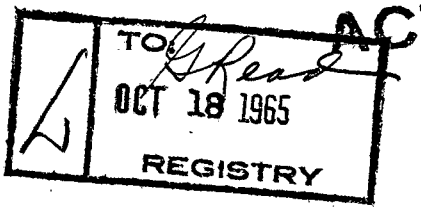
FOR RECORD YOUR ORIGINAL NUMBERED LET WOULD SEEM NEVER TO HAVE REACHED NY AND SECRETARIAT HAS THEREFORE NOT RPT NOT YET BEEN GIVEN CDN COMMENTS.PERHAPS YOU WOULD LIKE TO TRACE WHAT BECAME OF IT.

Mrs. Patvin please trace Glowin

Relates to Our letter L418 of Sept. 2

NNNNXVVVVV

OTT049



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EN028

FM PERMISNY OCT18/65

TO EXTERNAL 1889

INFO LEGAL DIV OTT UN DIV OTT → done

REF OURTEL 813 OCT12

6TH CTTEE:AGENDA ITEM 88;GENERAL MULTILATERAL TREATIES

TRANSMITTAL SLIP OCT13 COVERING COPIES OF YOURLET L418 SEP2

AND CDN COMMENTS FOR SECRETARIAT RECEIVED.

20-3-46

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[redacted]

OTT079

Draft Resolution
A/C 6/L.563

ACTION COPY

EN355

FM CANDELNY OCT15/65

TO EXTERNAL 1862

INFO TT GNEVA DE OTT

REF OURTEL 1861 OCT15

6TH CTTEE

FOLLOWING IS TEXT OF DRAFT RESLN ON AGENDA ITEM 88 REFERRED TO IN OURTEL 1861 OCT15.TEXT BEGINS QUOTE

GENERAL MULTILATERAL TREATIES CONCLUDED UNDER AUSPICES OF LEAGUE OF NATIONS

NIGERIA AND SWEDEN:DRAFT RESLN

UNGA:

1. RECALLING ITS RESLN 1903(XVII)NOV18/63 ON PARTICIPATION IN GENERAL MULTILATERAL TREATIES CONCLUDED UNDER AUSPICES OF LEAGUE OF NATIONS
2. HAVING CONSIDERED REPORT OF SECGEN(A/5759 AND ADD.1)SUBMITTED IN ACCORDANCE WITH OPERATIVE PARA 3(C)OF THAT RESLN
3. NOTING THAT SINCE THERE WAS SUFFICIENT EVEIDENCE THAT INTERNAINL CONVENTION ON SUPPRESSION OF COUNTERFEITING CURRENCY AND OPTIONAL PROTOCOL THERETO BOTH DONE AT GNEVA ON APR20/29 WERE STILL IN FORCE AND WERE OF INTEREST FOR ACCESSION BY ADDITIONAL STATES SECGEN HAS ALREADY ISSUED INVITATIONS FOR ACCESSION TO THOSE INSTRUMENTS
4. FURTHER NOTING RESULTS OF SECGENS CONSULTATIONS IN REGARD TO OTHER NINETEEN TREATIES DEALT WITH IN ABOVE MENTPONED REPORT
5. RECOGNIZING THAT AN INVITATION TO ACCEDE IS SIMPLY A FORMAL STEP WHICH PERMITS ADDITIONAL STATES TO BECOME PARTIES IF THEY WISH TO DO SO BUT DOES NOT RPT NOT PREJUDICE QUESTION WHETHER TREATIES SHOULD BE ADOPTED TO CONTEMPORARY CONDITIONS OR QUESTION OF METHOD BY WHICH SUCH ADAPTATION IF DESIRABLE SHOULD BE ACCOMPLISHED

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RECOGNIZES THAT TREATIES LISTED IN ANNEX TO PRESENT RESLN MAY BE OF INTEREST FOR ACCESSION BY ADDITIONAL STATES WITHIN TERMS OF UNGA RESLN 1903(XVIII)NOV18/63.UNQUOTE TEXT ENDS.

2.ANNEX LISTS 9 TREATIES IN FIRST 3 CATEGORIES MENTIONED IN PARAS 133-135 OF REPORT OF SECGEN A/5759.

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FILE COPY

MESSAGE

RE

DATE	FILE/DOSSIER		SECURITY SECURITE
OCT.13/65	20-3-1-6		
	37	4s'	UNCLAS.

FM/DE EXTERNAL OTT

NO	PRECEDENCE
L-403	PRIORITY

TO/A CANBELN.Y.

INFO

REF YOURTEL 1813 OF OCT. 12

SUB/SUJ 6th CTTEE. AGENDA ITEM 88

COPIES OF YOURLET 637 OF JULY 9 REQUESTING CDN COMMENTS ON THIS ITEM AND OUR REPLY L 418 OF SEPT. 2 ARE GOING FORWARD BY BAG TODAY.

DISTRIBUTION
LOCAL/LOCALE

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG. G.....READ-HAMMOND...../cs.	LEGAL	2-5406	SIG. A. E. GOTLIEB ..... A.E. GOTLIEB

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

NNNN

was seen by Mr. Goldbloom Mr. Miller Mr. Miller + ACTION Copy

Mr. Goldbloom
Mr. Miller
& file

KVV

A-20-3-1-6

OTT089

EN48

FM CANDELNY OCT12/65

TO EXTERNAL 1813

REF OURLET 84 JAN31/64

6TH CTTEE:AGENDA ITEM 88 GENERAL MULTILATERAL TREATIES

OURLET UNDER REF WITH ATTACHED NOTE LE 245/1 JAN24/64 REQUESTED

CDN COMMENTS ON MATTER REFERRED TO IN SUB-PARA(C)OF OP PARA3

OF UNGA RESLN 1903(XVIII) NOV18/63.

2.ALTHOUGH OUR FILES RECORD NO RPT NO REPLY,IT IS OUR UNDERSTANDING

THAT CDN COMMENTS WERE SUBMITTED ON THIS MATTER RECENTLY.IF SO,

WE WOULD BE GRATEFUL FOR A COPY SOONEST.THIS MATTER IS LIKELY

TO BE TAKEN UP BY 6TH CTTEE AT END OF THIS WEEK.

RL

20-3-1-6

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orig: 24-12-7-20th-6th

FM CANDELNY OCT8/65 RESTR

TO EXTERNAL 1779

REF OURTEL 1728 OCT5

6TH CTTEE:ILC REPORTS:DRAFT RESLN

GENERAL DEBATE ON ILC REPORT IS EXPECTED TO END ON WED OCT13 AFTER WHICH THERE MAY BE A BRIEF FURTHER DEBATE AND ADOPTION OF A RESLN.

2.OURTEL 1780 OCT8 SETS OUT TEXT OF A PROPOSED AMENDMENT SUBMITTED TODAY BY GHANA AND RUMANIA TO LEBANON-MEXICO DRAFT RESLN SENT IN OUR REFTEL.IT IS LIKELY THAT THIS TEXT MAY BE SLIGHTLY REVISED.

3.SECRETARIAT AND SOME OTHER MISSIONS ARE DUBIOUS AS TO WISDOM OF REFERRING TO ILC SEMINARS IN AN OPERATIVE PARA BUT WORDING OF AMENDMENT APPEARS SUFFICIENTLY BROAD NOT RPT NOT TO COMMIT UN TO FINANCING SCHOLARSHIPS.SINCE IT APPEARS LIKELY THAT LARGE MAJORITY INCLUDING MOST WESTERN NATIONS WILL FAVOUR VOTING IN SUPPORT OF THIS AMENDMENT WE PROPOSE TO DO SO AS WELL UNLESS YOU INSTRUCT US OTHERWISE OR UNLESS SECRETARIAT DECIDES THERE ARE FINANCIAL IMPLICATIONS FOR UN.

Chevrier

Miller
JG

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Orig: 24-12-7-20½-6 tr

FM CANDELNY OCT6/65 RESTR

TO EXTERNAL 1744 IMMED

REF OURTEL 1728 OCT5

6TH CTTEE-ITEM 87 REPORTS OF ILC

IMMEDLY FOLLOWING TEL CONTAINS PARTIAL TEXT OF SHORT STATEMENT WE PROPOSE TO MAKE MON MORNING OCT11.IF YOU WISH TO MAKE CHANGES OR SUGGEST EXPANSION PLEASE TRY TO SEND TEL BY END OF FRI.

2.REFTEL GAVE TEXT OF RESLN TABLED BY LEBANON AND MEXICO.WE HAVE DISCUSSED IT WITH SECRETARIAT WHO HELPED TO DRAFT IT.THEY ARE SATISFIED RESLN IS SATISFACTORY.SECRETARIAT SAID IT IS NOT RPT NOT NECESSARY OR PROPER FOR OPERATIVE PART OF RESLN TO APPROVE HOLDING OF JAN 1966 MTG.SPECIFIC LEGAL AUTHORITY FOR THAT WILL BE OBTAINED IN BUDGET ESTIMATES TO BE DEALT WITH IN FIFTH CTTEE. AS FOR TWO-WEEK EXTENSION OF 1966 SUMMER SESSION,SECGEN SAID IN DOCU A/C.6/L.557 OF SEP27 THAT COST COULD PROBABLY BE COVERED WITHIN LEVEL OF CREDITS ALREADY REQUESTED IN HIS 1966 BUDGET ESTIMATES.DRAFT RESLN IS LIKELY TO BE VOTED EARLY NEXT WEEK AND WE PROPOSE TO SUPPORT IT.

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orig: 24-12-7-20th. 6th

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DFM CANDELNY OCT6/65

TO EXTERNAL 1745 IMMED

REF OUR IMMEDLY PRECEDING TEL

6TH CTTEE-ITEM 87 REPORTS OF ILC

FOLLOWING IS PARTIAL TEXT OF PROPOSED CDN STATEMENT TO BE MADE

MON NEXT:

TEXT BEGINS:

2.OF THE MATTERS WHICH ARE DEALT WITH IN THE REPORTS OF THE ILC ON ITS 16TH AND 17TH SESSIONS,THE DRAFT ARTICLES DRAWN UP WITH RESPECT TO THE LAW OF TREATIES AND TO SPECIAL MISSIONS ARE UNDOUBTEDLY OF THE GREATEST IMPORTANCE,SINCE IT IS THESE WHICH MOST URGENTLY NEED TO BE PUT INTO FINAL FORM BEFORE THE TERM OF MEMBERSHIP OF THE COMMISSION,AS AT PRESENT CONSTITUTED,EXPIRES.MY GOVT HAS ALREADY SUBMITTED ITS OBSERVATIONS ON THE FIRST AND SECOND PARTS OF THE DRAFT LAW OF TREATIES,HOWEVER,AND IT PROPOSES TO SUBMIT OBSERVATIONS ON THE THIRD PART OF THE LAW OF TREATIES AND ON THE DRAFT ARTICLES ON SPECIAL MISSIONS EARLY IN 1966.I DO NOT RPT NOT,THEREFORE,PROPOSE TODAY TO COMMENT SUBSTANTIVELY ON EITHER OF THESE PROJECTS;SUFFICE IT TO SAY THAT CDA IS ANXIOUS THAT BOTH THESE DRAFTS BE COMPLETED BY THE INTERNATIONAL LAW COMMISSION IN TIME FOR THEM TO BE CONSIDERED BY THE SIXTH CTTEE NEXT YEAR.IT IS FOR THIS REASON THAT CDA WILL ACTIVELY SUPPORT THE PROGRAMME OF WORK WHICH THE ILC HAS PROPOSED IN CHAPTER IV OF THE REPORT ON ITS 17TH SESSION AND WHY,IN PARTICULAR,WE FAVOUR THE HOLDING OF THE PROPOSED WINTER SESSION IN JUN OF 1966 AND,IF NECESSARY,

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THE EXTENSION OF THE REGULAR 1966 SUMMER SESSION AS WELL.

3.FURTHER TO THE LAW OF TREATIES I SHOULD ALSO LIKE TO REFER BRIEFLY TO A NUMBER OF OTHER MATTERS.OF THESE,THE FIRST IS THE PRESENT INTENTION OF THE ILC TO DRAW UP THE DRAFT ARTICLES OF THE LAW OF TREATIES IN THE FORM OF A SINGLE UNIFIED CONVENTION. MY DEL IS IN FAVOUR OF THIS PROPOSAL SINCE IT IS OUR BELIEF THAT THE EMERGENCE OF A CONVENTION,FROM THE MEANY YEARS OF EFFORT WHICH HAVE LED UP TO THE ILCS PRESENT TASK OF REVISING IN FINAL FORM THE DRAFT LAW OF TREATIES,WOULD CONTRIBUTE IN A MARKED DEGREE TO THE ESTABLISHMENT OF GREATER CERTAINTYSBETWEEN NATIONS IN THIS EX-TREMELY IMPORTANT FIELD OF INTERNATIONAL LAW.

4.THE SECOND MATTER TO WHICH I SHOULD LIKE TO REFER IN THIS CONTEXT IS THE SUGGESTION,MADE BY THE REP OF ISRAEL WHEN HE ADDRESSED THIS CTTEE ON OCT1,THAT THE SECRETARIAT MIGHT BE ASKED TO PREPARE FOR SUBMISSION TO THE 21ST SESSION OF UNGA A PAPER ON THE CONCRETE QUESTIONS LIKELY TO ARISE IF A DIPLO CON-FERENCE WERE TO BE CONVENED TO DEAL WITH THE DRAFT CONVENTION. IT IS THE OPINION OF CDN DEL THAT THE TIME IS NOT RPT NOT FAR OFF WHEN CONSIDERATION SHOULD INDEED BE GIVEN TO WHAT IS TO BE DONE IN DUE COURSE WITH THE ILCS DRAFT CONVENTION ON THE LAW OF TREATIES.WE THEREFORE AGREE WITH THE ISRAEL REPS SUGGESTION THAT THIS IS A MATTER TO WHICH THE SECRETARIAT MIGHT BE ASKED TO DEVOTE ITS AZTENTIONS PRIOR TO THE 21ST SESSION OF UNGA.

5.BEFORE LEAVING THE SUBJECT OF THE LAW OF TREATIES I SHOULD ALSO

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LIKE TO REFER TO THE WORK OF THE LATEST RAPPORTEUR IN THAT FIELD, SIR HUMPHREY WALDOCK,WHOSE LABOURS OVER THE PAST YEARS HAVE SO GREATLY FACILITATED NOT RPT NOT ONLY THE WORK OF THE INTERNATIONAL LAW COMMISSION ITSELF BUT ALSO THE APPRECIATION AND UNDERSTANDING BY GOVTS OF THE PURPOSE OF THE DRAFT ARTICLES.IT IS TRUE THAT THE WORK OF THE ILC IS A CORPORATE ONE TO WHICH MANY MEMBERS HAVE CONTRIBUTED BUT FOR THE DRAFT ARTICLES ON THE LAW OF TREATIES,AT THIS PRESENT STAGE,SIR HUMPHREY WALDOCK DESERVES BOTH OUR THANKS AND HIGH PRAISE.PROF BARTOS,WHO SO ABLY INTRODUCED THE REPORT OF THE INTERNATIONAL LAW COMMISSION ON ITS 17TH SESSION,IS TO BE THANKED ALSO FOR HIS WORK AS THE RAPPORTEUR ON SPECIAL MISSIONS.

6.IT ONLY REMAINS FOR ME TO REFER TO CHAPTER V OF THE INTERNATIONAL LAW COMMISSIONS REPORTS.CDN DEL HAS NOTED WITH GREAT INTEREST THE REFS IN BOTH THE 1964 AND 1965 REPORTS TO COOPERATION WITH OTHER BODIES AND TO THE EXCHANGE AND DISTRIBUTION OF THE COMMISSIONS DOCUS.CDA IS IN FAVOUR OF THE SORT OF COOPERATION WHICH IS PROVIDED FOR UNDER ARTICLE 26 OF THE STATUTE OF THE ILC AND IT SUPPORTS THE PRINCIPLES LAID DOWN IN PARA64 OF THE ICLS REPORT ON ITS 17TH SESSION CONCERNING THE DISTRIBUTION OF THE COMMISSIONS DOCUS.MY DEL WAS PLEASED TO NOTE THAT STEPS HAVE ALREADY BEEN TAKEN BY THE SECRETARIAT,AS YOU,MR CHAIRMAN,MENTIONED AT OUR MTG ON SEP29,TO PUT THE PROPOSED MEASURES INTO EFFECT.WE HAVE ALSO NOTED THE SUGGESTION,IN PARA72 OF THE REPORT ON THE 17TH SESSION, WITH REGARD TO THE SEMINAR ON INTERNATIONAL LAW WHICH WAS HELD

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EARLIER THIS PAST SUMMER,THAT UNGA MIGHT WISH TO CONSIDER THE POSSIBILITY OF GRANTING FELLOWSHIPS TO ENABLE NATIONALS OF THE DEVELOPING COUNTRIES TO ATTEND FUTURE SEMINARS.SUBJECT TO THE NECESSARY FINANCIAL APPROVAL,THE ESTABLISHMENT OF A LIMITED NUMBER OF SUCH FELLOWSHIPS SEEMS MOST WORTHWHILE.WE ALSO BELIEVE HOWEVER THAT THE TOTAL ATTENDANCE AT FUTURE SEMINARS SHOULD REMAIN LIMITED, SINCE,IF THEY ARE TO BE OF REAL BENEFIT,IT IS NECESSARY THAT THEY BE SMALL ENOUGH TO ENABLE FRUITFUL INTERCHANGE OF VIEWS TO TAKE PLACE BETWEEN PARTICIPANTS.THE FIRST SEMINAR WAS ATTENDED BY ONLY 16 STUDENTS WHO WERE DESCRIBED IN THE REPORT AS HAVING HAD EXCELLENT QUALIFICATIONS.IT WOULD NOT RPT NOT,WE CONSIDER,SERVE A USEFUL PURPOSE IF THE GATHERING BECAME TOO LARGE OR THE STANDARD OF QUALIFICATION OF ATTENDANCE WERE ALLOWED TO FALL.

WUMIN CONCLUSION,I AM GLAD TO STATE THAT CDN DEL WILL SUPPORT THE DRAFT RESLN TABLED BY LEBANON AND MEXICO AND APPRECIATIONS THE INITIATIVE OF THE DISTINGUISHED DELS OF THOSE COUNTRIES IN ASSISTING THE CTTEE BY PRESENTING US WITH THIS RESLN.ENDS.

Mr. Miller

TO: Hammarskjold
OCT 6 1965
REGISTRY

ACTION COPY

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RR OTT

DE NYK

R 052228Z

FM CANDELNY OCT5/65

TO EXTERNAL 1728

6TH CTTEE AGENDA ITEM87:REPORTS OF ILC

FOLLOWING DRAFT RESLN HAS BEEN TABLED BY LEBANON AND MEXICO

(A/C.6/L.559 REFERS).TEXT BEGINS:

QUOTE THE UNGA

HAVING CONSIDERED THE REPORTS OF INTERNTL LAW COMMISSION ON WORK OF ITS SIXTEENTH AND SEVENTEENTH SESSIONS,

RECALLING RESLN 1902(XVIII)OF NOV18/63 BY WHICH UNGA RECOMMENDED THAT COMMISSION SHOULD CONTINUE ITS WORK OF CODIFICATION AND PROGRESSIVE DEVELOPMENT OF LAW OF TREATIES AND ITS WORK ON STATE RESPONSIBILITY SUCCESSION OF STATES AND GOVTS SPECIAL MISSIONS AND RELATIONS BETWEEN STATES AND INTER-GOVTAL ORGANIZATIONS,

EMPHASIZING NEED FOR FURTHER CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNTL LAW WITH A VIEW TO MAKING IT A MORE EFFECTIVE MEANS OF IMPLEMENTING PURPUSES AND PRINCIPLES SET FORTH IN ARTICLES 1 AND 2 OF CHARTER OF UN.

NOTING THAT WORK OF CODIFICATION AND PROGRESSIVE DEVELOPMENT OF TOPICS OF LAW OF TREATIES AND OF SPECIAL MISSIONS HAS REACHED AN ADVANCED STAGE,

NOTING FURTHER WITH APPROVAL THAT COMMISSION HAS PROPOSED TO HOLD A FOUR-WEKK SERIES OF MTGS IN JAN 1966 AND HAS ASKED TO RESERVE POSSIBILITY OF A TWO-WEEK EXTENSION OF ITS SUMMER SESSION IN 1966 IN ORDER TO ENABLE IT TO COMPLETE ITS DRAFT ARTICLES ON LAW OF TREATIES AND ON SPECIAL MISSIONS BEFORE END OF TERM OF OFFICE OF ITS PRESENT MEMBERS,

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CC: 20-3-3
20-3-1-6

1.TAKES NOTE OF THE REPORTS OF INTERNTL LAW COMMISSION ON THE WORK OF ITS SIXTEENTH AND SEVENTEENTH SESSIONS;

2.EXPRESSES APPRECIATION TO COMMISSION FOR WORK IT HAS ACCOMPLISHED;

3.RECOMMENDS THAT COMMISSION SHOULD:

(A)CONTINUE WORK OF CODIFICATION AND PROGRESSIVE DEVELOPMENT OF LAW OF TREATIES AND OF SPECIAL MISSIONS TAKING INTO ACCOUNT VIEWS EXPRESSED AT TWENTIETH SESSION OF UNGA AND COMMENTS WHICH MAY BE SUBMITTED BY GOVTS WITH OBJECT OF PRESENTING FINAL DRAFTS ON THOSE TOPICS IN REPORT ON WORK OF ITS EIGHTEENTH SESSION IN 1966;

(B)CONTINUE WHEN POSSIBLE ITW WORK ON STATE RESPONSIBILITY SUCCESSION OF STATES AND GOVTS AND RELATIONS BETWEEN STATES AND INTER-GOVTAL ORGANIZATIONS TAKING INTO ACCOUNT VIEWS AND CONSIDERATIONS REFERRED TO IN UNGA RESLN 1902(XVIII)OF NOV18/63;

4.REQUESTS THE SECGEN TO FORWARD TO INTERNTL LAW COMMISSION RECORDS OF DISCUSSIONS AT TWENTIETH SESSION ON REPORTS OF COMMISSION.UNQUOTE TEXT ENDS.

NNNN VVVVV

Mr. Robertson Legal Div

CONFIDENTIAL

TWENTIETH REGULAR SESSION OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS

Provisional Agenda Item No. 90:	Question of extended participation in General Multilateral Treaties concluded under the auspices of the League of Nations.
Documents:	Report of the Sixth Committee (A/5602) Resolution 1903 (XVIII) of 18 November 1963. Report of the Secretary-General (A/5759)

20-3-1-6
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1. The background to this item is fully set out in the brief for the 18th Session. The short problem is that a number of League of Nations multilateral conventions, some of them of considerable standing and importance, have been in danger of becoming ossified for lack of some further action regarding them. The reason is that these conventions have since the days of the League been in a static position as regards the number of states parties to them, because the terms of the treaties entrusted to the Council of the League the right to extend invitations to non-Member states to accede, and made no provision for the substitution of any other body for the League in the event of the latter's dissolution. With the dissolution of the League, these instruments therefore became closed to further accession. The United Nations, on considering the matter, has favoured the course of correcting the position by means of a Resolution (passed at the 18th Session of the Assembly) in which the General Assembly has assumed the League Council's functions under the relevant machinery clauses of these treaties and in which the Assembly has authorized the Secretary-General to invite and accept new accessions to the treaties. (This Resolution itself is deemed to constitute the assent to this decision on the part of those Members of the United Nations which are parties to the treaties in question). The full implementation of this Resolution has however been delayed pending some enquiries which the Secretary-General was, in terms of the Resolution, instructed to make. These have been completed, and the Secretary-General's report (A/5759) is to be considered at the 20th Session. On the basis of this report, and unless objection is raised to the direction conveyed in the 1963 Resolution, the Assembly will presumably indicate to the Secretary-General that he should now proceed routinely to issue invitations for further accessions to the relevant League of Nations treaties. The action taken at the 18th Session, the nature of the Secretary-General's Report, and the views we have formed are accordingly set out below.

2. At the 18th Session the Sixth Committee had before it and considered the report of the International Law Commission (pp.30-35 of A/5509) which suggested that the problem of opening the League of Nations treaties in question to wider participation might be solved not by a formal

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protocol of amendment (which was a device used for the reopening of several of the League treaties between 1946 and 1953) but merely by administrative action on the part of the General Assembly. The Committee then debated the merits of a nine-Power* draft resolution based on the suggestion made by the Commission. Most representatives approved the ultimate aim of the draft resolution and also the procedure by which it was to be achieved, but a number wondered what would happen if one or more of the Parties to the treaties voted against the draft resolution or abstained in the vote. Against this it was argued that the alternative procedure of a protocol of amendment would not rule out the possibility of one or more of the States Parties to the League treaties objecting to the amendment of the participation clauses. Some representatives thought that the procedure proposed in the draft resolution might open the treaties to accession but not necessarily to effective participation by new States, since a resolution of the General Assembly could not bind States Parties in that respect. They took the view that the nine-Power draft resolution would be a temporary measure only. Nevertheless most of the debate was taken up not with legal points but with the political question of deciding which States should be invited to accede to the treaties under consideration. Much time was spent in traversing the familiar positions on the "all States" formula. Eventually the nine-Power draft resolution, slightly amended, was adopted by 69 (New Zealand) to none with 22 abstentions. The final text of Resolution 1903, as adopted by the General Assembly on 18 November 1963, is set out as an annex to this brief.

3. There was a certain ambiguity about the Assembly's position on this matter, because although the Resolution directed the Secretary-General to issue invitations to accede to the old League treaties, it also indicated that he should, "where necessary", consult with States, and with United Nations organs and specialized agencies, "as to whether any of the treaties in question have ceased to be in force, have been superseded by later treaties, have otherwise ceased to be of interest for accession by additional States, or require action to adapt them to contemporary conditions." On this question, the Secretary-General was asked to report at the 19th (and hence the 20th) Session. The general implication was therefore that the Secretary-General would not proceed to put out invitations for new accessions until the Assembly had had a chance to see the material gathered by him concerning the state of the parties to and concerning current interest in, the treaties in question. Before the Resolution was passed there was indeed some divergence of view in the Sixth Committee debate about the need for consultation on the treaties. The sponsors of the Resolution suggested that the Secretary-General should consult the parties only where the state of the treaties seemed dubious, while in the remaining cases accessions of new States could be recorded immediately. Some representatives thought however that the treaties should be examined before any new States were invited to accede. In the event, the Secretary-General later took a very cautious view of the power given to him under paragraph 4 of the resolution to invite accessions to the treaties. Since sufficient evidence existed that two of the 21 treaties in question (i.e. the Convention for the Suppression of Counterfeiting Currency and

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* Australia, Ghana, Greece, Guatemala, Indonesia, Mali, Morocco, Nigeria and Pakistan

the Optional Protocol concerning the Suppression of Counterfeiting Currency, both done at Geneva on 20 April 1929) were fully operative, the Secretary-General took steps to invite States to accede to these two treaties. As about eleven new accessions have taken place as a result, it would seem that the whole exercise of opening the other League conventions to accessions is by no means a merely academic one. In pursuance of paragraph 3(c) of Resolution 1903, the Secretary-General also circulated on 24 January 1964 a questionnaire to the fifty four States known to be parties to any of the 21 treaties in question and to five specialised agencies which he considered might have an interest in the subject matter and application of some of the treaties. New Zealand sent no reply to this enquiry in respect of the nine League multilaterals to which it is party because, upon closer study, the terms of paragraph 3(c) appeared to have undesirable implications. Paragraph 3(c) suggest that each State party to a treaty is competent to say whether that treaty is still in force or whether it has been superseded by later treaties. Although it is perhaps appropriate enough to ask States to express a subjective view on the other two limbs of paragraph 3(c) - whether the treaties have otherwise ceased to be of interest for accession by additional States and whether they require action to adopt them to contemporary conditions - it does not seem proper to take the attitude implied in 3(c) that the views of individual states are necessarily decisive as to whether a multilateral treaty is or is not in existence. On this aspect, it can be noted that the draft resolution sponsored by Australia, Ghana and Israel at the 17th Session did not contain provision for a review of the treaties. This suggestion crept in via the International Law Commission's report, which indicated that the treaties should be examined to see how many of them hold interest for States today and what action might be necessary to adapt them to contemporary conditions. With the benefit of hindsight, it is now apparent that the form in which this suggestion was incorporated in resolution 1903 was a little unfortunate. That New Zealand is not the only State to have had second thoughts about paragraph 3(c) may account in part for the paucity of the replies submitted to the Secretary-General, but we would think the main factor was probably a simple lack of knowledge as to how many of the League treaties are still "living" instruments in a practical sense. Only 9 or the 54 Governments replied (USA, United Kingdom, USSR, Ireland, Japan, Netherlands, Norway, Poland and Sweden), and details of their comments on the individual treaties are to be found on pages 15-37 of the Secretary-General's Report.

4. The replies given show a fair measure of agreement, and the conclusions which the Secretary-General has drawn from them appear on pages 38-41 of the Report. The 8 treaties mentioned in paragraph 137 of the Report are thought to be of no interest for accession by additional States (New Zealand is party to two of the treaties in this category, the Convention relating to the Transmission in Transit of Electric Power and the Convention relating to the Development of Hydraulic Power affecting more than one State. Neither would ever have been of any practical interest to New Zealand because it is an island nation and it is unclear why we ever became associated with them.) Two other treaties - the Declaration regarding the Teaching of History and the

/Convention

*Convention and Statute on the International Regime of Railways - are thought to be of doubtful interest, but the interest of the remaining treaties is not questioned. Of the latter, New Zealand is party to the Convention and Statute on Freedom of Transit, Convention and Statute on the Regime of Navigable Waterways of International Concern (and Additional Protocol), the Convention and Statute on the International Regime of Maritime Ports, the International Convention concerning the Use of Broadcasting in the Cause of Peace and the International Convention relating to the Simplification of Customs Formalities. Several of these Conventions, particularly those on Transit, Navigable Waterways and Maritime Ports are, of course, of great importance as significant law - making treaties. There is no doubt at all that there would be every advantage in pursuing the United Nation's work in opening these and the other remaining treaties to new accessions; and the interest already shown by Governments in acceding to the two Currency Conventions already opened up by the Secretary-General points to the likelihood that this interest will extend to these other League multilaterals as well.

5. A difficulty in the way of further action is that, as the Secretary-General has decided that consultation was necessary in the case of all but two of these treaties, and has now reported on this consultation, he probably needs a specific direction from the General Assembly to proceed, on the basis of his report, to implement the instruction already given in the 1963 Resolution by inviting further accessions. The best thing would accordingly seem to be for the General Assembly to request the Secretary-General to open for accession at least the treaties mentioned in paragraphs 133-135 of the Report (and perhaps if there is substantial pressure for it, some of those mentioned in paragraphs 136 or 137 as well). The reason is that the basic purpose of resolution 1903 was really to open the treaties to accession, and not immediately to secure their substantive revision. The right of the newer States to participate in the treaties should therefore now be made effective by the issue of invitations, and it would be up to each of the invitees to decide which treaties are of sufficient interest to it to warrant its own accession. As for the general question of substantive revision, if there is enough enthusiasm about any of these treaties which appear to need some revision to make them fully effective, this task could be taken up later as a separate matter among the parties, including the new parties, to each of them. It is possible, too, that the General Assembly may later on wish to pass resolutions approving amending protocols for some of the treaties (as was done in 1946, for example, in the case of treaties on narcotic drugs). But initially there seems to be no reason why we should not wait and see what response is forthcoming from the States to which the treaties have been thrown open. Conceivably, for example, the new States may prove to be more interested in acquiring the right to accede to the treaties than in actually acceding to many of them; so that it might turn out that some of the treaties will be passed over and that only a certain number will attract new accessions. In these circumstances, the problem of revision would partially solve itself and time would not be wasted at this stage in tinkering or wondering whether to tinker with treaties in which real interest had been lost.

/While

*New Zealand is a party

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6. While our general attitude, as shown above, is in favour of proceeding to implement further the decision already reached by the Assembly in the 1963 Resolution on this subject, it must be admitted that we retain some qualms about the course which that Resolution decided upon. In brief, we are not free of doubt about the propriety of the procedure of amending the relevant accession clauses of the League treaties by means of a United Nations Resolution. We would not, of course, wish to take the very rigid view that the terms or application of a treaty can never be amended except by a written amendment in treaty form. To take this line would at least run counter to the opinion of the International Law Commission which, in its commentaries on the law of treaties, has "recognized that amendment sometimes takes place by oral agreement or by an agreement arrived at tacitly in the application of the treaty."* Our point of difficulty is that we do not think that this process of "tacit amendment", which in effect was constituted by the 1963 Resolution (and which might be appropriate enough for some, e.g. temporary purposes) should have been used to make a permanent change in an important clause of a large number of multilateral conventions. More properly we would think, a general amending protocol or protocols should have been favoured, notwithstanding that this procedure would be more time-consuming and expensive than a simple Resolution.

7. There is indeed a certain degree of precedent in the Resolution of 1946 [24(1)] by which the United Nations charged the Secretariat with the purely depositary functions of the League under League treaties. However, the extent to which this instance is helpful at present may be doubted, especially as the relevant machinery (depositary) clauses of the treaties concerned were of an entirely objective character. The machinery clauses in point now (i.e. the accession provisions of the League treaties) are of more substantial character and might have deserved closer consideration. It is interesting, in this respect, to note that the 1946 Resolution to some extent acknowledged this, since in it the General Assembly provided that in the case of provisions "relating to the substance of the instruments" whose due execution depended on the exercise of functions and powers by the League or its organs, the General Assembly would take the necessary measures to ensure the continued exercise of the functions and powers concerned. These measures promoted after 1946 in fact took the shape of

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* Report of the I.L.C. on the work of its 16th Session 11 May - 24 July 1964 (A/5809) p. 21; and see text of draft Article 65 at p. 19. See also the Report on the 14th Session of 24 April - 29 June 1962 (A/5209) at p. 12: "It seems to be established that the opening of a treaty to accession by additional States, while it requires the consent of the States entitled to a voice in the matter, does not necessitate the negotiation of a fresh treaty amending or supplementing the earlier one." See also A/5509, p. 33, para. 41.

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formal amending Protocols* which, inter alia, provided for the calling of new accessions to the treaties concerned. In answer to all this, the argument put by the International Law Commission would run somewhat as follows: The clauses permitting states to accede upon the invitation of the League Council are basically on the same footing as clauses naming a depositary (which were altered by the 1946 Resolution); the parties never intended the treaties to be closed - they consented in advance to accession by any state which the League Council cared to invite; hence the simple substitution of the United Nations for the League on the anology of the 1946 Resolution would have less effect on the substantive obligations of the parties than might first appear; we admit that the accession clauses of League treaties were hitherto amended by Protocols, but this is not conclusive, since the Protocols substantively amended other parts of the treaties at the same time. While admitting that the foregoing is one tenable line of argument we ourselves would think it more convincing to say that the taking over of the power to call for new accessions represented a matter of substance, involving at least some political considerations, and that it required a fairly large mental leap to assume that the transference of powers relevant to calling for further accessions and to the basis on which they should be called represented only a purely mechanical matter. It is worth adding that the political discussions on the latter point which took place at the 18th Session already serve to show that some important political questions were necessarily involved in the taking over and implementation of those particular functions by the United Nations .

8. There is also a basic problem, common to both the Resolution and Protocol procedures, of ascertaining which states are already parties to the League treaties (especially as some original parties have split into several entities which might be entitled now to regard themselves as separate parties). This problem, which bears, of course on the question of which and how many states must give their assent in order to make the amendment of the League treaties legally effective is a vexed one.** It is not in our opinion necessarily solved or simplified by the Resolution procedure which in effect summarily disposed of these legal issues by adopting the view that the United Nations took over the accession clause functions as soon as a majority of the United Nations members voted in favour of the 1963 Resolution. This

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* e.g. U.N.T.S. Vol. 12, p. 179; Vol. 46, p. 169; Vol. 53, p. 13; Vol. 30, pp. 3 and 23; Vol. 182, p. 51. These Protocols were approved in various Assembly resolutions, but this fact in itself had no legal effect except in so far as the States parties to the instruments agreed, ex propria voluntate, to accept the recommendation that they should become parties to the protocols in question. See, e.g. Resols. 126 (II) 26 October 1947 and 794 (VIII) 23 October 1953.

** Where the procedure of an amending Protocol has been used in the past, it has been the practice for the Protocol to enter into force upon the deposit of two instruments of acceptance. The amendments to the treaty brought about by the Protocol did not however become effective until two-thirds of the Parties to the treaty had accepted the Protocol. Even then the amendments were effective only as between those Parties to the treaty which were also Parties to the Protocol .

is a matter of some convenience, but it still seems to us to remain a doubtful question whether the Resolution was efficacious to secure its intended result; for example, did the majority voting for it include a definite majority of the states parties to each and all of the treaties concerned - if not, what was the legal effect of their non-support and what of the legal force of the Resolution in regard to the appreciable number of states who abstained on that Resolution? From the point of view of convenience therefore, we are by no means sure that the procedure by Resolution held the great advantages which it was supposed to have over any other means of dealing with the situation.

9. The above comments do not represent an exclusive list of the questions to which the 1963 Resolution gives rise, but there is one further difficulty which should be mentioned. The amendment of the accession clauses of the League treaties is of course considered as being effected not by that Resolution as such, but by the tacit agreement of the United Nations Members, parties to the League Conventions in question, which is evidenced by the Resolution. The problem we foresee is that if this practice is continued, then by a process of confusion between these two factors there may arise a tendency to argue that other United Nations resolutions affect the substance of treaties even in circumstances where states voting for the resolutions did not intend to assent to any treaty amendment. The latter would, of course, be an extreme and perhaps unlikely result; but because there is a danger of imputing too much legal effect to resolutions, we should prefer that further instances of the kind represented by the 1963 Resolution should not be encouraged. There is a certain disposition, even at present, to build overmuch on the 1946 and 1963 Resolutions; for example, a note published by a member of the United Nations Office of Legal Affairs comments enthusiastically, in relation to the 1963 precedent, that "although the subject matter was relatively minor and the distance from full international legislation is still far off, the episode may perhaps be regarded as one more, if tentative, step towards a process of law making - or at least law adapting - on a universal scale by means of Assembly resolutions."* Our own view would be that in relation to amending treaties, any question of intervention by United Nations resolutions is likely to produce more risks than advantages.

10. We have therefore some doubts not necessarily about the legality but more especially as to the propriety of the procedure followed in the 1963 Resolution; but New Zealand and a respectable body of other Governments voted for that proposal, and we can hardly refrain from following it further. The attitude which the New Zealand delegation should take at the present Session may accordingly be put as follows: -

/If there

* M. Hardy, the United Nations and General Multilateral Treaties Concluded Under the Auspices of the League of Nations, 1963 B.Y.I.L. 425 at 440.

A. If there is continuing respectable support for the implementation of the 1963 Resolution on this subject, we should be inclined to pursue the terms of that Resolution through to its logical conclusion by supporting action to request the Secretary-General to call for new accessions to the League treaties referred to in paras. 133 - 135 of his Report. Whether all of these should be opened for accession is a matter that could be discussed with friendly delegations; but by and large we would not see much use in postponing the opening of these treaties for accession while consultation about and revision of their terms takes place. These matters can surely be left over for later action.

B. It does not seem desirable to invite new accessions to those League treaties which are generally felt to have no current interest. The Secretary-General thought that there was good reason for believing that the treaties mentioned in para. 137 of his Report fell into this category. Unless there is general opposition to this view, we should prefer to see these treaties put aside, and possibly also the treaties listed in para. 136, which also seem hardly worth resuscitating.

C. As it is not clear in what way the discussion of this item may develop, the delegation could report back for further instruction if the debate substantially diverges from the general lines presupposed in paras. A and B above. In any event, the delegation should discuss our hesitations about the 1963 Resolution with other friendly delegations. It would of course be a matter for judgment as to what extent any doubt could be indicated in the course of debate, but if a proper opportunity arose, we should prefer that some indication of our opinion be given.

Department of External Affairs,
WELLINGTON.

21 September 1965

Annex

The General Assembly,

'Having considered the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations, and the report of the International Law Commission thereon,

'Noting that there are twenty-one such treaties of a technical and non-political character which by their terms authorised the Council of the League of Nations to invite additional States to become parties, and thus were not intended to be closed to new States,

'Further noting that since the Council of the League ceased to exist a large number of new States have come into being and that many of them have been unable to become parties to the treaties in question through lack of an invitation to accede,

'Recalling the recommendation made by the Assembly of the League of Nations at its final session, that its Members should facilitate in every way the assumption by the United Nations of functions and powers entrusted to the League of Nations under international agreements of a technical and non-political character,

'Further recalling that the General Assembly, in resolution 24(I) of 12 February 1946, declared that the United Nations was willing in principle to assume the exercise of certain functions and powers previously entrusted to the League of Nations under international agreements,

'1. Decides that the General Assembly is the appropriate organ of the United Nations to exercise the power conferred by multilateral treaties of a technical and non-political character on the Council of the League of Nations to invite States to accede to those treaties;

'2. Records that those Members of the United Nations which are parties to the treaties referred to above assent by the present resolution to the decision set forth in paragraph 1 above and express their resolve to use their good offices to secure the cooperation of the other parties to the treaties so far as this may be necessary;

'3. Requests the Secretary-General:

(a) As depositary of the treaties referred to above, to bring to the notice of any party which is not a Member of the United Nations the terms of the present resolution;

(b) To transmit copies of the present resolution to States Members of the United Nations which are parties to those treaties;

(c) To consult, where necessary, with the States referred to in sub-paragraphs (a) and (b) above, and with the United Nations organs and the specialised agencies concerned as to whether any of the treaties in question have ceased to be in force, have been superseded by later treaties, have otherwise ceased to be of interest for accession by additional States, or require action to adapt them to contemporary conditions;

/To report

(d) To report on these matters to the General Assembly at its nineteenth session;

'4. Further requests the Secretary-General to invite each State which is a Member of the United Nations or member of a specialised agency or party to the Statute of the International Court of Justice, or has been designated for this purpose by the General Assembly, and which otherwise is not eligible to become a party to the treaties in question, to accede thereto by depositing an instrument of accession with the Secretary-General of the United Nations;

'5. Decides to place on the provisional agenca of its nineteenth session an item entitled 'General multilateral treaties concluded under the auspices of the League of Nations'.

Department of External Affairs,
WELLINGTON.

21 September 1965

27 Sept. 1963

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TWENTIETH REGULAR SESSION OF THE GENERAL ASSEMBLY
OF THE UNITED NATIONS

20-3-1-6
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Provisional Agenda Item No. 90: Question of extended participation in General Multilateral Treaties concluded under the auspices of the League of Nations.

Documents: Report of the Sixth Committee (A/5602)
Resolution 1903 (XVIII) of 18 November 1963.
Report of the Secretary-General (A/5759)

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1. The background to this item is fully set out in the brief for the 18th Session. The short problem is that a number of League of Nations multilateral conventions, some of them of considerable standing and importance, have been in danger of becoming ossified for lack of some further action regarding them. The reason is that these conventions have since the days of the League been in a static position as regards the number of states parties to them, because the terms of the treaties entrusted to the Council of the League the right to extend invitations to non-Member states to accede, and made no provision for the substitution of any other body for the League in the event of the latter's dissolution. With the dissolution of the League, these instruments therefore became closed to further accession. The United Nations, on considering the matter, has favoured the course of correcting the position by means of a Resolution (passed at the 18th Session of the Assembly) in which the General Assembly has assumed the League Council's functions under the relevant machinery clauses of these treaties and in which the Assembly has authorized the Secretary-General to invite and accept new accessions to the treaties. (This Resolution itself is deemed to constitute the assent to this decision on the part of those Members of the United Nations which are parties to the treaties in question). The full implementation of this Resolution has however been delayed pending some enquiries which the Secretary-General was, in terms of the Resolution, instructed to make. These have been completed, and the Secretary-General's report (A/5759) is to be considered at the 20th Session. On the basis of this report, and unless objection is raised to the direction conveyed in the 1963 Resolution, the Assembly will presumably indicate to the Secretary-General that he should now proceed routinely to issue invitations for further accessions to the relevant League of Nations treaties. The action taken at the 18th Session, the nature of the Secretary-General's Report, and the views we have formed are accordingly set out below.

2. At the 18th Session the Sixth Committee had before it and considered the report of the International Law Commission (pp.30-35 of A/5509) which suggested that the problem of opening the League of Nations treaties in question to wider participation might be solved not by a formal

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protocol of amendment (which was a device used for the reopening of several of the League treaties between 1946 and 1953) but merely by administrative action on the part of the General Assembly. The Committee then debated the merits of a nine-Power* draft resolution based on the suggestion made by the Commission. Most representatives approved the ultimate aim of the draft resolution and also the procedure by which it was to be achieved, but a number wondered what would happen if one or more of the Parties to the treaties voted against the draft resolution or abstained in the vote. Against this it was argued that the alternative procedure of a protocol of amendment would not rule out the possibility of one or more of the States Parties to the League treaties objecting to the amendment of the participation clauses. Some representatives thought that the procedure proposed in the draft resolution might open the treaties to accession but not necessarily to effective participation by new States, since a resolution of the General Assembly could not bind States Parties in that respect. They took the view that the nine-Power draft resolution would be a temporary measure only. Nevertheless most of the debate was taken up not with legal points but with the political question of deciding which States should be invited to accede to the treaties under consideration. Much time was spent in traversing the familiar positions on the "all States" formula. Eventually the nine-Power draft resolution, slightly amended, was adopted by 69 (New Zealand) to none with 22 abstentions. The final text of Resolution 1903, as adopted by the General Assembly on 18 November 1963, is set out as an annex to this brief.

3. There was a certain ambiguity about the Assembly's position on this matter, because although the Resolution directed the Secretary-General to issue invitations to accede to the old League treaties, it also indicated that he should, "where necessary", consult with States, and with United Nations organs and specialized agencies, "as to whether any of the treaties in question have ceased to be in force, have been superseded by later treaties, have otherwise ceased to be of interest for accession by additional States, or require action to adapt them to contemporary conditions." On this question, the Secretary-General was asked to report at the 19th (and hence the 20th) Session. The general implication was therefore that the Secretary-General would not proceed to put out invitations for new accessions until the Assembly had had a chance to see the material gathered by him concerning the state of the parties to and concerning current interest in, the treaties in question. Before the Resolution was passed there was indeed some divergence of view in the Sixth Committee debate about the need for consultation on the treaties. The sponsors of the Resolution suggested that the Secretary-General should consult the parties only where the state of the treaties seemed dubious, while in the remaining cases accessions of new States could be recorded immediately. Some representatives thought however that the treaties should be examined before any new States were invited to accede. In the event, the Secretary-General later took a very cautious view of the power given to him under paragraph 4 of the resolution to invite accessions to the treaties. Since sufficient evidence existed that two of the 21 treaties in question (i.e. the Convention for the Suppression of Counterfeiting Currency and

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* Australia, Ghana, Greece, Guatemala, Indonesia, Mali, Morocco, Nigeria and Pakistan

the Optional Protocol concerning the Suppression of Counterfeiting Currency, both done at Geneva on 20 April 1929) were fully operative, the Secretary-General took steps to invite States to accede to these two treaties. As about eleven new accessions have taken place as a result, it would seem that the whole exercise of opening the other League conventions to accessions is by no means a merely academic one. In pursuance of paragraph 3(c) of Resolution 1903, the Secretary-General also circulated on 24 January 1964 a questionnaire to the fifty four States known to be parties to any of the 21 treaties in question and to five specialised agencies which he considered might have an interest in the subject matter and application of some of the treaties. New Zealand sent no reply to this enquiry in respect of the nine League multilaterals to which it is party because, upon closer study, the terms of paragraph 3(c) appeared to have undesirable implications. Paragraph 3(c) suggest that each State party to a treaty is competent to say whether that treaty is still in force or whether it has been superseded by later treaties. Although it is perhaps appropriate enough to ask States to express a subjective view on the other two limbs of paragraph 3(c) - whether the treaties have otherwise ceased to be of interest for accession by additional States and whether they require action to adopt them to contemporary conditions - it does not seem proper to take the attitude implied in 3(c) that the views of individual states are necessarily decisive as to whether a multilateral treaty is or is not in existence. On this aspect, it can be noted that the draft resolution sponsored by Australia, Ghana and Israel at the 17th Session did not contain provision for a review of the treaties. This suggestion crept in via the International Law Commission's report, which indicated that the treaties should be examined to see how many of them hold interest for States today and what action might be necessary to adapt them to contemporary conditions. With the benefit of hindsight, it is now apparent that the form in which this suggestion was incorporated in resolution 1903 was a little unfortunate. That New Zealand is not the only State to have had second thoughts about paragraph 3(c) may account in part for the paucity of the replies submitted to the Secretary-General, but we would think the main factor was probably a simple lack of knowledge as to how many of the League treaties are still "living" instruments in a practical sense. Only 9 or the 54 Governments replied (USA, United Kingdom, USSR, Ireland, Japan, Netherlands, Norway, Poland and Sweden), and details of their comments on the individual treaties are to be found on pages 15-37 of the Secretary-General's Report.

4. The replies given show a fair measure of agreement, and the conclusions which the Secretary-General has drawn from them appear on pages 38-41 of the Report. The 8 treaties mentioned in paragraph 137 of the Report are thought to be of no interest for accession by additional States (New Zealand is party to two of the treaties in this category, the Convention relating to the Transmission in Transit of Electric Power and the Convention relating to the Development of Hydraulic Power affecting more than one State. Neither would ever have been of any practical interest to New Zealand because it is an island nation and it is unclear why we ever became associated with them.) Two other treaties - the Declaration regarding the Teaching of History and the

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*Convention and Statute on the International Regime of Railways - are thought to be of doubtful interest, but the interest of the remaining treaties is not questioned. Of the latter, New Zealand is party to the Convention and Statute on Freedom of Transit, Convention and Statute on the Regime of Navigable Waterways of International Concern (and Additional Protocol), the Convention and Statute on the International Regime of Maritime Ports, the International Convention concerning the Use of Broadcasting in the Cause of Peace and the International Convention relating to the Simplification of Customs Formalities. Several of these Conventions, particularly those on Transit, Navigable Waterways and Maritime Ports are, of course, of great importance as significant law - making treaties. There is no doubt at all that there would be every advantage in pursuing the United Nation's work in opening these and the other remaining treaties to new accessions; and the interest already shown by Governments in acceding to the two Currency Conventions already opened up by the Secretary-General points to the likelihood that this interest will extend to these other League multilaterals as well.

5. A difficulty in the way of further action is that, as the Secretary-General has decided that consultation was necessary in the case of all but two of these treaties, and has now reported on this consultation, he probably needs a specific direction from the General Assembly to proceed, on the basis of his report, to implement the instruction already given in the 1963 Resolution by inviting further accessions. The best thing would accordingly seem to be for the General Assembly to request the Secretary-General to open for accession at least the treaties mentioned in paragraphs 133-135 of the Report (and perhaps if there is substantial pressure for it, some of those mentioned in paragraphs 136 or 137 as well). The reason is that the basic purpose of resolution 1903 was really to open the treaties to accession, and not immediately to secure their substantive revision. The right of the newer States to participate in the treaties should therefore now be made effective by the issue of invitations, and it would be up to each of the invitees to decide which treaties are of sufficient interest to it to warrant its own accession. As for the general question of substantive revision, if there is enough enthusiasm about any of these treaties which appear to need some revision to make them fully effective, this task could be taken up later as a separate matter among the parties, including the new parties, to each of them. It is possible, too, that the General Assembly may later on wish to pass resolutions approving amending protocols for some of the treaties (as was done in 1946, for example, in the case of treaties on narcotic drugs). But initially there seems to be no reason why we should not wait and see what response is forthcoming from the States to which the treaties have been thrown open. Conceivably, for example, the new States may prove to be more interested in acquiring the right to accede to the treaties than in actually acceding to many of them; so that it might turn out that some of the treaties will be passed over and that only a certain number will attract new accessions. In these circumstances, the problem of revision would partially solve itself and time would not be wasted at this stage in tinkering or wondering whether to tinker with treaties in which real interest had been lost.

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*New Zealand is a party

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6. While our general attitude, as shown above, is in favour of proceeding to implement further the decision already reached by the Assembly in the 1963 Resolution on this subject, it must be admitted that we retain some qualms about the course which that Resolution decided upon. In brief, we are not free of doubt about the propriety of the procedure of amending the relevant accession clauses of the League treaties by means of a United Nations Resolution. We would not, of course, wish to take the very rigid view that the terms or application of a treaty can never be amended except by a written amendment in treaty form. To take this line would at least run counter to the opinion of the International Law Commission which, in its commentaries on the law of treaties, has "recognized that amendment sometimes takes place by oral agreement or by an agreement arrived at tacitly in the application of the treaty."* Our point of difficulty is that we do not think that this process of "tacit amendment", which in effect was constituted by the 1963 Resolution (and which might be appropriate enough for some, e.g. temporary purposes) should have been used to make a permanent change in an important clause of a large number of multilateral conventions. More properly we would think, a general amending protocol or protocols should have been favoured, notwithstanding that this procedure would be more time-consuming and expensive than a simple Resolution.

7. There is indeed a certain degree of precedent in the Resolution of 1946 [24(1)] by which the United Nations charged the Secretariat with the purely depositary functions of the League under League treaties. However, the extent to which this instance is helpful at present may be doubted, especially as the relevant machinery (depositary) clauses of the treaties concerned were of an entirely objective character. The machinery clauses in point now (i.e. the accession provisions of the League treaties) are of more substantial character and might have deserved closer consideration. It is interesting, in this respect, to note that the 1946 Resolution to some extent acknowledged this, since in it the General Assembly provided that in the case of provisions "relating to the substance of the instruments" whose due execution depended on the exercise of functions and powers by the League or its organs, the General Assembly would take the necessary measures to ensure the continued exercise of the functions and powers concerned. These measures promoted after 1946 in fact took the shape of

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* Report of the I.L.C. on the work of its 16th Session 11 May - 24 July 1964 (A/5809) p. 21; and see text of draft Article 65 at p. 19. See also the Report on the 14th Session of 24 April - 29 June 1962 (A/5209) at p. 12: "It seems to be established that the opening of a treaty to accession by additional States, while it requires the consent of the States entitled to a voice in the matter, does not necessitate the negotiation of a fresh treaty amending or supplementing the earlier one." See also A/5509, p. 33, para. 41.

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formal amending Protocols* which, inter alia, provided for the calling of new accessions to the treaties concerned. In answer to all this, the argument put by the International Law Commission would run somewhat as follows: The clauses permitting states to accede upon the invitation of the League Council are basically on the same footing as clauses naming a depositary (which were altered by the 1946 Resolution); the parties never intended the treaties to be closed - they consented in advance to accession by any state which the League Council cared to invite; hence the simple substitution of the United Nations for the League on the anology of the 1946 Resolution would have less effect on the substantive obligations of the parties than might first appear; we admit that the accession clauses of League treaties were hitherto amended by Protocols, but this is not conclusive, since the Protocols substantively amended other parts of the treaties at the same time. While admitting that the foregoing is one tenable line of argument we ourselves would think it more convincing to say that the taking over of the power to call for new accessions represented a matter of substance, involving at least some political considerations, and that it required a fairly large mental leap to assume that the transference of powers relevant to calling for further accessions and to the basis on which they should be called represented only a purely mechanical matter. It is worth adding that the political discussions on the latter point which took place at the 18th Session already serve to show that some important political questions were necessarily involved in the taking over and implementation of those particular functions by the United Nations .

8. There is also a basic problem, common to both the Resolution and Protocol procedures, of ascertaining which states are already parties to the League treaties (especially as some original parties have split into several entities which might be entitled now to regard themselves as separate parties). This problem, which bears, of course on the question of which and how many states must give their assent in order to make the amendment of the League treaties legally effective is a vexed one.** It is not in our opinion necessarily solved or simplified by the Resolution procedure which in effect summarily disposed of these legal issues by adopting the view that the United Nations took over the accession clause functions as soon as a majority of the United Nations members voted in favour of the 1963 Resolution. This

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* e.g. U.N.T.S. Vol. 12, p. 179; Vol. 46, p. 169; Vol. 53, p. 13; Vol. 30, pp. 3 and 23; Vol. 182, p. 51. These Protocols were approved in various Assembly resolutions, but this fact in itself had no legal effect except in so far as the States parties to the instruments agreed, ex propria voluntate, to accept the recommendation that they should become parties to the protocols in question. See, e.g. Resols. 126 (II) 26 October 1947 and 794 (VIII) 23 October 1953.

** Where the procedure of an amending Protocol has been used in the past, it has been the practice for the Protocol to enter into force upon the deposit of two instruments of acceptance. The amendments to the treaty brought about by the Protocol did not however become effective until two-thirds of the Parties to the treaty had accepted the Protocol. Even then the amendments were effective only as between those Parties to the treaty which were also Parties to the Protocol .

is a matter of some convenience, but it still seems to us to remain a doubtful question whether the Resolution was efficacious to secure its intended result; for example, did the majority voting for it include a definite majority of the states parties to each and all of the treaties concerned - if not, what was the legal effect of their non-support and what of the legal force of the Resolution in regard to the appreciable number of states who abstained on that Resolution? From the point of view of convenience therefore, we are by no means sure that the procedure by Resolution held the great advantages which it was supposed to have over any other means of dealing with the situation.

9. The above comments do not represent an exclusive list of the questions to which the 1963 Resolution gives rise, but there is one further difficulty which should be mentioned. The amendment of the accession clauses of the League treaties is of course considered as being effected not by that Resolution as such, but by the tacit agreement of the United Nations Members, parties to the League Conventions in question, which is evidenced by the Resolution. The problem we foresee is that if this practice is continued, then by a process of confusion between these two factors there may arise a tendency to argue that other United Nations resolutions affect the substance of treaties even in circumstances where states voting for the resolutions did not intend to assent to any treaty amendment. The latter would, of course, be an extreme and perhaps unlikely result; but because there is a danger of imputing too much legal effect to resolutions, we should prefer that further instances of the kind represented by the 1963 Resolution should not be encouraged. There is a certain disposition, even at present, to build overmuch on the 1946 and 1963 Resolutions; for example, a note published by a member of the United Nations Office of Legal Affairs comments enthusiastically, in relation to the 1963 precedent, that "although the subject matter was relatively minor and the distance from full international legislation is still far off, the episode may perhaps be regarded as one more, if tentative, step towards a process of law making - or at least law adapting - on a universal scale by means of Assembly resolutions."* Our own view would be that in relation to amending treaties, any question of intervention by United Nations resolutions is likely to produce more risks than advantages.

10. We have therefore some doubts not necessarily about the legality but more especially as to the propriety of the procedure followed in the 1963 Resolution; but New Zealand and a respectable body of other Governments voted for that proposal, and we can hardly refrain from following it further. The attitude which the New Zealand delegation should take at the present Session may accordingly be put as follows: -

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* M. Hardy, the United Nations and General Multilateral Treaties Concluded Under the Auspices of the League of Nations, 1963 B.Y.I.L. 425 at 440.

A. If there is continuing respectable support for the implementation of the 1963 Resolution on this subject, we should be inclined to pursue the terms of that Resolution through to its logical conclusion by supporting action to request the Secretary-General to call for new accessions to the League treaties referred to in paras. 133 - 135 of his Report. Whether all of these should be opened for accession is a matter that could be discussed with friendly delegations; but by and large we would not see much use in postponing the opening of these treaties for accession while consultation about and revision of their terms takes place. These matters can surely be left over for later action.

B. It does not seem desirable to invite new accessions to those League treaties which are generally felt to have no current interest. The Secretary-General thought that there was good reason for believing that the treaties mentioned in para. 137 of his Report fell into this category. Unless there is general opposition to this view, we should prefer to see these treaties put aside, and possibly also the treaties listed in para. 136, which also seem hardly worth resuscitating.

C. As it is not clear in what way the discussion of this item may develop, the delegation could report back for further instruction if the debate substantially diverges from the general lines presupposed in paras. A and B above. In any event, the delegation should discuss our hesitations about the 1963 Resolution with other friendly delegations. It would of course be a matter for judgment as to what extent any doubt could be indicated in the course of debate, but if a proper opportunity arose, we should prefer that some indication of our opinion be given.

Department of External Affairs,
WELLINGTON.

21 September 1965

Annex

The General Assembly,

'Having considered the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations, and the report of the International Law Commission thereon,

'Noting that there are twenty-one such treaties of a technical and non-political character which by their terms authorised the Council of the League of Nations to invite additional States to become parties, and thus were not intended to be closed to new States,

'Further noting that since the Council of the League ceased to exist a large number of new States have come into being and that many of them have been unable to become parties to the treaties in question through lack of an invitation to accede,

'Recalling the recommendation made by the Assembly of the League of Nations at its final session, that its Members should facilitate in every way the assumption by the United Nations of functions and powers entrusted to the League of Nations under international agreements of a technical and non-political character,

'Further recalling that the General Assembly, in resolution 24(I) of 12 February 1946, declared that the United Nations was willing in principle to assume the exercise of certain functions and powers previously entrusted to the League of Nations under international agreements,

'1. Decides that the General Assembly is the appropriate organ of the United Nations to exercise the power conferred by multilateral treaties of a technical and non-political character on the Council of the League of Nations to invite States to accede to those treaties;

'2. Records that those Members of the United Nations which are parties to the treaties referred to above assent by the present resolution to the decision set forth in paragraph 1 above and express their resolve to use their good offices to secure the cooperation of the other parties to the treaties so far as this may be necessary;

'3. Requests the Secretary-General:

(a) As depositary of the treaties referred to above, to bring to the notice of any party which is not a Member of the United Nations the terms of the present resolution;

(b) To transmit copies of the present resolution to States Members of the United Nations which are parties to those treaties;

(c) To consult, where necessary, with the States referred to in sub-paragraphs (a) and (b) above, and with the United Nations organs and the specialised agencies concerned as to whether any of the treaties in question have ceased to be in force, have been superseded by later treaties, have otherwise ceased to be of interest for accession by additional States, or require action to adapt them to contemporary conditions;

/To report

(d) To report on these matters to the General Assembly at its nineteenth session;

'4. Further requests the Secretary-General to invite each State which is a Member of the United Nations or member of a specialised agency or party to the Statute of the International Court of Justice, or has been designated for this purpose by the General Assembly, and which otherwise is not eligible to become a party to the treaties in question, to accede thereto by depositing an instrument of accession with the Secretary-General of the United Nations;

'5. Decides to place on the provisional agenca of its nineteenth session an item entitled 'General multilateral treaties concluded under the auspices of the League of Nations'.

Department of External Affairs,
WELLINGTON.

21 September 1965

ANNEX I

DRAFT ARTICLES ON THE LAW OF TREATIES

AS DISCUSSED AND ADOPTED

AT THE FIRST PART OF THE 17TH SESSION

I.L.C. - 1965

Attached to Geneva tn # 372 of Sept. 9/65

Commentary on Draft Articles

The Commission considered a number of general questions relating to the first part of the draft articles on the Law of Treaties before proceeding to a detailed re-examination of the articles in light of governments' comments. These general questions were:

(a) the form of the draft articles;
(b) whether a single draft convention or three separate conventions should be produced;
(c) the scope of the draft articles; and
(d) terminology and definitions.

(a) Form of the Draft Articles

2. The Commission noted that certain governments had commented on the form of the draft articles and that two governments had expressed the view that the form should be that of a "code" rather than that of a "convention" on the Law of Treaties. Consequently, although the question had been thoroughly canvassed before in the Commission during its 1961 and 1962 sessions, it was re-examined at the 1965 session. Nearly all the members of the Commission felt it necessary to comment on the issue and all supported the decision of the Commission taken in 1961 to prepare a single set of draft articles capable of serving as a basis for a multilateral convention on the Law of Treaties. It was pointed out that the majority of the representatives at the 17th session of the General Assembly had stated in the 6th Committee approval of the Commission's decision. Moreover, it was the feeling of the Commission, particularly Tunkin and Reuter, that the Commission ought to aim at achieving the maximum results possible from its work on the codification of the Law of Treaties and that this could best be done by means of a convention rather than an expository code. The majority of the Commission accepted the view expressed by some governments, however, particularly Sweden, that the draft contained too much detail and controversial matter (a view not wholly shared by Ago, Bartos, Rosenne, Ruda and De Arechaga). It was the general feeling of the Commission that: (a) many of the draft articles should be shortened and simplified considerably, and much of the detail omitted; (b) the emphasis should be on substantive legal content, and purely procedural questions and descriptive articles should be eliminated to the extent possible, so that the draft articles would not partake too much of the codification approach; (c) a more logical re-arrangement of the articles is required, (views differing somewhat on the kind of re-arrangement needed); (d) a number of articles and parts of articles

which might be desirable in a code may be unnecessary in a draft convention and should be deleted; and (e) the overall aim should be to produce substantive residual rules rather than to cover every contingency however remote.

3. As a consequence the Commission extensively revised the articles contained in Part I, eliminating from them purely descriptive elements more appropriate in a code than a convention, and, where necessary redrafting them so as to formulate them more explicitly as rules of law. The Commission re-affirmed, however, its 1961 decision in favour of a convention, citing in its report (document A/CN.4/181 of July 14, 1965, paragraph 16) as the principal reasons for its decision, firstly, that an expository code cannot be as effective as a convention for consolidating the law, and secondly, that a multilateral convention would give new states greater opportunities to participate in the formulation of the law.

(b) Whether a Single Draft Convention or Three Separate Conventions should be produced

4. The Commission had left open at its 14th, 15th and 16th sessions the question whether the article should be cast in the form of a single draft convention or of a series of related conventions on Part I (conclusion, entry into force and registration) and II (invalidity and termination) and III (application, effects, modification and interpretation). It was the feeling of the members of the Commission in the light of their work on the Law of Treaties during the previous three sessions that the legal rules set out in the respective parts are so far interrelated that it was desirable that they should be codified in a single convention incorporating a closely integrated set of articles. The Commission therefore decided that in the course of their second reading of the draft articles the article should be re-arranged in the form of a single convention.

(c) The Scope of the Draft Articles

5. The Special Rapporteur had drawn attention to the need to lay down an explicit term on the scope of the articles. However, whereas article 1(a) of Part I defined the term treaty as including international agreements in a written form between two or more states or other subjects of international law, this definition was not consistent with the provision of article 2, paragraph 1 that the article should apply to every treaty as defined in article 1, paragraph 1(a). He pointed out that one would expect from this that the draft would deal with both treaties between states and also treaties concluded by other subjects of international law, whereas in fact there were few provisions on the later kind of treaty. He therefore considered it necessary to limit the scope of the articles.

6. It will be recalled that at its 14th session, the Commission reaffirmed its decision taken in 1951 and 1959 to defer examination of treaties entered into by international organizations until it had made

further progress with its draft on treaties concluded by states. The Commission had recognized, however, that international organizations may possess a certain capacity to enter into international agreements and that these agreements fall within the scope of the Law of Treaties. For instance, in formulating the rules regarding capacity to conclude treaties contained in article 3, the Commission included a provision concerning the treaty-making capacity of international organizations.

7. Ago initially opposed the deletion to the reference to "other subjects of international law", drawing particular attention to the position of the Holy See. (Pessou also took strong exception to any action which might appear to limit the right of the Joly See to enter into treaties). Rosenne also expressed preliminary reservations on the grounds that many more of the articles might relate to treaties concluded by international organizations than might appear at first sight. Tunkin, while not admitting that international organizations could conclude treaties, proposed a new first article which would set clearly that the scope of the articles was limited to treaties concluded between states and it was ultimately so decided.

8. The majority of the members of the Commission considered that since most of its draft articles on the Law of Treaties were applicable only to treaties concluded between states and that further study of treaties concluded by international organizations would be needed before rules applicable to that category of treaties could be codified accordingly. For these other reasons, the Commission decided explicitly to limit the scope of the articles to treaties concluded between states. (As appears below, this decision is embodied in the new first article and in consequential changes in articles 1 and 3).

9. The Commission also considered it essential, however, to avoid any possibility that the limitation of the draft articles to treaties concluded between states might be construed as denying the legal force of such other forms of treaties or the application to them of the principles set forth in the draft articles pursuant to general international law. The Commission accordingly decided to include (in article 2) a new provision safeguarding the legal force of these forms of treaties and the application to them of relevant principles of general international law which may be contained in the draft articles.

(d) Terminology and Definitions

10. The Special Rapporteur drew attention to the question which had been raised directly or indirectly in the comments received from a number of governments of the need to ensure consistency in terminology and definitions. He suggested, however, that decisions on terminology should not be dealt with until a later stage of the re-examination of the various articles, and, after a brief discussion, it was so decided.

11. The detailed commentaries on each article which follow are rather briefer than in previous reports since the articles were receiving second reading at the 17th session. (For this reason, the Commission adopted the unusual practice of providing no commentary at all on the 28 articles revised during the first part of the 17th session.

Article 0 (The Scope of the Present Articles)

> The present articles relate to treaties concluded between States.

12. This new article embodies the decision of the Commission to limit the scope of the articles to treaties concluded between states, discussed in paragraphs 5-8 of Annex I above.

Article 1 (Use of Terms)

Paragraph 1(a)

13. Paragraph (a) as amended by the Commission provides:

> "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

As pointed out in paragraphs 5-8 of Annex I above, the principal change in paragraph (a) was the deletion of the words "or other subjects of international law", which had been contained in the former version. A further change was the deletion of the list of appellations given to treaties and which had been set out between brackets, a change suggested in comments of a number of governments and concurred in by the Special Rapporteur in his 4th report on the Law of Treaties (A/CN.4/177). The further proposal by a number of states, including Australia, Austria and United Kingdom (ans approved in the Commentary) to refer to the intention to create legal obligations in the definition section was not accepted by the Commission, which agreed with the view of the Special Rapporteur that such a reference was unnecessary.

Paragraph 1(b)

14. A number of states had expressed dissatisfaction with the definition of "treaty in simplified form" contained in paragraph (b) as lacking precision. While the members of the Commission recognized the importance in treaty practice of the development of the use of the simplified treaty form, the Commission as a whole concluded that the concept lacks the degree of precision necessary for it to provide a satisfactory criterion for distinguishing between different categories of treaties in formulating the rules in articles 4 and 12. The Commission therefore accepted the Special Rapporteur's recommendation that

articles 4 (authority to negotiate, draw-up, authenticate, sign, ratify) and 12 (ratification) be re-formulated un such a way as to remove the distinction between formal treaties and treaties in simplified form, and thereby rendering paragraph (b) unnecessary, and that paragraph (b) defining "treaty in simplified form" be deleted, and it was so decided.

Paragraph 1(c)

15. This paragraph, containing a definition of general multilateral treaty was criticized in the comments of a number of states. The Special Rapporteur had, in his 4th report (A/CN.4/177), accepted the criticism that the definition was too broad, and had recommended deletion of the words "or deals with matters of general interest to states as a whole". (The only other place where the phrase "general multilateral treaty" occurred was in article 8(1)). The Commission recognized the relationship between any attempt to define the term "general multilateral treaty" and the controversial political questions concerning "all states" raised by articles 8 and 9. As the Commission was unable to agree on a formulation of articles 8 and 9, (as appears below) it was decided to postpone consideration of those articles and also article 1(c) to its resumed session next January.

Paragraph 1(d)

16. "Ratification", "Accession", "Acceptance" and "Approval" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.

The Commission postponed consideration of the recommendation by the Government of Luxembourg in its comments on this paragraph that the word "approval" be deleted. The Commission discussed, however, the desirability of retaining the term "signature" in the context of an article laying down the means whereby a state establishes on the international plane its consent to be bound by a treaty, and it was decided to delete the reference to "signature", because of the changes made in the rules concerning signature and also the succeeding sentence, (explaining that signature can mean, according to the context, an act of authentication of the text of a treaty.) The definition was shortened and somewhat modified to bring out the fact that the draft articles concerning ratification, accession, acceptance and approval deal with the international act and not with any internal procedures which might have preceded.

Paragraph 1(e)

17. "Full powers" means a document emanating from the competent authority of a State designating a person to represent the State for negotiating, adopting or authenticating the text of a treaty or for expressing the consent of the State to be bound by a treaty.

The language of the paragraph was slightly modified so as to take into account the decision not to refer to authentication in the preceding paragraph, and the decision referred to below to delete article 5 on negotiation

and drawing-up of a treaty. The 1962 text had been more or less confined to a formal instrument of full powers but the revised version now took into account the modern practice of employing less formal methods. It will be seen that the amended paragraph also avoids the stipulation that "full powers" be a formal instrument, and refers to the actual processes of concluding a treaty (negotiating, adopting and also authenticating the text) in lieu of the more general language contained in the original draft.

Paragraph 1(f)

18. "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or to vary the legal effect of certain provisions of the treaty in their application to that State.

The only change made was to insert the words "however phrased or named" after the reference to "a unilateral statement". The sub-paragraph contains an extremely important definition and the change is intended to bring out that, however designated, any statement purporting to exclude or vary the legal effects of certain provisions in a treaty would constitute a reservation.

Paragraph 1(f)(bis)

19. "Party" means a State which has consented to be bound by a treaty and for which the treaty has come into force.

The Commission decided that this new definition put forward by the Drafting Committee would need to be examined later in conjunction with the definition of a "contracting State" that might be included as sub-paragraph (f)(ter). (As appears in paragraph 10 of Annex I above, the Commission decided to postpone a number of decisions on terminology.)

Paragraph 1(f)(quarter)

20. "International organization" means an inter-governmental organization.

This provision is new and was inserted so as to exclude non-governmental organizations.

Paragraph 1(g)

21. On the recommendation of the Drafting Committee, the Commission decided to delete the definition of "depository". (At the suggestion of Reuter and Ago, the function of custodian exercised by the depository was transferred from the definition section to article 29, which sets out the functions of a depository, in paragraph (a)).

Article 1 (Paragraph 2)

22. The Government of the United States had recommended drafting changes in this article intended to avoid the possibility of the article being interpreted as having the effect of modifying internal law. The Government of Israel had recommended its complete deletion.

23. Professor Briggs developed the point raised by the USA Government, but it was the general view of the Commission that theproblem did not really arise, since it was clear that the paragraph had related merely to the question of terminology under internal law regarding the characterization or classification of international agreements. A number of members expressed the view also that since the appellations which had been contained in article 1(a) had been deleted, there is no longer any need for paragraph 2, which had been directed solely at the appellations. The Drafting Committee spent some time discussing the paragraph and while concluding that some provision on those lines would be necessary, decided that for lack of time the matter would have to be postponed until the next session. After some further discussion by the Commission, it was decided to postpone the decision on the inclusion of a provision on this question, in accordance with the Commission's general decision to consider questions of terminology at a later stage in its re-examination of the draft article.

Article 2 (Treaties and other international agreements not within the scope of the present articles)

24. The fact that the present articles do not relate

(a) to treaties concluded between States and other subjects of international law or between such other subjects of international law; or

(b) to international agreements not in written form shall not effect the legal force of such treaties or agreements of the application to them of any of the rules set forth in the present articles to which they would be subject independently of these articles.

The Commission decided to delete paragraph 1 of article 2 which had provided that the present article shall apply to every treaty as defined in former paragraph 1(a). As explained in paragraph 9 of Annex I above, the Commission considered it necessary, however, in the light of its decision to confine the scope of the draft articles to treaties concluded between states, to include in article 2 a provision intended to safeguard the legal force of treaties concluded between states and other subjects of international law or between such other subjects of international law. The former paragraph 2 had already provided for the safeguarding of international agreements not in written form, and, the amended article retained this provision, together with an analogous one applying to treaties concluded by "other subjects of international law". At the suggestion of Rosenne, the Commission gave consideration to having article 2 follow immediately after the new first article, but it was decided that since the article is an entirely independent, self-contained article that dealt with two separate matters, its order should not be changed.

Article 3 (Capacity of States to conclude treaties)

25. 1. Every State possesses capacity to conclude treaties.

2. States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.

This article proved to be one of the most controversial - and one of the most important from the Canadian point of view - of any discussed by the Commission during this session. The majority of governments which commented on the Commission's formulation of the article had criticized it, as being an inadequate statement of the Law on the question, and the Special Rapporteur had, as a consequence, recommended its deletion in his 4th Report. Article 3 as previously drafted by the Commission had laid down that the capacity of the member states of a federal union "depends on the federal constitution". A number of members of the Commission, principally Briggs and De Aréchaga, pointed out that this was an incorrect statement of the Law since the question was a matter for international law rather than internal law and matters such as recognition could not be overlooked as factors determining capacity of the member states of a federal union. In the initial discussion on the article, a slight majority of the members then present, including Yasseen, Castren, Lachs, de Luna, Rosenne, Reuter, de Aréchaga, Briggs and Amado expressed reservations about the article and substantial agreement with the suggestion that it be deleted. At that stage only Ago, Tunkin, El-Erian, Pessou and Bartos expressed support for the article. The article was accordingly referred to the Drafting Committee for redrafting. The redraft was then discussed again at some length. At this stage, the trend of debate was clearly in favour of the deletion of paragraph 2 of the article (dealing with the capacity of the member states of a federal union to conclude treaties). Ago made a strong intervention, however, in favour of an article indicating the limitations of the capacity of member states of a federal union and one less likely to create a presumption of capacity. During the subsequent debate, both Rosenne and Waldock reversed their original position and accepted in principle that suggested by Ago. At this point only Tunkin, Lachs, Bartos, Yasseen and Pessou were in favour of the article as re-drafted by the Drafting Committee with Aréchaga, Briggs, Amado, Pal, Ruda, Tsuruoka and Reuter all strongly opposing it, with Rosenne, Castren, Verdross and Waldock supporting the Ago suggestion. Some members of the Commission considered that paragraph 1 was unnecessary and redundant and should therefore be deleted. Tunkin, Lachs and Bartos may have influenced some members by arguing that the provision had anti-colonial implications, i.e. that while at one time it may have been argued that not every state possesses capacity to conclude treaties, under the "new International Law", this is no longer true. The majority of the members of the Commission seemed to consider that the paragraph was worth retaining.

26. The Drafting Committee subsequently introduced the present revised version at the beginning of a meeting when some members (Ruda, Amado and Ago) had not yet arrived. No further discussion occurred on

the article and the Chairman put it promptly to the vote. Briggs requested a separate vote on the two paragraphs. The vote on paragraph 2 was 7 in favour (Yasseen, Waldock, Rosenne, Tunkin, Lachs, Elias and Bartos), 3 against (Reuter, Tsuruoka, Briggs), 4 abstentions (Castren, Verdross, Pessou and Pal). The vote on article 3 as a whole was 7 in favour (same as above), 3 against (Reuter, Briggs and Ruda), 4 abstentions (Tsuruoka, Pessou, Pal and Castren). The disparity in total votes cast was caused by Ruda entering after the vote on paragraph 2, but before the vote on the article as a whole. As pointed out in paragraphs 26 and 27 of the attached report, the amended wording is still unsatisfactory and should, perhaps, be re-opened at the resumed 17th session.

Article 3 (bis) (Treaties which are constituent instruments of international organizations or which have been drawn up within international organizations

27. The application of the present articles to treaties which are constituent instruments of an international organization or have been drawn up within an international organization shall be subject to the rules of the organization in question.

This article is an amended version of former article 48 which had been contained in part II, Section 3 of the draft articles. The Special Rapporteur had recommended that this reservation be transferred to the "general provision" part and amended to cover the draft articles as a whole, rather than merely the section in which it had earlier been contained. The Special Rapporteur had also recommended that articles 31 to 37 and article 45 be excepted from the application of this provision, but the Commission decided to make the reservation generally applicable to all the articles. The article was included in the draft on a provisional basis, at the recommendation of the Drafting Committee.

Article 4 (Full powers to represent the State in the negotiation and conclusion of treaties

28. 1. Except as provided in paragraph 2, a person is considered as representing a State for the purpose of negotiating, adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty only if:

(a) he produces an appropriate instrument of full powers; or
(b) it appears from the circumstances that the intention of the States concerned was to dispense with full powers.

2. In virtue of their functions and without having to produce an instrument of full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(b) Heads of diplomatic missions, for the purpose of negotiating and adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(c) Representatives accredited by States to an international organization, for the purpose of negotiating and adopting the text of a treaty.

This article as originally drafted was criticized in the comments of a number of governments which considered that it should have been directed more towards evidence of full powers than actual authority to negotiate, draw-up, authenticate, etc. The Government of Sweden, in particular, had pointed out that the legally relevant point is whether a representative is competent to bind the authority he purports to represent, and that this point was not covered. The Swedish Government also maintained that the issue of interest to a state concluding a treaty is whether it refrains from asking for full powers at its own risk. The Commission accepted the validity of these comments, and re-drafted the article laying down emphasis on evidence of full powers rather than the actual authority represented by them, and amending the title accordingly.

29. Some doubts were expressed by some members of the Commission as to whether there is a legal rule that Heads of State, Heads of governments and Ministers for Foreign Affairs are not bound to produce full powers; it was generally agreed that the article should provide that such persons should be considered as representing their state without having to produce an instrument of full powers. However, the previous formulation (paragraph 2(a)) according similar status to Heads of a Diplomatic Mission was amended, at the suggestion of Rosenne and others, to limit their exemption from production of full powers to the case of negotiating and adopting the text of a treaty between the accrediting state and the state to which they are accredited. Corresponding changes were also made in the corresponding provision relating to representatives to international conferences or organs of international organizations. The amendments made reflect also the decision of the Commission that the concept of "treaties in simplified form" is insufficiently precise to form a basis for the rules laid down in article 4.

<u>The Question of an Article on the Question of Treaties by One State on Behalf of Another or by an International Organization on Behalf of a Member State</u>

30. El-Erian asked whether the Commission proposed to take a decision on the question raised on page 50 of the Special Rapporteur's Report (A/CN.4/177). In the view of the Special Rapporteur, if there was to be an article on this subject it ought to be placed just after the draft article

on capacity, but he favoured its omission, as did El-Erian and Rosenne. Ago and Amado both argued that the Commission ought not to ignore the question of one state concluding a treaty implying rights and obligations for another state since actual cases did exist, e.g. the Belgo Luxembourg Economic Union; Reuter, Ago and Amado felt a decision should be postponed until a later stage of the discussion, after an examination of capacity and termination of agreements. Tunkin formally proposed that this be done, and it was so decided. The amended article also reversed the order of its paragraphs. Instead of stating in the first paragraph the rule relating to Heads of State, Heads of Government and Foreign Ministers, the article now begins with the statement of the general rule on requirement of full powers. The substance of the article is unchanged, however, except for paragraph 2(c) which, as pointed out above, embodies a different and more limited than that appearing in paragraph 2(b) of the 1962 formulation.

Article 5 (Negotiation and drawing-up of a treaty)

31. The article as it had been formulated by the Commission was criticized by a number of governments on the grounds that it was purely procedural and descriptive in content. (All those commenting but Israel, had questioned its usefulness). During debate on the article, Castren, Yasseen, Lachs, Tunkin, Briggs, Tsuruoka and Tabibi all favoured its deletion, with only Ago, Reuter, Rosenne, El-Erian and Bartos expressing support for it. The Special Rapporteur had reformulated the article with a view to eliminating certain defects and the Commission decided to refer the article to the Drafting Committee. Subsequently, the Commission provisionally decided to delete the article entirely on the grounds that it was essentially descriptive and did not state a legal rule. At the suggestion of Lachs, it was agreed that the contents of former article 5 be incorporated in the Commission's commentary on Article 6.

Article 6 (Adoption of the text)

32.

1. The adoption of the text of a treaty takes place by the unanimous agreement of the States participating in its drawing-up except as provided in paragraphs 2 and 3.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States participating in the conference unless:

   (a) by the same majority they shall decide to apply a different rule; or

   (b) the established rules of an international organization apply to the proceedings of the conference and prescribe a different voting procedure.

3. The adoption of the text of a treaty by an organ of an international organization takes place in accordance with the voting procedure prescribed by the established rules of the organization in question.

The Commission's formulation of the article was criticized by a number of states, some suggesting its complete deletion. The Special Rapporteur had proposed a reformulation re-arranging the order of presentation and intended to reflect government comments. Some discussion occurred as to whether the article as re-drafted now embodied a useful residual rule or whether the questions it covered should be left to mutual agreement amongst states. It was concluded, however, that the article was worth retaining and it was referred to the Drafting Committee. The Committee's revision made no changes of substance but altered the form of the article, which now begins by stating the unanimity rule and then the exception set out in paragraphs 2 and 3. This formulation was adopted without further discussion.

Article 7 (Authentication of the text)

33. The text of a treaty is established as authentic and definitive by such procedure as may be provided for in the text or agreed upon by the States concerned and failing any such procedure by:

(a) the signature, signature ad referendum or initialling by the representatives of the States concerned of the text of the treaty or of the Final Act of a conference incorporating the text; or

(b) such procedure as the established rules of an international organization may prescribe.

The Governments of Japan, Sweden and the USA questioned in their comments the Commission's decision to recognize authentication of the text as a distinct element in the treaty-making process. Government comments also criticized the article on the grounds that it took the form of procedural advice rather than of a rule of law. In explaining to the Commission his reformulation of the article, the Special Rapporteur expressed the view that although the legal effect of authentication may not be considerable, it should not be regarded as negligible either, and the article should therefore be retained after appropriate amendments, intended to remove its purely procedural aspects. He recommended, however, and the Commission accepted the suggestion, that because of the relationship of article 7 to article 10 (signature and initialling of the treaty) and article 11 (legal effects of signature), the three articles should be discussed together.

34. The discussion of the three articles ranged largely around the question of the choice between two systems of approach to the article, the descriptive system (that of article 10) criticized by some members of the Commission as being too code-like, and the substantive system which would concentrate on the force of acts and their legal effects and would not retain very much of the existing article 10. The intervention of Ago, Tunkin, Reuter and Tsuruoka (SR 783) provided a good discussion of the problem. Tunkin felt that all three articles contained descriptive elements and unnecessary detail, and could be simplified, eliminating the descriptive material, and the contents couched in terms suitable to legal norms. What was required was a residuary rule on the legal effects on the acts of authentication, signature and initialling due to the wide variation in practice. The structure of the three articles should reflect the three

stages in the treaty-making process, authentication, initialling and signature, the last two of which overlap. Rigid rules on signature and initialling should be avoided. Ago accepted Tunkin's approach. Reuter considered that the Special Rapporteur's proposal, based on the functional rather than the formal method, provided an adequate basis for discussion. Tsuruoka stressed as usual the practical approach to the problem from the point of view of States and chanceries having to deal with the results. He hoped the Drafting Committee would choose its terminology carefully so as to avoid those expressions which could be interpreted in different ways. The Special Rapporteur considered that it was not necessary to exclude either functional or formal methods in favour of the other but felt the Drafting Committee could resolve the difficulty. He proposed that articles 7 and 11 be retained, and what required retention from article 10 could be incorporated in article 11 or 7 but that there be no special article on initialling. It was agreed that articles 7, 10 and 11 be referred to the Drafting Committee for reformulation in the light of the discussion. The Drafting Committee's revisions were subsequently accepted by the Commission. The Drafting Committee's revision was shorter but comprised the same substantive rules covered in the previous article 7. Bartos stated, however, that he must abstain on the article because, while he accepted the notion of authentication since a distinction should be drawn between the establishment and the adoption of the text of a treaty, he was opposed to the idea of signature, for often a final treaty was not signed. The Drafting Committee's revision was therefore adopted with Bartos abstaining.

Article 8 (Participation in a treaty)

35. See the Commentary at pages 30 to 32 for the background discussion of this article. As reported in telegram 558 of June 4 from the Permanent Mission in Geneva, this article, together with the closely related article 9 provoked three days of vigorous and wide-ranging debate. It will be recalled that during the first reading of part I of the Law of Treaties (conclusion, entry into force and registration of treaties), the Commission had a series of lengthy and difficult discussions on the applicability of the "all states" formula to accession to general multilateral treaties, and ultimately adopted the following formulation of article 8(1): "In the case of a general multilateral treaty, every state may become a party to the treaty unless it is otherwise provided by the terms of the treaty itself or by the established rules of an established international organization". The Commission was divided on the question, however, and the 1962 vote was as follows: 12 in favour (Ago - Italy, Amado - Brazil, Rosenne - Israel, Tunkin - USSR, Elias - Nigeria, El-Erian - UAR, Castren - Finland, Lachs - Poland, Pal - India, Yasseen - Syria, Verdross - Austria, De Luna - Spain); five against: (Briggs - USA, Gros - France, Tsuruoka - Japan, Waldock - UK and myself); no abstentions.

36. The Commission's 1962 formulation was criticized by a number of governments, particularly the USA, UK and Japan. The Special Rapporteur, although disagreeing in his personal capacity with the 1962 decision, considered himself bound as Special Rapporteur to maintain the approach laid down in the 1962 formulation and this he did in his re-draft. The whole question was re-opened at the present session of the Commission during the second reading of the article. Briggs made a very effective analysis of the article's legal defects, particularly the lack of an adequate definition

of general multilateral treaties, and pointed out that it did not reflect the existing UN practice. Tsuruoka and I supported Briggs; in my statement (a copy of which is attached), I pointed out also that the formulation was not a compromise; it favoured the "all states" position by permitting in effect a decision by one-third plus one of the participants of a conference that the "all states" formula should apply to the treaty drafted at it. We also drew attention to the difficulties the "all states" formula created for the Secretary-General when acting as depository for treaties to which the "all states" formula was to be applied, and emphasized that there was a serious political problem in issue which could not be side-stepped by the Commission. Tunkin, Lachs, Bartos and Pal made the usual arguments in support of the "all states" formula, with only El-Erian contributing some new ideas. During the course of the debate, three prominent members of the Commission (Amado, Ago and Rosenne) who had supported the 1962 formulation reversed their decision on it. Ruda, who had been elected to the Commission since the 1962 discussion also supported our position.

37. Briggs formally proposed the deletion of article 8(1); Tunkin proposed the "all states" formula; Ago proposed a formulation reflecting existing UN practice; and a number of members expressed support for the 1962 formulation. All four proposals were put to the vote with the following results.

38. (a) Briggs' proposal to delete article 8(1): ten in favour: (Ago, Amado, Briggs, Pessou, Dahomey, Reuter, France, Rosenne, Ruda, Argentine, Tsuruoka, Waldock and myself); ten against: (Bartos, Yugoslavia, Castren, El-Erian, Elias, Lachs, Pal, Paredes, Tunkin, Verdross and Yasseen); no abstentions; proposal defeated.

39. (b) Tunkin's proposal, consisting of one paragraph stating that in the case of general multilateral treaties all states have the right to accede to it, plus a second paragraph stating that accession to such treaties would not raise questions of recognition and a third paragraph stating that the article would not be retroactive: 5 in favour (Bartos, El-Erian, Lachs, Pal and Tunkin); 13 against (Ago, Amado, Briggs, Castren, Elias, Paredes, Pessou, Reuter, Rosenne, Ruda, Tsuruoka, Waldock and myself); 2 abstentions: (Verdross and Yasseen); proposal defeated.

40. (c) Ago's proposal that any state taking part in the drawing up of a multilateral treaty or invited to the conference at which it was drawn up may become a party to the treaty, and that any state to which the treaty was made open by its terms may become a party to a multilateral treaty: nine in favour (Ago, Amado, Briggs, Reuter, Rosenne, Ruda, Tsuruoka, Waldock and myself); 9 against (Bartos, Castren, El-Erian, Elias, Lachs, Pal, Paredes, Tunkin, Yasseen); 2 abstentions: (Pessou, Verdross); proposal defeated.

41. (d) The principle embodied in the 1962 formulation: 9 in favour (Bartos, Castren, El-Erian, Elias, Lachs, Pal, Tunkin, Verdross, Yasseen; 10 against (Ago, Amado, Briggs, Paredes, Pessou, Reuter, Ruda, Tsuruoka, Waldock and myself); 1 abstention (Rosenne); proposal defeated.

42. Some further discussion ensued as to the position which obtained in the light of the defeat of all four proposals, and it was finally agreed that the Special Rapporteur, in consultation with the Drafting Committee, would attempt a new formulation, taking into account the debate on the question and the votes taken. The supporters of the "all states" formula argued that the Commission had expressed a clear desire to have an article of some sort on the question but Rosenne, Amado and I pointed out that no such conclusion could be drawn. It was subsequently decided that given the importance of the question, it should not be discussed further in the absence of a number of members of the Commission (including De Luna, Arechaga, Tabibi and the new Algerian member, Bedjaoui) and the question was therefore postponed to the resumed 17th session in January.

43. It will be seen from the foregoing that, although the Commission's decisions were not final, they were extremely important in that they rejected both the "compromise" formula which had been agreed to in 1962 and the more extreme formulation of the "all states" clause proposed by Tunkin. As pointed out on our telegram 558 of June 4, 1965, it is too early to say what will be the eventual outcome of the Commission's deliberations on this question. It is unlikely that future votes will be as favourable, since several supporters of the "all states" formula were absent, when the vote was taken. At least, however, the 1962 formulation has been discredited and it has been demonstrated that any similar formulation stands little chance of providing generally acceptable.

Article 9 (The opening of a treaty to the participation of additional States)

44. See pages 33 to 36 of the Commentary for background discussion of this article. As appears above, the article was discussed in conjunction with article 8, and it was decided to postpone further debate on it until the resumed 17th session in January in Monaco.

Article 10 (Initialling and signature ad referendum as forms of signature)

45. See pages 37 to 39 of the Commentary for a discussion of the background and the relevance to Canadian practice of former article 10. In revising the articles dealing with signature, ratification, acceptance and approval, the Commission found it possible to dispense with article 10 (and article 14, as appears below). The article was accordingly deleted and its substance incorporated in article 11.

Article 11 (Consent to be bound expressed by signature)

46. 1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

(a) the treaty provides that signature shall have that effect;
(b) it appears from the circumstances of the conclusion of the treaty that the States concerned were agreed that signature should have that effect;
(c) the intention of the State in question to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiations.

2. For the purpose of paragraph 1:

(a) the initialling of a text constitutes a signature of the treaty when it appears from the circumstances that the contracting States so agreed;

(b) the signature ad referendum of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

It will be recalled that this article (which had been numbered 9 in the Special Rapporteur's First Report, and entitled "Legal effects of a full signature") had received general acceptance in the Commission, but only after some divergence of views on the question whether a signatory state is under an obligation to examine the question of ratification in good faith. This proposition had been opposed by me and others at the 14th session and defeated by a close vote; the Argentine Delegation subsequently revived this proposal in the 6th Committee. The Government of Luxembourg also reiterated in its comments its observations on the term "approval" also contained in its comments on article 1(d), and recommended the deletion of the term. The Special Rapporteur, however, recommended only one change of substance, the deletion of the words "confirmed or as the case may be" in paragraph 2. As appears above, the Commission discussed this article in conjunction with articles 7 and 10 and referred the text of articles 10 and 11 to the Drafting Committee with a view to incorporating the substance of the article into article 11. Article 11 was accordingly substantially re-drafted by the Drafting Committee and now comprises in part the elements contained in former article 10 and in part the elements of former article 11. The title was altered to reflect the amendments to the text. Paragraph 1 incorporates the rules relating to those cases where, either expressly or by implication in the light of the circumstances, the states had shown their intention that signature should express consent to be bound. Paragraph 2 deals with two subsidiary questions. The first, covered by sub-paragraph (a), expresses in general terms the rule in cases where the initialling of the text amounts to signature; the article drops the distinction between initialling by the Head of State, Head of Government or Foreign Minister, on the one hand, and initialling by other representatives on the other. In paragraph 2(b) relating to signature ad referendum, the text does not state any rule respecting the date at which confirmation would be taken as operative. Government comments, especially those by the Government of the United States, had shown that a certain practice had emerged of using signature ad referendum as equivalent to signature subject to ratification. The text adopted is intended not to encourage that practice, although it actually contains the implication that signature would operate from its date, if subsequently confirmed. In the text presented by the Drafting Committee, the words "or from statements made by him during the negotiations" were contained in paragraph 1(c). This phrase was criticized by Yasseen, Tunkin, Lachs, Amado and later dropped by the Drafting Committee and the words "or was expressed" substituted for them. The Drafting Committee's formulation had also provided in paragraph 2 that initialling and signature ad referendum should be "considered as" signature in the circumstances set out. This too was dropped and the present language substituted.

Article 12 (Consent to be bound expressed by ratification, acceptance or approval)

47. 1. The consent of a State to be bound by a treaty is expressed by ratification when:

(a) the treaty or an established rule of an international organization provides for such consent to be expressed by means of ratification;
(b) it appears from the circumstances of the conclusion of the treaty that the States concerned were agreed that ratification should be required;
(c) the representative of the State in question has signed the treaty subject to ratification; or
(d) the intention of the State in question to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiations.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

The background to this article (previously numbered 10 in the Special Rapporteur's first draft) is discussed in the Commentary at pages 42 to 44. It will be recalled that at the 14th session, I had supported the Special Rapporteur's approach that the general residual rule should be that ratification was necessary, while subject to certain exceptions. It had been evident, however, that there was a fundamental difference in the Commission on the issue, some favouring this proposal and some that of Sir Gerald Fitzmaurice to the effect that ratification was not necessary unless specifically provided for or where circumstances required it. The comments of governments reflected this cleavage of opinion. Four governments (Japan, Sweden, UK and Denmark) expressed the desire to see the presumption reversed.

48. This article provoked a wide-ranging discussion in the Commission this year extending over four sessions. At the suggestion of the Special Rapporteur, he included his revised proposals (set out in A/CN.4/177 pages 96-99) in one paper, Conference Document No. 2 of May 13. The major question discussed, once again, was whether a treaty is to be considered in principle to be subject to ratification unless a contrary intention is disclosed or whether the rule is the reverse. The Special Rapporteur pointed out that article 12 had been fairly strongly criticized by governments and it was necessary, in his view, that the Commission make up its mind whether or not to lay down a basic residual rule. He had provided in his reformulation alternative (A) setting out a presumption in favour of ratification, and alternative (B) setting out a presumption the other way. There was a division of views between the Commission members on whether the requirement of ratification should be the general rule or the exception, with some members holding that it was not necessary to make a choice. Tunkin and Reuter argued against the presumption in favour of ratification. Bartos

suggested that, whereas great powers preferred no ratification as it enabled them to put pressure on smaller states, the smaller states preferred to have the safeguard of ratification. Tunkin's views were generally supported by Castren, Lachs and de Luna, with most of the other members of the Commission supporting alternative (B), setting out a presumption that ratification is needed. Ago supported the approach of the Special Rapporteur, but proposed a new text, (set out in Conference Room Document No. 3 of May 14) providing for ratification where the treaty so provides, or the intention appears from the nature and form of the treaty, and where it appears from the full powers or the preparatory work or the circumstance, and providing that signature alone shall suffice where the same criteria indicate that it shall. The Special Rapporteur, summing up the discussion at that stage, pointed out that some members had emphasized the need to safeguard the constitutional provisions of states while other were concerned that reasonable security in the treaty-making process should be assured so that states could know with some degree of certainty when they could rely on acts that would commit both themselves and others to be bound by the terms of a treaty. While he shared the latter approach, he had come round to think after examining the observations of governments and listening to the Commission's subsequent discussion on the article that it would be wiser not to formulate any definite residuary rule, even though one might be foreshadowed. The Commission took note of the difference of opinion amongst governments as to whether or not there exists in the International Law of today any basic residuary rule that ratification of a treaty is necessary unless a contrary intention appears; the Commission noted also its previous decision not to retain the distinction between "formal treaties" and "treaties in simplified form" which had been embodied in former article 12 necessitating, in any event, redrafting the article. The Commission concluded that, in these circumstances, the appropriate course was simply to set out in one article the conditions under which signature would be considered as a definitive expression of consent to be bound, and set out the conditions under which consent to be bound would be expressed through ratification, acceptance or approval without stating any residuary rule in international law either in favour or against the need for ratification. It accordingly redrafted articles 11 and 12 along these lines, at the same time incorporating in article 12 the rules regarding "acceptance" and "approval" which had formed the subject of a separate article (article 14) in its 1962 report. As redrafted, article 12 accordingly consolidates a number of previously separate provisions, on the subject of ratification, acceptance and approval, accession being left aside for the time being. As pointed out by the Special Rapporteur, to some extent, the draft represents a compromise. Ratification has been dealt with separately in paragraph 1, so as to stress its importance and reflect the views of those who felt that a residual rule should have been included, stating the requirement of ratification.

Article 13 (Accession)

49. See page 46 of the Commentary for background. In deciding to postpone a decision on articles 8 and 9 dealing with participation in a treaty and the opening of a treaty to the participation of additional states, it was decided also to postpone a decision on the closely related article 13 dealing with accession.

Article 14 (Acceptance or approval)

50. See pages 47 and 48 of Commentary for background. As appears above, the Commission was able to dispense with this article entirely as a result of its revision of the articles dealing with signature, ratification, acceptance and approval, incorporating into article 12 the rules of "acceptance" and "approval" which had been contained in former article 14.

Article 15 (Exchange or deposit of instruments of ratification, accession, acceptance or approval)

51. Unless the treaty otherwise provides, instruments of ratification, accession, acceptance or approval become operative:

(a) by their exchange between the contracting States;
(b) by their deposit with the depositary; or
(c) by notification to the contracting States or to the depositary if so agreed.

See pages 48 and 49 of the Commentary for background. The Special Rapporteur had proposed a new formulation to take into account the comments of the Government of Japan that former paragraph 3 had been unnecessary. A difference in views occurred within the Commission as to whether the article as a whole should be maintained. Some discussion occurred also on whether it was necessary to provide for the relatively rare case where there were two alternative texts between which the ratifying State must choose, and on the more important question, whether the article should be concerned with the means of ratification (as in the former version) or the act of ratification itself (as in the present version). Tunkin argued very effectively in favour of formulating a flexible residual rule rather than make an attempt at applying rigid rules about when and how ratifications are to occur. Ago took the contrary view and considered it useful to have the various steps and variations of procedure spelled out, including the question of partial ratification. It was agreed, however, that in sending article 15 to the Drafting Committee an attempt would be made to formulate a residual rule. The Drafting Committee's reformulation incorporated the material formerly contained in article 15, paragraph 2, and sets out in shortened form the rules governing the procedures by which, and the time at which, an instrument of ratification, accession, acceptance or approval became operative as an instrument. This might not necessarily bring the treaty into force if, for example, a specified number of ratifications was necessary. Sub-paragraph (a) and (b) refer to the traditional procedures, but paragraph (c) is new and was inserted as a result of the emphasis which some members had placed on the modern trend towards a less formal procedure by means of notification through agreement being reached between the states concerned.

52. The Drafting Committee's reformulation was subsequently revised in minor respects and accepted by the Commission.

Article 16 (Consent relating to a part of a treaty and choice of differing provisions)

53. 1. Without prejudice to the provisions of articles 18 to 22, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

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

The Special Rapporteur had proposed a slightly revised formulation of the article to reflect the comments of the Government of the United States calling for greater precision. He recommended orally to the Commission, however, that the article be deleted since the most substantial effect of ratification, acceptance and approval, what was to establish the consent of the state concerned to be bound by the treaty, the idea which had been expressed in such paragraph (a) of the article, would be covered by the provisions of articles 12-14 when redrafted. The majority of the Commission agreed with this proposal and the article was referred to the Drafting Committee with instructions to that effect. The Drafting Committee decided, however, and the Commission concurred, that the provisions of former paragraph (b) of article 15 should be reformulated somewhat differently and become new article 16. (The earlier text of paragraph 15 left open the interpretation that the instrument would be void altogether unless it applied to the treaty as a whole, whereas in its new form the provision is more flexible.) The present version of article 16 therefore deals not with the legal effects of ratification, accession, acceptance and approval as did the earlier formulation, but with the simple case of consent of a state to be bound by a part only of a treaty. After further discussion in the Commission, it was pointed out by Rosenne, Briggs and others that it was important to have a safeguard against any inconsistency between the article and the provisions concerning reservations. The opening paragraph was therefore amended to begin "Without prejudice to articles 18 to 22".

Article 17 (Obligation of a State not to frustrate the object of a treaty prior to its entry into force)

54. A State is obliged to refrain from acts calculated to frustrate the object of a proposed treaty when:

(a) it has agreed to enter into negotiations for the conclusion of the treaty, while the negotiations are in progress;
(b) it has signed the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;
(c) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

The Commission's discussions of the article in 1962 had revealed differences of opinion as to the extent to which there is an obligation of good faith on the part of states which had participated in the drawing up of treaties prior to the ratification or entry into force to examine whether they should ratify the treaty. Together with a number of other members, I had opposed laying down such an obligation and argued in favour only of an obligation to refrain from acts calculated to frustrate the object of such a treaty. The article as adopted was worded in this sense. A number of states, however, including Australia, New Zealand, Japan, Poland, Sweden and Finland all expressed the view in their governmental comments that the article was too wide-sweeping, and that the rule should not apply to states which had only taken part in the negotiation of a treaty or in the drawing up or adoption of the text. The Special Rapporteur accepted the validity of these comments, and proposed a revision of the article intended to limit the obligation to cases where there had been signature subject to ratification, acceptance or approval; making certain amendments relating to the right to withdraw from a treaty after ratification but before it comes into force, which had been commented on by a number of governments; and to the question concerning undue delay in ratification raised by the United Kingdom; (in place of the phrase "undue delay" he suggested a period of ten years). His redraft of paragraph 1(b) covered the point raised by the Government of Finland regarding the withdrawal of consent, in cases where the treaty was subject to denunciation and where notification of withdrawal was given to the states concerned.

55. The Special Rapporteur's reformulation did not find acceptance in the Commission. A number of members, including Ago, Rosenne, Yasseen, Ruda, Briggs, Arechaga, El-Erian and Bartos criticized the ten year provision, while others, particularly Rosenne and Tunkin, spoke against the provision in paragraph 1(a) providing for "the recognition of its right to ratify". There was a divergency of views also over the substance of any obligation in good faith. De Luna maintained that such an obligation was a rule of jus cogens, while Tabibi maintained that such an obligation would be contrary to jus cogens. Rosenne questioned whether the obligation, if any, arose upon signature, pointing out that some treaties were not signed at all, but only authenticated, as in the case of the ILO Conventions. Tunkin, supported by Bartos, pointed to the need to differentiate between bilateral and multilateral negotiations. He also raised the question of a member state of an international organization taking part in a conference for drafting an international convention, even though it disapproved of the whole subject of the instrument.

56. The article was referred to the Drafting Committee for reformulation. The revision was also criticized by Ago, Bartos, Castren, Rosenne, Reuter and Yasseen on the grounds that the words "in good faith" were retained in the opening passage to the article. The majority of the Commission considered that while the rule was an application of the principle of good faith, there was no need to mention good faith expressly. Verdross, supported by the majority of the Commission, also criticized the revision on the grounds that the passage contained in paragraph 1(b) "until it shall become clear that it does intend to become a party" was too weak. (The redraft did not contain the Special Rapporteur's formulation providing for a ten year period nor his provision concerning the

recognition of the right to ratify.) The articles was referred back to the Drafting Committee, and the present formulation subsequently accepted with one further change, the insertion of the word "proposed" in the opening reference to the treaty, intended to take account of the point that there would be no treaty in existence during the period covered by the article. The final formulation is therefore considerably different from either the 1962 formulation or the Special Rapporteur's redraft.

Section III: Reservations to Multilateral Treaties

57. The Commission's reconsideration of its five articles on reservations was relatively brief, since these articles had been little criticized by governments and it was not considered necessary, therefore, to make substantive changes. (The background to the five articles is set out in pages 54 to 57 of the Commentary). The Commission retained the substance of articles 18 to 22 as adopted in 1962, while revising and re-arranging their provisions extensively in order to simplify their formulations and to take account of suggestions made by governments. It will be noted, however, that the wording of the five articles as finally adopted by the Commission differs considerably from both the 1962 formulation and the Special Rapporteur's subsequent redrafts.

Article 18 (Formulation of reservations)

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

(a) the reservation is prohibited by the treaty of by the established rules of an international organization;
(b) the treaty authorises specified reservations which do not include the reservation in question; or
(c) in cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty.

(See pages 58 and 59 of the Commentary for discussion of the former article and Special Rapporteur's reformulation of it.) The Special Rapporteur recommended that articles 18 (formulation of reservations), 19 (Acceptance of and objection to reservations) and 20 (the effects of reservations) be considered together and the Commission so agreed. (Subsequently, due to difficulties in discussing the three together, it was decided by vote to consider them separately). The Special Rapporteur pointed out, in introducing his reformulation of the three articles that his analysis of government comments indicated that most governments seemed to support the general approach adopted by the Commission to what was generally recognized to be an exceedingly difficult problem. He had assumed, therefore, as Special Rapporteur, that, broadly speaking, the decisions taken by the Commission at its 14th session would stand. His revisions, therefore, rearranged the material without modifying substance, apart from certain changes of nuance on one or two points. In re-arranging the material he had attempted to simplify the exposition of the rules. He considered it desirable also to take into account a point which had emerged from the

information furnished by the Secretariat, in compliance with General Assembly Resolution 1452B (XIV) in its report (A/5687) concerning depository practice, namely, that depositories seemed consistent in treating the instruments or signature to which reservations were attached as documents tendered for depository but not definitively deposited until some consultation had taken place with the other interested states.

59. During the general discussion of the article, a number of terminology problems were raised relating to such words as "party", "fewness" and "interested states". Some discussion occurred also on the basic issue whether unanimity should be required for a reservation. Ago expressed his preference for the traditional rule, while Ruda and Amado argued in favour of the flexible formulation contained in the 1962 version and Waldock's subsequent reformulation. Yasseen argued the existence of freedom to make reservations, whereas Ago, in reply, referred to them as "a necessary evil". Tunkin took the position that reservations are an institution of contemporary international law, but that most states, including the USSR made reservations with great reluctance. In his view, it was highly desirable to lay down a general rule permitting reservations, provided they were not incompatible with the object and purposes of a treaty. Rosenne concurred in Tunkin's view. Ago pointed out the dangers of reservations to treaties purporting to codify customary rules. Discussion also occurred on the desirability of retaining the 1962 rule on tacit consent, and on the basic principle adopted in 1962 that there is a requirement that a reservation must be compatible with the object and purpose of a treaty. Ruda argued that the 1951 Genocide case should not be interpreted as laying down the latter principle as a general rule, and there was no legal foundation for such a rule. The underlying issue throughout the debate, however, was whether the balance achieved in the 1962 compromise between a liberal and a restrictive approach to reservations should be maintained.

60. Early in the debate, I expressed general approval for the Special Rapporteur's reformulation which appeared to be a great improvement over the 1962 text. During the subsequent discussion as to the relative merits of the flexible system of reservations, representing a modified form of the Inter American system, embodied in the 1962 formulation of articles 18 to 20, I intervened again, along the following lines. As one of those who had been hesitant in approving the compromise formula worked out in 1962, I had looked at the new formula proposed by the Special Rapporteur to see if it was in keeping with the spirit of that compromise and, as I had said before, had finally decided that it was. I had also considered whether the Special Rapporteur had heeded the objections and suggestions which had been made, some of which were penetrating or constructive. In that respect, too, my impression was that the Special Rapporteur had succeeded brilliantly and had facilitated the Commission's work. I welcomed the suggestions for simplifying article 18; I realized, in particular, that those members (i.e. Yasseen, in particular), who supported the freedom of reservations would like the group of articles to begin in a way favourable to their position. The Commission should be careful not to upset the balance established in 1962. For example, it was slightly forcing the 1962 text to say that reservations were permitted in cases where the treaty was silent on the subject. The Drafting Committee would have to

consider that point very carefully. What Ago had called the "descriptive" method made it possible to avoid that trap. To adopt an abstract approach and postulate a principle would be straying beyond the scope of article 18 to deal with matters which, in the Special Rapporteur's new version, were governed by article 19, on "Treaties silent concerning reservations". I was convinced that the Commission as a whole did not want to change the text adopted in 1962 and that it would ask the Drafting Committee to work out a formula which would be slightly more condensed but which would be in keeping with the spirit of the text accepted by the majority at the time. This line of thought was supported by Ago, Tunkin, Amado, Pal, and El-Erian.

61. The Drafting Committee's subsequent reformulation adhered to the essential balance of the 1962 formulation. It retained the same arrangement to the extent of retaining the first provision of former article 18 on the formulation of reservations, while shortening it to only three sub-paragraphs, because the new paragraph (a) covered the substance of the former sub-paragraphs (a) and (b) of paragraph 1. Yasseen again criticized the formulation on the grounds that paragraph (b) could not be reconciled with the principle which, in his view, had been adopted by the Commission in 1962, namely the freedom to make reservations to multilateral treaties. Castren gave qualified support to Yasseen, but Ago, Tunkin, Amado, Tsuruoka and the Special Rapporteur made an appeal that the balance embodied in the text not be dropped. There were a number of other comments and suggestions concerning minor drafting changes, and the article was accordingly referred back to the Drafting Committee. After reconsideration of the article, the Drafting Committee made no further changes and the redraft was adopted without further discussion.

Article 19 (Acceptance of and objection to reservations)

62. 1. A reservation expressly or impliedly authorized by the treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

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

3. When a treaty is a constitueht instrument of an international organization, the reservations requires the acceptance of the compstent organ of that organization, unless the treaty otherwise provides.

4. In cases not falling under the preceding paragraphs of this article:

(a) acceptance by another contracting State of the reservation constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force;
(b) an objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State;
(c) an act expressing the State's consent to be bound which is subject to a reservation is effective as soon as at least one other contracting State which has expressed its own consent to be bound by the treaty has accepted the reservation.

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

(See pages 60 to 64 of the Commentary for discussion of the former article 19 and the Special Rapporteur's reformulation of it.) In the case of this article also, the Commission adhered in substance to the 1962 formulation but adopted many of the provisions suggested by the Special Rapporteur in his reformulation contained in his 4th Report, thereby greatly simplifying the presentation of the article, while retaining the essence of the 1962 formulation. During the discussion of the article, the differences of views concerning the "right" to formulate reservations was continued. Some discussion occurred also on the desirability of covering the special case of a treaty concluded between a small group of states, advocated by Ruda and the other Latin-Americans, and on the desirability of retaining the provisions on "tacit consent". On the latter point, Elias considered one year too short a period. Some members (Castren, Briggs, Ago) expressed the preference for Waldock's new formulation, whereas others (Yasseen, Tunkin) expressed a preference for the original 1962 formulation. Briggs objected to the provisions of paragraph 4 permitting a reserving state to become a party to the treaty upon acceptance of its reservation by one other contracting state and proposed an alternative text which would have necessitated acceptance by the majority of the parties to the treaty. Some discussion occurred also as to whether reservations constitute, in effect, a residual institution (the point of view of Ago, Briggs, Tsuruoka and Waldock) or whether the "right" to make reservations should be maintained from the outset (Tunkin and Yasseen), as in paragraph 1 of article 18 of the 1962 draft. (Subsequently, a dispute arose as to whether Briggs' text should be referred along with that of the Special Rapporteur to the Drafting Committee and I intervened to support Briggs' right to have his text considered by the Drafting Committee). Rosenne expressed opposition to the notion and the term "fewness" while Briggs supported it. Rosenne, Tunkin and Ago all referred to the Law of

the Sea Conventions as indicative of the difficulties which can arise concerning reservations. It was agreed that the Drafting Committee should attempt a new formulation taking into account the comments made. The next text of the article as formulated by the Drafting Committee had re-arranged the material contained in both former articles 19 and 20, retaining the substance of the old article 19 and, from the former article 20, the provisions regarding the implications to be drawn from the absence of objections, i.e. the question of tacit consent. All the procedural elements, however, had been transferred to the new article 22.

63. Verdross and Lachs criticized paragraph 1 on the grounds that the question was not one of acceptance but of the validity of the reservations notwithstanding an objection. With respect to paragraph 2, Lachs and Rosenne proposed the deletion of the two phrases "the nature of a treaty" and "other circumstances of its conclusion" since compatibility with the object and purpose of the treaty was as laid down in article 18, a sufficient criterion. Tunkin disagreed with Lachs, and the Special Rapporteur also defended the phrase "the nature of a treaty". With respect to paragraph 3, Rosenne criticized the term "admissibility of a reservation" contained in the article. With respect to paragraph 4, Castren pointed out that the term "contracting state" was used in some places whereas the term "party" was used in others. Minor criticisms were also expressed concerning paragraphs 5 and 6. The article was therefore referred back to the Drafting Committee.

64. The revised formulation took into account the criticisms which had been made. The word "nature" was replaced by the phrase "the object and purpose" and a change of order was made in that paragraph, so as to refer first to a limited number of contracting states. The reference to "admissibility" had been dropped from paragraph 3, and the contents of the previous paragraph 6 had now been transformed into a new sub-paragraph (c) in paragraph 4. At the request of Briggs, the Chairman put article 19 to the vote paragraph by paragraph. Paragraphs 1 to 3 were adopted by 17 votes to none; paragraph 4 by 15 votes to 2; paragraph 5 by 16 votes to none with 1 abstention; and the article as a whole by 15 votes to 1 with 1 abstention. Briggs explained he had voted against 19 as a whole (and paragraph 4) because the rule set out in paragraph 4 was not an existing rule of international law and not one that he considered it desirable for the Commission to recommend to states. Rosenne explained his abstention from the vote on paragraph 5 on the grounds that he was not convinced that it dealt adequately with the problem at the moment when the reservation took effect. Tsuruoka explained his abstention from the vote on the article as a whole because of his objections to article 4 on grounds similar to those given by Briggs. Ruda explained his vote for paragraph 2 on the understanding that the Commission would later consider the case of a treaty concluded within a small group of states belonging to an international organization which applied a different rule to treaties concluded under its auspices, thereby taking into account the practice of the Latin American States.

Article 20 (Procedure regarding reservations)

65. See pages 65 to 68 of the Commentary for discussion of the previous article and the Special Rapporteur's reformulation of it. There was some

discussion concerning the unanimity rule. Some further discussion occurred concerning the same problem which had been raised in connection with article 19, namely, whether states to which a treaty was open but which had not yet established their final consent to be bound should have some say in the matter of reservations. Further discussion also occurred as to whether the compatibility test should be applied to the validity of an objection as well as to a reservation. It was agreed that the title of the new article should be altered. Ruda criticized the term "small group" and defended paragraph 3(b), without which the Latin American practice in making reservations to multilateral conventions would be of doubtful legality. An exchange took place between Tunkin and Tsuruoka as to whether the unanimity rule or the flexible system was the more democratic regime. Tunkin took the opportunity to argue that the unanimity was not a democratic principle because it would mean that a minority could overrule the majority. There could be no uniformity of the treaty regime, however, since uniformity would pre-suppose the existence of a super-state organ competent to enact international legislation binding upon all states. Reservations not incompatible with the object and purpose of a treaty would clearly not break the substantial uniformity of a treaty, and therefore constituted a useful and valuable institution. He then went on to raise the question whether the same test of compatibility applicable to reservation also applied to an objection.

66. The Drafting Committee's reformulation contained in paragraph 2 maintained the rule approved by the Commission in 1962 that when a reservation was formulated at the time of the adoption of the text of a treaty or at the moment of signature subject to ratification, it must be formally confirmed when the reserving state expresses its consent to be bound. Lachs pointed out that it did not, however, deal with tacit consent or acceptance. Some discussion occurred concerning the relationship between articles 17 and 20 and the question of how the obligation of good faith operated when a state had made a reservation, i.e. is the reserving state bound during the period between the formulation and the confirmation of the reservation? The article was referred back to the Drafting Committee to consider the points raised. The only change of substance made subsequently, however, was that paragraph 2 no longer required confirmation of an objection to a reservation, the change being made on the grounds that political considerations might render such an obligation unacceptable to states.

Article 21 (Legal effects of reservations)

67. 1. A reservation established with regard to another party in accordance with articles 18, 19 and 20.

(a) modifies for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for such other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State objecting to a reservation agrees to consider the treaty in force between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

68. The background to the development of the article is set out in pages 69 and 70 of the Commentary. The article was discussed fairly extensively by the Commission, although the modifications made to the 1962 text were relatively slight. Japan and the United States has suggested in their Government comments that the word "claim" in paragraph 1(b) was unsuitable and the United States had also suggested that provision be made to cover the situation where a state might object to, or refuse to accept, a reservation, but nevertheless considered itself to be in treaty relations with the reserving state. The Special Rapporteur had accepted the validity of the Japanese criticism of the word "claim", and re-drafted the text accordingly. He had accepted also the validity of the United States comment, but altered the formulation proposed by the United States. The United States formulation had considered the situation in terms of a unilateral right of an objecting state, but in his view there was a kind of mutual relationship between the two states, and he had re-drafted the article accordingly. During the discussion of the article by the Commission a number of points were made. Ruda and Tunkin considered the title inadequate, since the article dealt with the legal effects of reservations, and the title was accordingly amended. Rosenne, Ruda, Tunkin and Briggs all expressed a preference for the United States "unilateral" approach, with only Pal supporting Waldock's "mutual" conception. Rosenne provoked some substantive discussion by suggesting the substitution of the word "application" for the word "provisions" in Waldock's new paragraph 1(b). The article was referred to the Drafting Committee for reconsideration.

69. The Special Rapporteur, in introducing the re-draft of the Drafting Committee, stated that the Committee had spent some time considering whether paragraph 1(a) should refer to modifying the provisions, or modifying the application of the provisions of a treaty, but had decided in favour of the term "provisions". A third paragraph had been drafted to deal with the case of a state objecting to a reservation, while nonetheless regarding the treaty as in force between itself and the reserving state, except for the provision to which the reservation related. Rosenne argued again in favour of the term "application". Lachs questioned the use of the word "modifies" in paragraph 1. Discussion occurred on both points and it was agreed to refer the text back to the Drafting Committee. The Committee subsequently made only minor drafting changes, including the deletion of the words "as effective" in paragraph 1, and the article was accepted as amended without further substantive discussion.

Article 22 (Withdrawal of reservations)

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

2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative when notice of it has been received by the other contracting States.

71. The background to the development of the article is set out in pages 71 and 72 of the Commentary. Two rather secondary suggestions were made in government comments concerning the article. The first was that it should take the form of a residual rule, and the second that communication of notice be made through the depository. Two rather more important comments were: the Israeli suggestion that notice of withdrawal take effect in accordance with rules laid down in the articles. This raised the question of the time when notice of withdrawal made through a depository would take effect. The second point of substance had been a suggestion by the United Kingdom that a period be provided within which states might be able to adjust their internal laws or administrative practices as a result of the withdrawal of a reservation. In the re-draft presented by Sir Humphrey Waldock, all these points were covered. In the event, however, the Commission did not accept the Israeli suggestion that the depository be mentioned, nor the United Kingdom proposal for a three-month waiting period. The Commission did, however, accept the Special Rapporteur's suggestion that the text begin with the word "unless the treaty otherwise provides" so as to transform the article into a residual rule. During the discussion of the article a number of members, including Tsuruoka, Elias, and Tunkin had expressed support for the United Kingdom proposal, but the Drafting Committee concluded that such a provision would create unnecessary complications, and it was not incorporated in the draft. Paragraph 2 of the re-draft deliberately provided that withdrawal of a reservation became operative only on receipt of notice by the contracting states, maintaining the provision formerly contained in article 22(1). Some further discussion occurred on the question when notice should operate, both Briggs and Rosenne questioning the provision contained in paragraph 2. The article was referred back to the Drafting Committee, but the Committee made no changes in the text. The article was subsequently accepted without dissent, although both Rosenne and Briggs expressed a reservation with respect to paragraph 2.

Article 23 (Entry into force of treaties)

72. 1. A treaty enters into force in such manner and upon such date as it may provide or as the States which adopted its text may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as all the States which adopted its text have consented to be bound by the Treaty.

3. Where a State consents to be bound after a treaty has come into force, the treaty enters into force for that State on the date when its consent becomes operative, unless the treaty otherwise provides.

73. The background to the article is set out in pages 73 to 76 of the Commentary. The article was much shortened and simplified by the Commission,

although it had not attracted much comment from governments and new proposals had been comparatively few. The suggestion by the Government of Luxembourg that the reference to "approval" be deleted and the proposal to insert an article providing for application of the treaty to the territories of parties were deferred.

74. The Special Rapporteur had revised paragraph 2 to take into account the comments of the Japanese Government, adding the words "without the states concerned having agreed upon another date" so as to give recognition to the freedom of states in the matter. He had also revised paragraph 3 to take into account the suggestion of the Swedish and United Kingdom Governments that it be made clear that the paragraph embodied a residuary rule. The discussion of the article centred on paragraphs 1, 2 and 3. The members of the Commission appeared to agree that it was not desirable to go too far in making presumptions about the intentions that could be attributed to the parties in certain circumstances when no provision existed in the treaty itself concerning entry into force, and when there was no subsequent agreement on the matter. The majority favoured reducing the scope of the article, retaining the essence of paragraph 1 and combining it with some residuary rule; and the dropping of paragraphs 2(a) and 2(b) of the original draft, while expressing support for the United Kingdom proposal for a provision laying down that a treaty not falling under paragraphs 1 and 2 should enter into force on the date of the signature or, if subject to ratification, acceptance, etc., when that event had taken place.

75. The article was referred to the Drafting Committee with the request that it attempt to amalgamate paragraphs 1, 2 and 3 in some abbreviated form, and retain paragraph 4 with various modifications of wording. The re-draft presented by the Drafting Committee was much the same as in the 1962 draft in substance, but much detail had been omitted. A small point of substance had also been omitted, namely that the provision that, where a treaty without specifying the date upon which it was to come into force fixed a date by which ratification, acceptance, or approval was to take place, it would come into force on that date. The Drafting Committee had concluded that it was not necessary to include this presumption in the article. The Committee had also dropped the former paragraph 2(b) as unnecessary, and 2(c) because it had been covered by paragraph 1. Rosenne questioned the use of the term "expresses its consent" in article 23, since he assumed that it had intended to refer to the moment when that expression of consent became operative. The article was, therefore, referred back to the Drafting Committee and the re-draft substituted the words "consented" and "consent" for the terms "expressed its consent" and "expresses its consent", respectively. The re-draft was then accepted in its amended form.

Article 24 (Entry into force of a treaty provisionally)

76. 1. A treaty may enter into force provisionally if:

(a) the treaty itself prescribes that it shall enter into force provisionally pending ratification, accession, acceptance or approval by the contracting States; or

(b) the contracting States have in some other manner so agreed.

2. The same rule applies to the entry into force provisionally of part of a treaty.

77. The development of this article is set out on pages 77 and 78 of the Commentary. In introducing his re-draft, the Special Rapporteur pointed out that the text had attracted only three government comments. The article was considerably shortened and simplified and its title slightly altered by the Commission. The Japanese Government had found that the precise legal nature of provisional entry into force was not clear and had suggested that, unless it could be defined better, the article should be dropped. The United States Government, while recognizing that the article corresponded to actual practice, questioned whether there was any need to include it in a convention of the law of treaties. The Swedish Government observed that, although the text of the article appeared to require an agreement between the parties in order to bring about the termination of the provisional application of a treaty, the Commentary indicated that provisional application may terminate simply on its becoming clear that the treaty was not going to be ratified or approved by one of the parties. It suggested that the Commentary came closer to current practice and recommended the re-drafting of the article along the lines of the Commentary. The Special Rapporteur in his report stated his view that it is desirable to recognize the practice of provisional entry into force lest its omission be interpreted as denying it. He accepted also the validity of the Swedish Government's observation and took it into account in his reformulation.

78. In the discussion of the article, Reuter questioned the term "provisional entry into force". While it may correspond to practice, it is incorrect and what the Commission was really concerned with was the provisional application of a treaty. He therefore recommended a change in wording, incorporating the terms "shall be applied provisionally". Much of the discussion centred around the point raised by Reuter, Verdross, de Luna and Lachs agreeing with Reuter. Elias questioned the utility of the article and recommended its deletion. There was some discussion also concerning when and how provisional application terminated. Ruda, in particular, attached importance to defining the circumstances in which a treaty ceased to be in force in cases where it was not ratified or approved. The article was referred to the Drafting Committee.

79. In introducing the re-draft, the Special Rapporteur stated that the Drafting Committee had given consideration to the difference of opinion which had arisen in the Commission as to whether the article related to entry into force of the treaty or an agreement to apply certain provisions of the treaty. The Committee had maintained the previous approach of the article and framed it in terms of the entry into force provisionally of the treaty, because that was the language very often used in treaties and by states. Tsuruoka expressed reservations about the continued use of the word "provisional", and Briggs queried the term "otherwise" which had been discussed earlier in the Commission.

The article was therefore referred back to the Drafting Committee for further consideration. The re-draft amended paragraph 1(b), eliminating the word "otherwise" and substituting the term "in some other manner", and paragraph 2 had been shortened and simplified. After a further brief discussion the article was accepted as amended.

Article 25 (Registration and publication of treaties)

80. 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.

81. The development of the article is set out on pages 79 to 81 of the Commentary. Much of the discussion of the article concerned its relationship to Article 102 of the Charter, the point on which a number of governments had also made comments. In introducing his re-draft of the article, the Special Rapporteur recalled that the Commission had wished to ensure that it was not in any way proposing an amendment of Article 102 of the Charter in including a provision on registration, a well-established institution of treaty practice. Moreover, the problem arose as to whether the provisions in the articles should be confined merely to states members of the United Nations. Rosenne suggested an amended text providing that registration of treaty by the Secretariat of the United Nations be performed in accordance with the regulations from time to time adopted by the General Assembly for giving effect to Article 102 of the Charter. He explained his text was intended to cover in a single paragraph all the ideas embodied in paragraphs 1, 2 and 3 of the Special Rapporteur's text. His use of the term "all treaties" was intended to draw no distinction between treaties signed by member states of the United Nations and those signed by non-member states. Verdross analyzed the issue as being essentially a decision whether the Commission wished to impose on states not members of the obligation to register treaties. El-Erian supported the maintenance of the distinction between states members of the United Nations and non-member states, and pointed out that Article 102(2) of the Charter sanctioned non-registration. The Secretary of the Commission, in response to a query from El-Erian, confirmed that it was possible to register treaties submitted by non-members of the United Nations; no treaty had ever been submitted for registration by a non-member, however; treaties to which both members and non-members were parties had been registered by international organizations. Further discussion occurred concerning the approach to be adopted to avoid doing violence to Article 102. Reuter drew attention to the difficulty consequent upon the Commission's earlier decision to confine its draft articles to treaties between states; presumably Article 25 could not be made to cover treaties between states and international organizations. It was decided to refer the article to the Drafting Committee for reconsideration. A shortened and simplified version was subsequently submitted by the Drafting Committee. In introducing it, the Special Rapporteur referred again to the problem of the

overlap between the article and Article 102 of the Charter. The Drafting Committee had concluded that the only satisfactory way of dealing with the problem was to state the rule on the registration and publication (a term objected to by Rosenne as being a matter for the Secretariat) of treaties without mentioning Article 102. The rule would apply to all states which subscribed to the draft article without raising the question of safeguarding the provisions of Article 102. The article was accepted in this form.

Article 26 (Correction of errors in texts or in certified copies of treaties)

82. 1. Where, after the authentication of the text of a treaty, the contracting States are agreed that it contains an error, the error shall, unless they otherwise decide, be corrected:

(a) by having the appropriate corredtion made in the text and causing the correction to be initialled by duly authorized representatives;

(b) by executing or exchanging a separate instrument or instruments setting out the correction which it has been agreed to make; or

(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter:

(a) shall notify the contracting States of the error and of the proposal to correct it if no objection is raised within a specified time-limit;

(b) if on the expiry of the time-limit no objection has been raised, shall make and initial the correction in the text and shall execute a procès-verbal of the rectification of the text, and communicate a copy of it to the contracting States;

(c) if an objection has been raised to the proposed correction, shall communicate the objection to the other contracting States and, in the case of a treaty drawn up by an international organization, to the competent organ of the organization.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which it is agreed should be corrected.

4. (a) The corrected text replaces the defective text ab initio, unless the contracting States otherwise decide.

(b) The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

5. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a procès-verbal specifying the rectification and communicate a copy to the contracting States.

83. The development of the article is set out in pages 82 and 83 of the Commentary. The Governments of Japan, Sweden and the United States offered essentially editorial comments on the 1962 formulation, and the Special Rapporteur re-drafted the article accordingly, shortening it and attempting to take their comments into account. He proposed a text consisting of three articles (26, 27 and 27(bis)) in place of the ten paragraphs formerly contained in articles 26 and 27. He pointed out that the single article containing a consolidated text, which had been proposed by the Japanese Government, had omitted three questions of substance covered by the 1962 text which he had retained in his own proposal. The first was that of the non-concordance of two or several authentic texts where the treaty had more than one language version; the second was that of certified copies; and the third was that of an objection to a proposed correction. In the view of the Special Rapporteur, if these three points were retained, it would not be possible to incorporate all the necessary provisions in one article. A number of members, however, including Castren, Ago, Tunkin and Rosenne, expressed the view that articles 26, 27, and 27(bis) could be reduced to one shortened article. Some discussion occurred concerning the distinction between correction of errors in wording and substantive error. Reuter recommended deferring discussion of correction of errors until a careful study had been made of each category of error, since the problems they raised differ widely. Pal pointed out that the essential point was the agreement of the parties on the existence of an error. In his view, in drafting articles 26 and 27, the Commission had had in mind all kinds of errors, whether clerical or substantial, provided they were agreed to be errors. Rosenne, supported by several other members of the Commission, expressed the view that undue importance not be accorded to the question of correction of errors. Ago added that the emphasis should be more on the idea of correction rather than on the idea of error. It was suggested also by the Special Rapporteur that the title to Section V required amendment. It was agreed that the article be referred to the Drafting Committee for reconsideration. The Drafting Committee's re-draft managed to incorporate in a single article the substance of the former article 26 on the correction of errors in the text of treaties for which there is no depository, and the substance of article 27 on the correction of errors in the text of treaties for which there is a depository. Paragraph 1 of the new article dealt with the correction of errors in the text of treaties for which there was no depository. Paragraph 2 dealt with the same question where there was a depository, and paragraph 3 dealt with a different case in which there was no error in the text, but a lack of concordance between two or more language versions. The wording of that paragraph had been chosen by the Committee so as to avoid the problem of having to decide whether the provision related to a text or to a version of a text. Tsuruoka raised the question of the relationship of the words "if no objection is raised within a specified time limit", contained in paragraph 2(a), to the rest of the sentence.

As a result of his point, the Commission voted on the article paragraph-by-paragraph with the following results: paragraphs 1 to 3 were adopted by 15 votes to none; paragraphs 4 and 5 by 16 votes to none; and article 26 as a whole by 16 votes to none.

Article 27

84. This article was deleted by the Commission and its substance incorporated in article 26, as appeared above.

Article 28 (Depositaries of treaties)

85. 1. The depositary of a treaty, which may be a State or an international organization, shall be designated by the contracting States in the treaty or in some other manner.

2. The functions of a depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance.

86. The background to the development of this article is set out in page 87 of the Commentary. The Special Rapporteur, in introducing the discussion on the article, pointed out that it had not given rise to any criticism on the part of governments, and that the Swedish Government, usually critical on the grounds that the Commission's texts were either procedural or descriptive in character, had recognized that the article had contained a dispositive rule; the United States Government regarded it as a declaratory as a well accepted practice. A number of the members of the Commission, however, (Tunkin, Ago, Rosenne, Yasseen, and Castren) promptly spoke in favour of its deletion. El-Erian and Aréchaga spoke in favour of its retention. Ruda recommended the deletion of paragraph 1 and the retention of paragraph 2. The article was referred back to the drafting Committee for reconsideration. Article 1 of the Drafting Committee's reformulation contained a simplified version of the former article 28. It dealt with the appointment of a depository by the treaty, or by a separate agreement of the contracting states. The former article 28 had contained two presumptions; the first that a competent organ of an international organization would be the depository in the case of a treaty drawn up within an international organization; and the second that, in the case of a treaty drawn up at a conference, the depository would be the state on whose territory the conference had been convened. The Drafting Committee had considered that these presumptions were not likely to be very useful in practice, and since it had given rise to some dispute in the Commission, it decided to drop them. Paragraph 2 embodied the provision previously contained in the second sentence of paragraph 1 of the former article 29, to the effect that a depository was under an obligation to act impartially and internationally. Briggs proposed that, in paragraph 1, the word "appointed" be replaced by the word "designated", and it was so agreed. Tsuruoka questioned the appropriateness of the phrase "to perform the functions set forth in article 29", and wondered whether it did not raise the question of the possible omission of other functions of a depository. Some discussion occurred on the point and eventually, on Pal's

proposal, a vote was taken on the deletion of the phrase. The phrase was deleted by ten votes to 3, with 3 abstentions. Paragraph 1, as amended, was then adopted by 16 votes to none, and article 28, as amended, was then adopted as a whole by 16 votes to none.

Article 29 (Functions of depositaries)

87. 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 or by the established rules of an international organization, and transmitting them to the contracting States;

(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 contracting States of acts, communications and notifications relating to the treaty;

(f) informing the contracting States 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) performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the other contracting States or, where appropriate, of the competent organ of the organization concerned.

88. The background on the development of the article is set out in pages 88 to 91 of the Commentary. A number of states commented on the 1962 formulation, making a number of editorial suggestions and also recommending in some cases that special reference be made to the depository's duty to register the treaty and related documents. The Japanese Government made a number of suggestions for streamlining the text, and the United States suggested that it be provided that the obligations under paragraph 3(a) should be "at the time the depository is designated". The Special Rapporteur's reformulation of the article took into account a number of the Japanese suggestions for streamlining the text,

and also the United States proposal regarding paragraph 3(a). He also re-arranged the order of the paragraphs in a more logical fashion.

89. In introducing his reformulation, the Special Rapporteur pointed out that none of the governments submitting observation had suggested that the article was unnecessary (although it broke new ground in view of the absence of any analogous provisions in earlier draft ~~articles~~ or conventions). During the discussion, Rosenne submitted a proposal to add a paragraph reading: "Unless otherwise provided in the treaty, or these articles, any notice communicated by the depository to the states mentioned in article 29, paragraph 1, becomes operative ninety days after the receipt by the depository of the instrument to which the communication relates." He explained the purpose of his proposal as providing for an accidental repetition of what had happened in the case considered by the International Court of Justice concerning the Right of Passage over Indian Territory. His suggestion provoked considerable discussion, with the result that it was later referred to the Drafting Committee for consideration, and his suggestion was ultimately dropped. The majority of the members of the Commission expressed the view that the Special Rapporteur's reformulation was a considerable improvement over the 1962 text, with the exception of the inclusion of the United States suggestion. Reuter raised the question whether it was intended that the paragraph constitute a complete enumeration of the functions of the depository, and whether it would not be more appropriate to refer to the depository's essential function of custodian in such an article. Ago and Tunkin supported his recommendation and, as appears above, it was decided to transfer the provisions of article 1(g) to article 29(a). Tunkin also recommended, with the support of Ago and others, that the article begin with a general saving clause concerning provisions of the treaty in question, and also the relevant regulations of international organizations. The suggestion of the saving clause was accepted, but without the reference to international organizations. Some discussion occurred concerning the desirability of retaining the reference to the depository's obligation to act impartially, and, as appears above, the reference was transferred from article 29 to paragraph 2 of article 28. Tunkin recommended that a provision be included to the effect that the functions of a depository are international in character, and the recommendation was accepted, and that provision also placed in paragraph 2 of article 28. Paragraph 2 of article 29 as re-drafted constitutes in essence paragraph 8 of the 1962 formulation and paragraph 4 of the Special Rapporteur's re-draft. During the subsequent discussion of the Drafting Committee's reformulation, Rosenne recommended the insertion of an additional paragraph defining one of the functions of the depository as registering the treaty in accordance with article 25 of these articles. It was later decided to defer consideration of Rosenne's proposal until the next session of the Commission.

Article 29 (bis)(Communications and notifications to contracting States)

90. Whenever it is provided by the present articles that a communication or notification shall be made to contracting States, such communication or notification shall be made;

(a) in cases where there is no depositary, directly to each of the States in question;

(b) in cases where there is a depositary, to the depositary for communication to the States in question.

91. The Special Rapporteur explained that the purpose of this new article, proposed by the Drafting Committee, was to give effect to the suggestion of Tunkin that the drafting of the provisions concerning the depository could be simplified if a separate article were inserted to cover the two possibilities of when there was and when there was not a depository. The article as drafted was accepted without discussion.

Mr Gotlieb

Mr Robertson / Laque

For info to USSEA

OTT083

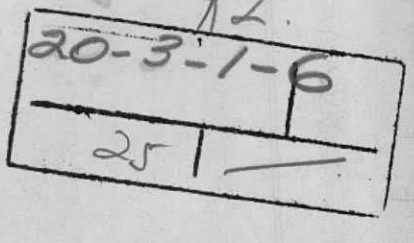
This is good reason for your return to Ottawa in Nov. in order that I may be ready for USSEA

EN47

orig. on 20-5-2-2

25 RL.

cc



FM PERMISNY SEP7/65

TO EXTERNAL 1429

ROBERTSON-MACPHERSON TELECON SEP3

1966 MTG OF ILC

LEGAL OFFICES OF SECRETARIAT EXPECT THAT ALL FOUR WEEKS OF JAN MTG OF ILC WILL BE DEVOTED TO CONSIDERATION OF PART II OF DRAFT ARTICALES OF LAW OF TREATIES.THERE WILL BE NO RPT NO NEED TO ELECT OFFICERS NOR RPT NOR ARE THERE ANY OTHER ORGANIZATIONAL QUESTIONS.

diary
div diary
f

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary of State for External Affairs

FROM / De: Mr. J. S. Nutt, Legal Division

REFERENCE / Référence:

SUBJECT / Sujet: Washington Meeting of American Society of International Law

SECURITY / Sécurité: Restricted

DATE: September 3, 1965

NUMBER / Numéro: RL

FILE / DOSSIER
OTTAWA 20-3-1-6
MISSION 21-1-

ENCLOSURES / Annexes

DISTRIBUTION

Hugh Lawford rang me yesterday to inform me that he is a member of the Committee on the International Law Commission's Draft of the Law of Treaties of the American Society of International Law which is meeting in Washington on September 17 to prepare a report on the I.L.C. Draft.

2. Lawford has offered to endeavour ih a personal capacity to further the Canadian Government's points of view in relation to the Draft in the discussion on it, if we would like him to do so. In my opinion this is a helpful offer and, if you agree, we could arrange to brief him in the same manner as we spoke to Professor Cohen with regard to the International Law Association's studies on Boundary Rivers. Perhaps, if you can find time, you might wish to talk to him yourself on this matter.

3. I would be grateful for your comments.

JS NUTT

J. S. Nutt

Ext. 407D/Bil.
(Admin. Services Div.)

000581

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Legal/A.W.Robertson/cs.

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

RETURN TO LEGAL DIV. DCO
7/9/65

TO / À: THE CANADIAN PERMANENT MISSION TO THE UNITED NATIONS, NEW YORK, N.Y.

FROM / De: THE UNDER-SECRETARY OF STATE FOR EXTERNAL AFFAIRS, OTTAWA, CANADA.

REFERENCE / Référence: Your letter 637 of July 9, 1965.

SUBJECT / Sujet: General Multilateral Treaties Concluded Under the Auspices of The League of Nations.

SECURITY / Sécurité: UNCLASSIFIED

DATE: September 2, 1965.

NUMBER / Numéro: L- 418

FILE / DOSSIER
OTTAWA 20-3-1-6
MISSION 25/45

ENCLOSURES / Annexes: 1

DISTRIBUTION

U.N. DIV.

With your letter under reference you attached a copy of a note from the Secretary-General, LE 245/1 of July 2. In that note there is a reference to an earlier note LE 245/1 dated January 24, 1964. It would appear that the January note either never reached Ottawa or has been irretrievably misfiled. It would also appear that in it, as in the latest one, the Secretary-General had asked whether Canada wished to transmit any observations as to whether the 21 multilateral treaties (listed in A/5759 of February 25, 1965) have ceased to be in force, have been superseded by later treaties, have otherwise ceased to be of interest for accession by additional States, or require action to adapt them to contemporary conditions.

2. It seems from paragraph 12 of A/5759 that only nine of the fifty-four States to whom the Secretary-General addressed himself have replied to his note. Although it is somewhat late in the day we think that Canada should express its views, at least on the one treaty of those listed to which it is a party. We would therefore be grateful if you would pass on to the Secretary General the following comments, which you may wish to include in the body of a suitable note.

J. S. NUTT for the

Under-Secretary of State
for External Affairs.

OK

Ext. 407D/Bil.
(Admin. Services Div.)

3.9.15(05)

000582

Comments of the Canadian Government

Canada is a party to only one of the 21 treaties, The Convention on Certain Questions Relating to the Conflict of Nationality Laws, The Hague, April 12, 1930, listed in the report of the Secretary-General on General Multilateral Treaties Concluded Under the Auspices of The League of Nations A/5759, of February 25, 1965.

The Government of Canada agrees with the five Governments which have already commented on this Convention that it is still in force. It has, moreover, noted with interest the comments of the Governments of the United Kingdom and Norway to the effect that certain provisions of the Convention might require modification insofar as they relate to the Convention on the Nationality of Married Women, done at New York February 20, 1957; the Convention on the Reduction of Statelessness, done at New York August 30, 1961; and the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, concluded within the framework of the Council of Europe May 6, 1963.

As the Government of Canada is not, however, a party to any of these three Conventions it does not wish to comment on them in detail.

FILE COPY RETURN TO REGISTRY

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
JULY 28	20-3-1-6	UNCLASSIFIED

FM/DE EXTERNAL

	NO	PRECEDENCE
TO/A PERMIS GENEVA	L-306	ROUTINE
INFO PERMIS NY		

REF

SUB/SUJ ILC 17TH SESSION PROVISIONAL RECORDS

FOLLOWING FOR BEESLEY FROM USSEA

I HAVE BEEN REQUESTED BY BAGIUNIAN, U.N. DIRECTEUR DE LA DIVISION DE CODIFICATION, TO PROVIDE BEFORE AUGUST 30 ANY CORRECTIONS I MIGHT WISH TO MAKE TO THE PROVISIONAL RECORDS OF THE 17TH SESSION OF THE I.L.C.

2. PLEASE CHECK THE PROVISIONAL RECORDS AND LET ME KNOW WHETHER YOU CONSIDER ANY CORRECTIONS ARE REQUIRED. EVEN IF NONE NEED BE MADE IT WILL STILL BE NECESSARY SO TO INFORM THE DIVISION LINGUISTIC, BUREAU C-422, PALAIS DES NATIONS BEFORE DEADLINE

CADIEUX

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ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG A.W.L. Robertson Legal/A.W.L.Robertson/efg	LEGAL	2-5406	SIG M. CADIEUX M. CADIEUX

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

MEMORANDUM

TO / À: Mr. M. Cadieux

FROM / De: Legal Division

REFERENCE / Référence:

SUBJECT / Sujet: 17th Session I.L.C.

SECURITY / Sécurité: UNCLASSIFIED

DATE: July 28, 1965

NUMBER / Numéro: RL

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	25/1--

ENCLOSURES / Annexes: 1

DISTRIBUTION

We attach a letter addressed to you from the New York Office of the United Nations together with a telegram for your signature to Mr. Beesley.

2. The telegram has been drafted on the assumption that, since Beesley was ~~presumably~~ present at the Session when you were he will be able to spot any obvious errors in the provisional records which, if left uncorrected, might distort the position you adopted.

A. E. GOTLIEB

Legal Division.

Ext. 407D/Bil.
(Admin. Services Div.)

ACTION COPY

FM GENEVA JUL20/65 RESTR LTD DISTRIBUION

TO EXTERNAL 762 IMMED

REF OURTEL 761 JUL20

ILC:COMPLETION OF 17TH SESSION:LAW OF TREATIES

FOLLOWING FOR USSEA ONLY

DRAFT ARTICLES ON LAW OF TREATIES-SECTION I:GENERAL PROVISIONS.

ART 0(NEW FIRST ARTICLE:SCOPE OF PRESENT ARTICLES):PRESENT ARTICLES RELATE TO TREATIES CONCLUDED BETWEEN STATES.

2.ART 1:(1)COMMISSION DECIDED TO RECOMMEND DELETION IN PARA1 OF: SUB-PARA(B)-QUOTE TREATY IN SIMPLIFIED FORM UNQUOTE,SUB-PARA(D) -REF TO QUOTE SIGNATURE UNQUOTE,SUB-PARA(G)-QUOTE DEPOSITARY UN-QUOTE.(2)COMMISSION DECIDED TO RECOMMEND POSTPONEMENT OF DECISIONS ON:PARA 1,SUB-PARA(C)-QUOTE GENERAL MULTILATERAL TREATY UNQUOTE; PARA 1,SUB-PARA(F)(TER)-QUOTE CONTRACTING STATE UNQUOTE;PARA2.(3) TEXT OF ART 1 AS THUS MODIFIED READS AS FOLLOWS:

3.ART 1(USE OF TERMS):(1)FOR PURPOSES OF PRESENT ARTICLES: (A)QUOTE TRATY UNQUOTE MEANS AN INTERNATIONAL AGREEMENT CONCLUDED BETWEEN STATES IN WRITTEN FORM AND GOVERNED BY INTERNATIONAL LAW, WHETHER EMBODIED IN A SINGLE INSTRUMENT OR IN TWO OR MORE RELATED INSTRUMENTS AND WHATEVER ITS PARTICULAR DESIGNATION.(B)DELETED BY COMMISSION.(C)QUOTE GENERAL MULTILATERAL TREATY UNQUOTE(DECISION POSTPONED UNTIL COMMISSION RESUMES ITS EXAM OF ARTS 8 AND 9.)(D) QUOTE RATIFICATION UNQUOTE,QUOTE ACCESSION UNQUOTE,QUOTE ACCEPTANCE UNQUOTE AND QUOTE APPROVAL UNQUOTE MEAN IN EACH CASE THE INTERNAT-IONAL ACT SO NAMED WHEREBY A STATE ESTABLISHES ON THE INTERNATIONAL PLANE ITS CONSENT TO BE BOUND BY A TREATY.(REF TO QUOTE SIGNATURE

...2

UNQUOTE DELETED BY COMMISSION.)(E)QUOTE FULL POWERS UNQUOTE MEANS A DOCU EMANATING FROM COMPETENT AUTHORITY OF A STATE DESIGNATING A PERSON TO REPRESENT THE STATE FOR NEGOTIATING,ADOPTING OR AUTHENTICATING TEXT OF A TREATY OR FOR EXPRESSING THE CONSENT OF THE STATE TO BE BOUND BY A TREATY.(F)QUOTE RESERVATION UNQUOTE MEANS A UNILATERAL STATEMENT,HOWEVER PHRASED OR NAMED,MADE BY A STATE, WHEN SIGNING,RATIFYING,ACCEDING TO,ACCEPTING OR APPROVING A TREATY, WHEREBY IT PURPORTS TO EXCLUDE OR TO VARY THE LEGAL EFFECT OF CERTAIN PROVISIONS OF THE TREATY IN THEIR APPLICATION TO THAT STATE. (F)(BIS)QUOTE PARTY UNQUOTE MEANS A STATE WHICH HAS CONSENTED TO BE BOUND BY A TREATY AND FOR WHICH TREATY HAS COME INTO FORCE.(F) (TER)QUOTE CONTRACTING STATE UNQUOTE(CONSIDERATION OF THE USE OF THIS TERM AND OF THE PROBLEM OF TERMINOLOGY TO BE USED IN REGARD TO STATES HAVING A RIGHT TO BE CONSULTED OR NOTIFIED WITH RESPECT TO ACTS RELATING TO A TREATY HAS BEEN DEFERRED BY COMMISSION UNTIL A LATER STAGE OF ITS WORK.)(F)(QUATER)QUOTE INTERNATIONAL ORGANIZATION UNQUOTE MEANS AN INTER-GOVTL ORGANIZATION.(G)DELETED BY COMMISSION.(2)DECISION CONCERNING INCLUSION OF A PROVISION REGARDING CHARACTERIZATION OR CLASSIFICATION OF INTERNATIONAL AGREEMENTS UNDER INTERNAL LAW POSTPONED.

4.ART 2(TREATIES AND OTHER INTERNATIONAL AGREEMENTS NOT RPT NOT WITHIN SCOPE OF PRESENT ARTICLE):FACT THAT PRESENT ARTICLES DO NOT RPT NOT RELATE(A)TO TREATIES CONCLUDED BETWEEN STATES AND OTHER SUBJECTS OF INTERNATIONAL LAW OR BETWEEN SUCH OTHER SUBJECTS OF INTERNATIONAL LAW;OR TO INTERNATIONAL LAW AGREEMENTS NOT RPT NOT IN WRITING

...3

FORM SHALL NOT RPT NOT AFFECT LEGAL FORCE OF SUCH TREATIES OR AGREEMENTS OF APPLICATION TO THEM OF ANY OF THE RULES SET FORTH IN PRESENT ARTICLES TO WHICH THEY WOULD BE SUBJECT INDEPENDENTLY OF THESE ARTICLES.

5.ART 5(CAPACITY OF STATES TO CONCLUDE TREATIES):(1)EVERY STATE POSSESSES CAPACITY TO CONCLUDE TREATIES.(2)STATES MEMBERS OF A FEDERAL UNION MAY POSSESS A CAPACITY TO CONCLUDE TREATIES IF SUCH CAPACITY IS ADMITTED BY FEDERAL CONSTITUTION AND WITHIN LIMITS THERE LAID DOWN.

6.ART 3(BIS):(TREATIES WHICH ARE CONSTITUENT INSTRUMENTS OF INTERNATIONAL ORGANIZATIONS OR WHICH HAVE BEEN DRAWN UP WITHIN INTERNATIONAL ORGANIZATIONS.)APPLICATION OF PRESENT ARTICLES TO TREATIES WHICH ARE CONSTITUENT INSTRUMENTS OF AN INTERNATIONAL ORGANIZATION OR HAVE BEEN DRAWN UP WITHIN AN INTERNATIONAL ORGANIZATION SHALL BE SUBJECT TO RULES OF ORGANIZATION IN QUESTION.

SECTION II:CONCLUSION OF TREATIES BY STATES

7.ART 4(FULL POWERS TO REPRESENT STATE IN NEGOTIATION AND CONCLUSION OF TREATIES)(1)EXCEPT AS PROVIDED IN PARA2,A PERSON IS CONSIDERED AS REPRESENTING A STATE FOR THE PURPOSE OF NEGOTIATING, ADOPTING OR AUTHENTICATING TEXT OF A TREATY OR FOR PURPOSE OF EXPRESSING CONSENT OF STATE TO BE BOUND BY A TREATY ONLY IF:(A)HE PRODUCES AN APPROPRIATE INSTRUMENT OF FULL POWERS;OR(B)IT APPEARS FROM CIRCUMSTANCES THAT INTENTION OF STATES CONCERNED WAS TO DISPENSE WITH FULL POWERS.(2)IN VIRTUE OF THEIR FUNCTION AND WITHIN HAVING TO PRODUCE AN INSTRUMENT OF FULL POWERS,FOLLOWING ARE

...4

CONSIDERED AS REPRESENTING THEIR STATE:(A)HEADS OF STATE,HEADS OF GOVTS AND MINISTERS FOR FOREIGN AFFAIRS,FOR THE PURPOSE OF PERFORMING ALL ACTS RELATING TO CONCLUSION OF A TREATY;(B)HEADS OF DIPLO MISSIONS,FOR THE PURPOSE OF NEGOTIATING AND ADOPTING OF THE TEXT OF A TREATY BETWEEN THE ACCREDITING STATE AND THE STATE TO WHICH THEY ARE ACCREDITED;(C)REPS ACCREDITED BY STATES TO AN INTERNATIONAL CONFERENCE OR TO AN ORGAN OF AN INTERNATIONAL ORGANIZATION,FOR THE PURPOSE OF THE NEGOTIATING AND ADOPTING OF THE TEXT OF A TREATY.

8.ART 5 NEGOTIATION AND DRAWING UP OF A TREATY(DELETED BY THE COMMISSION)

9.ART 6 ADOPTION OF THE TEXT

1.THE ADOPTING OF THE TEXT OF A TREATY TAKES PLACE BY THE UNANIMOUS AGREEMENT OF THE STATES PARTICIPATING IN ITS DRAWING UP EXCEPT AS PROVIDED IN PARAS 2 AND 3.

2.THE ADOPTION OF THE TEXT OF A TREATY AT AN INTERNATIONAL CONFERENCE TAKES PLACE BY THE VOTE OF TWO-THIRDS OF THE STATES PARTICIPATING IN THE CONFERENCE UNLESS:

(A)BY THE SAME MAJORITY THEY SHALL DECIDE TO APPLY A DIFFERENT RULE;OR

(B)THE ESTABLISHED RULES OF AN INTERNATIONAL ORGANIZATION APPLY TO THE PROCEEDINGS OF THE CONFERENCE AND PRESCRIBE A DIFFERENT VOTING PROCEDURE.

3,THE ADOPTION OF THE TEXT OF A TREATY BY AN ORGAN OF AN INTERNATIONAL ORGANIZATION TAKES PLACE IN ACCORDANCE WITH THE

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PROCEDURE PRESCRIBED BY ESTABLISHED RULES OF THE ORGANIZATION IN QUESTION.

10.ART 7 AUTHENTICATION OF THE TEXT

THE TEXT OF A TREATY IS ESTABLISHED AS AUTHENTIC AND DEFINITIVE BY SUCH PROCEDURE AS MAY BE PROVIDED FOR IN THE TEXT OR AGREED UPON BY THE STATES CONCERNED AND FAILING ANY SUCH PROCEDURES BY: (A)THE SIGNATURE,SIGNATURE AD REFERENDUM OR INITIALLING BY THE REPS OF THE STATES CONCERNED OF THE TEXT OF THE TREATY OR OF THE FINAL ACT OF A CONFERENCE INCORPORATING THE TEXT;OR(B)SUCH PROCEDURE AS THE ESTABLISHED RULES OF AN INTERNATIONAL ORGANIZATION MAY PRESCRIBE.

11.ART I PARTICIPATION IN A TREATY(DECISION POSTPONED BY THE COMMISSION)

12.ART 9 THE OPENING OF A TREATY TO THE PARTICIPATION OF ADDITIONAL STATES(DECISION POSTPONED BY THE COMMISSION)

13.ART 10 INITIALLING AND SIGNATURE AD REFERENDUM AS FORMS OF SIGNATURE(DELETED BY THE COMMISSION AND SUBSTANCE INCORPORATED IN ART 11)

14.ART 11 CONSENT TO BE BOUND EXPRESSED BY SIGNATURE

1.THE CONSENT OF A STATE TO BE BOUND BY A TREATY IS EXPRESSED BY THE SIGNATURE OF ITS REP WHEN:(A)THE TREATY PROVIDES THAT SIGNATURE SHALL HAVE THAT EFFECT;(B)IT APPEARS FROM THE CIRCUMSTANCES OF THE CONCLUSION OF THE TREATY THAT THE STATES CONCERNED WERE AGREED THAT SIGNATURE SHOULD HAVE THAT EFFECT;(C)THE INTENTION OF

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THE STATE IN QUESTION TO GIVE THAT EFFECT TO THE SIGNATURE APPEARS FROM THE FULL POWERS OF ITS REP OR WAS EXPRESSED DURING THE NEGOTIATIONS.

2.FOR THE PURPOSES OF PARA 1:

(A)THE INITIALLING OF A TEXT CONSTITUTES A SIGNATURE OF THE TREATY WHEN IT APPEARS FROM THE CIRCUMSTANCES THAT THE CONTRACTING STATES SO AGREED;(B)THE SIGNATURE AD REFERENDUM OF A TREATY BY A REP,IF CONFIRMED BY HIS STATE,CONSTITUTES A FULL SIGNATURE OF THE TREATY.

15.ART K12 CONSENT TO BE BOUND EXPRESSED BY RATIFICATION, ACCEPTANCE OR APPROVAL

1.THE CONSENT OF A STATE TO BE BOUND BY A TREATY IS EXPRESSED BY RATIFICATION WHEN:(A)THE TREATY OR AN ESTABLISHED RULE OF AN INTERNATIONAL ORGANIZATION PROVIDES FOR SUCH CONSENT TO BE EXPRESSED BY MEANS OF RATIFICATION;(B)IT APPEARS FROM THE CIRCUMSTANCES OF THE CONCLUSION OF THE TREATY THAT THE STATES CONCERNED WERE AGREED THAT RAFIFICATION SHOULD BE REQUIRED;(C)THE REP OF THE STATE IN QUESTION HAS SIGNED THE TREATY SUBJECT TO RATIFICATION;OR(D)THE INTENTION OF THE STATE IN QUESTION TO SIGN THE TREATY SUBJECT TO RATIFICATION APPEARS FROM THE FULL POWERS OF ITS REP OR WAS EXPRESSED DURING THE NEGOTIATIONS.

2.THE CONSENT OF A STATE TO BE BOUND BY A TREATY IS EXPRESSED BY ACCEPTANCE OR APPROVAL UNDER CONDITIONS SIMILAR TO THOSE WHICH APPLY TO RATIFICATIONS.

16.ART 13 ACCESSION (DECISION POSTPONED BY THE COMMISSION PENDING DECISIONS ON ART 8 AND 9)

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17.ART 14 ACCEPTANCE OR APPROVAL(DELETED BY THE COMMISSION AND SUBSTANCE INCORPORATED IN ART 12)

18.ART 15 EXCHANGE OR DEPOSIT OF INSTRUMENTS OF RATIFICATION, ACCESSION,ACCEPTANCE OR APPROVAL

UNLESS THE TREATY OTHERWISE PROVIDES,INSTRUMENTS OR RATIFICATION ACCESSION,ACCEPTANCE OR APPROVAL BECOME OPERATIVE:(A)BY THEIR EXCHANGE BETWEEN THE CONTRACTING STATES;(B)BY THEIR DEPOSIT WITH THE DEPOSITARY;OR(C)BY NOTIFICATION TO THE CONTRACTING STATES OR TO THE DEPOSITARY,IF SO AGREED.

19.ART 16 CONSENT RELATING TO A PART OF A TREATY AND CHOICE OF DIFFERING PROVISIONS

1.WITHOUT PREJUDICE TO THE PROVISIONS OF ARTS 18 TO 22,THE CONSENT OF A STATE TO BE BOUND BY PART OF A TREATY IS EFFECTIVE ONLY IF THE TREATY SO PERMITS OR THE OTHER CONTRACTING STATES SO AGREE.

2.THE CONSENT OF A STATE TO BE BOUND BY A TREATY WHICH PERMITS A CHOICE BETWEEN DIFFERING PROVISIONS IS EFFECTIVE ONLY IF IT IS MADE PLAIN TO WHICH OF THE PROVISIONS THE CONSENT RELATES.

20.ART 17 OBLIGATION OF A STATE NOT RPT NOT TO FRUSTRATE THE OBJECT OF A TREATY PRIOR TO ITS ENTRY INTO FORCE

A STATE IS OBLIGED TO REFRAIN FROM ACTS CALCULATED TO FRUSTRATE THE OBJECT OF A PROPOSED TREATY WHEN:(A)IT HAS AGREED TO ENTER INTO NEGOTIATIONS FOR THE CONCLUSION OF THE TREATY,WHILE THE NEGOTIATIONS ARE IN PROGRESS;(B)IT HAS SIGNED THE TREATY SUBJECT TO RATIFICATION,ACCEPTANCE OR APPROVAL,UNTIL IT SHALL HAVE MADE ITS

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INTENTION CLEAR NOT RPT NOT TO BECOME A PARTY TO THE TREATY;(C)IT HAS EXPRESSED ITS CONSENT TO BE BOUND BY THE TREATY,PENDING THE ENTRY INTO FORCE OF THE TREATY AND PROVIDED THAT SUCH ENTRY INTO FORCE IS NOT RPT NOT UNDULY DELAYED.

SECTION III:RESERVATIONS TO MULTILATERAL TREATIES

21. ART 18 FORMULATION OF RESERVATIONS

A STATE MAY,WHEN SIGNING,RATIFYING,ACCEDING TO,ACCEPTING OR APPROVING A TREATY,FORMULATE A RESERVATION UNLESS:(A)THE RESERVATION IS PROHIBITED BY THE TREATY OR BY THE ESTABLISHED RULES OF AN INTERNATIONAL ORGANIZATION;(B)THE TREATY AUTHORIZES SPECIFIED RESERVATIONS WHICH DO NOT RPT NOT INCLUDE THE RESERVATION IN QUESTION;OR(C)IN CASES WHERE THE TREATY CONTAINS NO RPT NO PROVISIONS REGARDING RESERVATIONS,THE RESERVATION IS INCOMPATIBLE WITH THE OBJECT AND PURPOSE OF THE TREATY.

22.ART 19 ACCEPTANCE OF AND OBJECTION TO RESERVATIONS

1.A RESERVATION EXPRESSELY OR IMPLIEDLY AUTHORIZED BY THE TREATY DOES NOT RPT NOT REQUIRE ANY SUBSEQUENT ACCEPTANCE BY THE OTHER CONTRACTING STATES UNLESS THE TREATY SO PROVIDES.

2.WHEN IT APPEARS FROM THE LIMITED NUMBER OF THE CONTRACTING STATES, THE OBJECT AND PURPOSE OF THE TREATY AND THE CIRCUMSTANCES OF ITS CONCLUSION THAT THE APPLICATION OF THE TREATY IN ITS ENTIRETY BETWEEN ALL THE PARTIES IS AN ESSENTIAL CONDITION OF THE CONSENT OF EACH ONE TO BE BOUND,A RESERVATION REQUIRES ACCEPTANCE BY ALL THE STATES PARTIES TO THE TREATY.

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3.WHEN A TREATY IS A CONSTITUENT INSTRUMENT OF AN INTERNATIONAL ORGANIZATION,THE RESERVATION REQUIRES THE ACCEPTANCE OF THE COMPETENT ORGAN OF THE ORGANIZATION,UNLESS THE TREATY OTHERWISE PROVIDES.

4.IN CASES NOT RPT NOT FALLING UNDER THE PRECEDING PARAS OF THIS ARTICLE:(A)ACCEPTANCE BY ANOTHER CONTRACTING STATE OF THE RESERVATION CONSTITUTES THE RESERVING STATE A PARTY TO THE TREATY IN RELATION TO THAT STATE IF OR WHEN THE TREATY IS IN FORCE;(B)AN OBJECTION BY ANOTHER CONTRACTING STATE TO A RESERVATION PRECLUDES THE ENTRY INTO FORCE OF THE TREATY AS BETWEEN THE OBJECTING AND RESERVING STATES UNLESS A CONTRARY INTENTION IS EXPRESSED BY THE OBJECTING STATE;(C)AN ACT EXPRESSING THE STATES CONSENT TO BE BOUND WHICH IS SUBJECT TO A RESERVATION IS EFFECTIVE AS SOON AS AT LEAST ONE OTHER CONTRACTING STATE WHICH HAS EXPRESSED ITS OWN CONSENT TO BE BOUND BY THE TREATY HAS ACCEPTED THE RESERVATION.

5.FOR THE PURPOSES OF PARAS 2 AND 4 A RESERVATION IS CONSIDERED TO HAVE BEEN ACCEPTED BY A STATE IF IT SHALL HAVE RAISED NO RPT NO OBJECTION TO THE RESERVATION BY THE END OF A PERIOD OF TWELVE MONTHS AFTER IT WAS NOTIFIED OF THE RESERVETION OR BY THE DATE ON WHICH IT EXPRESSED ITS CONSENT TO BE BOUND BY THE TREATY,WHICHEVER IS LATER.

23.ART 20 PROCEDURE REGARDING RESERVATIONS

1.A RESERVATION,AN EXPRESS ACCEPTANCE OF A RESERVATION,AND AN OBJECTION TO A RESERVATION MUST BE FORMULATED IN WRITING AND COMMUNICATED TO THE OTHER CONTRACTING STATES.

2.IF FORMULATED ON THE OCCASION OF THE ADOPTION OF THE TEXT OR UPON SIGNING THE TREATY SUBJECT TO RATIFICATION,ACCEPTANCE OR APPROVAL,A RESERVATION MUST BE FORMALLY CONFIRMED BY THE RESERVING STATE WHEN EXPRESSING ITS CONSENT TO BE BOUND BY THE TREATY.IN SUCH A CASE THE RESERVATION SHALL BE CONSIDERED AS HAVING BEEN MADE ON THE DATE OF ITS CONFIRMATION.HOWEVER,AN OBJECTION TO THE RESERVATION MADE PREVIOUSLY TO ITS CONFIRMATION DOES NOT RPT NOT ITSELF REQUIRE CONFIRMATION.

24.ART 21 LEGAL EFFECTS OF RESERVATIONS

1.A RESERVATION ESTABLISHED WITH REGARD TO ANOTHER PARTY IN ACCORDANCE WITH ARTS 18,19 AND 20:(A)MODIFIES FOR THE RESERVING STATE THE PROVISIONS OF THE TREATY TO WHICH THE RESERVATION RELATES TO THE EXTENT OF THE RESERVATION;AND(B)MODIFIES THOSE PROVISIONS TO THE SAME EXTENT FOR SUCH OTHER PARTY IN IS RELATIONS WITH THE RESERVING STATE.

2.THE RESERVATION DOES NOT RPT NOT MODIFY THE PROVISIONS OF THE TREATY FOR THE OTHER PARTIES TO THE TREATY INTER SE.

3.WHEN A STATE OBJECTING TO A RESERVATION AGREES TO CONSIDER THE TREATY IN FORCE BETWEEN ITSELF AND THE RESERVING STATE,THE PROVISION TO WHICH THE RESERVATION RELATES DO NOT RPT NOT APPLY AS BETWEEN THE TWO STATES TO THE EXTENT OF THE RESERVATION.

25.ART 22 WITHDRAWAL OF RESERVATIONS

1.UNLESS THE TREATY OTHERWISE PROVIDES,A RESERVATION MAY BE WITHDRAWN AT ANY TIME AND THE CONSENT OF A STATE WHICH HAS ACCEPTED THE RESERVATION IS NOT RPT NOT REQUIRED FOR ITS WITHDRAWAL.

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2.UNLESS THE TREATY OTHERWISE PROVIDES OR IT IS OTHERWISE AGREED, THE WITHDRAWAL BECOMES OPERATIVE WHEN NOTICE OF IT HAS BEEN RECEIVED BY THE OTHER CONTRACTING STATES.

SECTION IV:ENTRY INTO FORCE AND REGISTRATION

26.ART 23 ENTRY INTO FORCE OF TREATIES

1.A TREATY ENTERS INTO FORCE IN SUCH MANNER AND UPON SUCH DATE AS IT MAY PROVIDE OR AS THE STATES WHICH ADOPTED ITS TEXT MAY AGREE.

2.FAILING ANY SUCH PROVISION OR AGREEMENT,A TREATY ENTERS INTO FORCE AS SOON AS ALL THE STATES WHICH ADOPTED ITS TEXT HAVE CONSENTED TO BE BOUND BY THE TREATY.

3.WHERE A STATE CONSENTS TO BE BOUND AFTER A TREATY HAS COME INTO FORCE,THE TREATY ENTERS INTO FORCE FOR THAT STATE ON THE DATE WHEN ITS CONSENT BECOME OPERATIVE,UNLESS THE TREATY OTHERWISE PROVIDES.

27.NEW ARTICLE:ENTRY INTO FORCE OF TREATIES WITHIN THE TERRITORY OF THE PARTIES(PROPOSED BY LUXEMBOURG)(SEE A/CN.4/177/ADD.1))(THE COMMISSION DECIDED TO POSTPONE ITS CONSIDERATION OF THIS PROPOSAL UNTIL IT DEALS WITH ART 55.)

28.ART 28 ENTRY INTO FORCE OF A TREATY PROVISIONALLY

1.A TREATY MAY ENTER INTO FORCE PROVISIONALLY IF:(A)THE TREATY ITSELF PRESCRIBES THAT IT SHALL ENTER INTO FORCE PROVISIONALLY PENDING RATIFICATION,ACCESSION,ACCEPTANCE OR APPROVAL BY THE CONTRACTING STATES;OR(B)THE CONTRACTING STATES HAVE IN SOME OTHER MANNER SO AGREED.

2.THE SAME RULE APPLIES TO THE ENTRY INTO FORCE PROVISIONALLY OF PART OF A TREATY.

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29.ART 25 REGISTRATION AND PUBLICATION OF TREATIES

TREATIES ENTERED INTO BY PARTIES TO THE PRESENT ARTS SHALL AS SOON AS POSSIBLE BE REGISTERED WITH THE SECRETARIAT OF THE UN. THEIR REGISTRATION AND PUBLICATION SHALL BE GOVERNED BY THE REGS ADOPTED BY THE GENERAL ASSEMBLY OF THE UN.

39.ART 26 CORRECTION OF ERRORS IN TEXTS OR IN CERTIFIED COPIES OF TREATIES

1.WHERE,AFTER THE AUTHENTICATION OF THE TEXT OF A TREATY, THE CONTRACTING STATES ARE AGREED THAT IT CONTAINS AN ERROR,THE ERROR SHALL,UNLESS THEY OTHERWISE DECIDE,BE CORRECTED:

(A)BY HAVING THE APPROPRIATE CORRECTION MADE IN THE TEXT AND CAUSING THE CORRECTION TO BE INITIALLED BY DULY AUTHORIZED REPS;

(B)BY EXECUTING OR EXCHANGING A SEPARATE INSTRUMENT OR INSTRUMENTS SETTING OUT THE CORRECTION WHICH IT HAS BEEN AGREED TO MAKE;OR

(C)BY EXECUTING A CORRECTED TEXT OF THE WHOLE TREATY BY THE SAME PROCEDURE AS IN THE CASE OF THE ORIGINAL TEXT.

2.WHERE THE TREATY IS ONE FOR WHICH THERE IS A DEPOSITARY,THE LATTER:

(A)SHALL NOTIFY THE CONTRACTING STATES OF THE ERROR AND OF THE PROPOSAL TO CORRECT IT IF NO RPT NO OBJECTION IS RAISED WITHIN A SPECIFIED TIME-LIMIT;

(B)IF ON THE EXPIRY OF THE TIME-LIMIT NO RPT NO OBJECTION HAS BEEN RAISED,SHALL MAKE AND INITIAL THE CORRECTION IN THE TEXT AND SHALL EXECUTE A PROCES-VERBAL OF THE RECTIFICATION OF THE TEXT, AND COMMUNICATE A COPY OF IT TO THE CONTRACTING STATES;

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(C)IF AN OBJECTION HAS BEEN RAISED TO THE PROPOSED CORRECTION, SHALL COMMUNICATE THE OBJECTION TO THE OTHER CONTRACTING STATES AND,IN THE CASE OF A TREATY DRAWN UP BY AN INTERNATIONAL ORGANIZATION ,TO THE COMPETENT ORGAN OF THE ORGANIZATION.

3.THE RULES IN PARAS 1 AND 2 APPLY ALSO WHERE THE TEXT HAS BEEN AUTHENTICATED IN TWO OR MORE LANGUAGES AND IT APPEARS THAT THERE IS A LACK OF CONCORDANCE WHICH IT IS AGREED SHOULD BE CORRECTED.

4.(A)THE CORRECTED TEXT REPLACES THE DEFECTIVE TEXT AB MINITIO, UNLESS THE CONTRACTING STATES OTHERWISE DECIDE.(?) THE CORRECTION OF THE TEXT OF A TREATY THAT HAS BEEN REGISTERED SHALL BE NOTIFIED TO THE SECRETARIAT OF THE UN.

5.WHERE AN ERROR IS DISCOVERED IN A CERTIFIED COPY OF A TREATY, THE DEPOSITARY SHALL EXECUTE A PROCES-VERBAL SPECIFYING THE RECTIFICATION AND COMMUNICATE A COPY TO THE CONTRACTING STATES.

31.ART 27 THE CORRECTION OF ERRORS IN THE TEXT OF TREATIES FOR WHICH THERE IS A DEPOSITARY(DELETED BY THE COMMISSION AND SUBSTANCE INCORPORATED IN ART 26).

32.ART 28 DEPOSITARIES OF TREATIES

1.THE DEPOSITARY OF A TREATY,WHICH MAY BE A STATE OR AN INTERNATIONAL ORGANIZATION,SHALL BE DESIGNATED BY THE CONTRACTING STATES IN THE TREATY OR IN SOME OTHER MANNER.

2.THE FUNCTIONS OF A DEPOSITARY OF A TREATY ARE INTERNATIONAL IN CHARACTER AND THE DEPOSITARY IS UNDER AN OBLIGATION TO ACT IMPARTIALLY IN THEIR PERFORMANCE.

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33.ART 29 FUNCTIONS OF DEPOSITARIES

1.THE FUNCTIONS OF A DEPOSITARY,UNLESS THE TREATY OTHERWISE PROVIDES, COMPRISE IN PARTICULAR:

(A)DEEPING THE CUSTODY OF THE ORIGINAL TEXT OF THE TREATY,IF ENTRUSTED OT IT;

(B)PREPARING CERTIFIED COPIES OF THE ORIGINAL TEXT AND ANY FURTHER TEXTS IN SUCH ADDITIONAL LANGUAGES AS MAY BE REQUIRED BY THE TREATY OR BY THE ESTABLISHED RULES OF AN INTERNATIONAL ORGANIZATION,AND TRANSMITTING THEM TO THE CONTRACTING STATES;

(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 ARTS AND,IF NEED BE,BRINGING THE MATTER TO THE ATTN OF THE STATE IN QUESTION;

(E)INFORMING THE CONTRACTING STATES OF ACTS,COMMUNICATIONS AND NOTIFICATIONS RELATING TO THE TREATY;

(F)INFORMING THE CONTRACTING STATES 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)PERFORMING THE FUNCTIONS SPECIFIED IN OTHER PROVISIONS OF THE PRESENT ARTS.

2.IN THE EVENT OF ANY DIFFERENCE APPEARING BETWEEN A STATE AND THE

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DEPOSITARY AS TO THE PERFORMANCE OF THE LATTERS FUNCTIONS, THE DEPOSITARY SHALL BRING THE QUESTION TO THE ATTN OF THE OTHER CONTRACTING STATES OR, WHERE APPROPRIATE, OF THE COMPETENT ORGAN OF THE ORGANIZATION CONCERNED.

34. ART 29(BISJ)

THE COMMISSION DECIDED THAT THE PROPOSAL BY MR ROSENNE(A/CN.4/L.108) SHOULD BE POSTPONED, AND SHOULD BE REVIEWED IN THE LIGHT OF LATER PARTS OF THE DRAFT ARTS.

EXTERNAL AFFAIRS | AFFAIRES EXTÉRIEURES

TO / À: THE UNDER-SECRETARY OF STATE FOR EXTERNAL AFFAIRS, OTTAWA, ONTARIO, CANADA.

FROM / De: THE CANADIAN PERMANENT MISSION TO THE UNITED NATIONS, NEW YORK, N.Y.

REFERENCE / Référence:

SECURITY / Sécurité: UNCLASSIFIED

DATE: July 9, 1965.

NUMBER / Numéro: 637

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	7-1-7

SUBJECT / Sujet: General Multilateral Treaties concluded under the Auspices of the League of Nations.

ENCLOSURES / Annexes

DISTRIBUTION

You will have the Secretary-General's report on this subject (A/5759 of February 25, 1965). We now attach three copies of a note dated July 2 and addressed to the Secretary of State for External Affairs. The note formally forwards a copy of the Secretary-General's report, points out that the question dealt with in the report has been included in the provisional agenda of the 20th Session of the General Assembly, and indicates that any observations with a view to the consideration of this item by the General Assembly will be issued in a supplement to the report.

P. A. Jarmain
Permanent Mission.

Ext. 4078/Bil.
(Admin. Services Div.)

Legal Services
Supp

K.L.

J-12

20-3-1-6

ACTION COPY

FM GENEVA JUL2/65 CONFD

TO EXTERNAL 691 IMMED

FOR USSEA ONLY

REF YOURTEL L265 JUN25

ILC:FEDERAL STATE ARTICLE

COMMISSION TODAY ADOPTED WITHOUT FURTHER DEBATE REVISED VERSION OF ARTICLE THREE WORDED AS FOLLOWS:QUOTE CAPACITY OF STATES TO CONCLUDE TREATIES:

1.EVERY STATE POSSESSES CAPACITY TO CONCLUDE TREATIES.

2.STATES MEMBERU OF A FEDERAL UNION MAY POSSESS A CAPACITY TO CONCLUDE TREATIES IF SUCH CAPACITY IS ADMITTED BY FEDERAL CONSTITUTION AND WITHIN LIMITS THERE LAID D WN.UNQUOTE

2.BRIGGS REQUESTED SEPARATE VOTE ON THE TWO PARAS:VOTE ON PARA 2 WAS 7 IN FAVOUR(YASSEEN,WALDOCK,ROSENNE,TUNKIN,LACHS,ELIAS AND BARTOS),3 AGAINST(REUTER,TSURUOKA,BRIGGS),4 ABSTENTIONS(CASTREN, VERDROSS,PESSOU AND PAL).VOTE ON ART 3 AS A WHOLE WAS 7 IN FAVOUR (SAME AS ABOVE),3 AGAINST(REUTER:BRIGGS AND RUDA),4 ABSTENTIONS (TSURUOKA,PESSOU,PAL AND CASTREN).DISPARITY IN TOTAL VOTES CAST WAS CAUSED BY RUDA ENTERING AFTER VOTE ON PARA 2,BUT BEFORE VOTE ON ARTICLE AS A WHOLE.

3.DE ARECHAGA WAS ABSENT,AND AMADO AND AGO WERE TOO LATE TO PARTICIPATE IN VOTE,BUT EVEN IF ARECHAGA YOU AMADO AND RUDA HAD ALL BEEN ABLE TO PARTICIPATE IN VOTE,ARTICLE WOULD HAVE CARRIED BY ONE VOTE, ASSUMING AGO(REAL AUTHOR OF ARTICLE)WAS ALSO PRESENT.

4.WE HAD PASSED ON YOUR LET AND ATTACHMENT TO WALDOCK(AFTER FIRST

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2.7.40(03)

ASCERTAINING THAT HE HAD NO RPT NO OBJECTIONS),BUT HE REMAINED, TOGETHER WITH ROSENNE,PERSUADED OF CORRECTNESS OF THE AGOHVIEW. IN SEVERAL DISCUSSIONS WITH WALDOCK,HE HAS SUGGESTED THAT ARTICLE PRESENTS NO RPT NO PROBLEM SINCE QUESTION OF RECOGNITION IS IMPLICIT IN THE DETERMINATION OF CAPACITY,BUT HE IS AWARE THAT WE DO NOT RPT NOT SHARE THIS VIEW.

5.IT HAS OCCURRED TO US THAT IT MAY BE WORTH CONSIDERING POSSIBILITY OF RECONSIDERING ARTICLE AT THE JAN SESSION,PROVIDED SOME BASIS CAN BE FOUND FOR SO DOING.(IN DISCUSSION YESTERDAY OF ANOTHER ARTICLE, POSSIBILITY WAS RAISED OF RECONSIDERING THAT ARTICLE AT A SUBSEQUENT SESSION EVEN THOUGH THIS COULD NOT RPT NOT BE DONE AT PRESENT SESSION,ONCE AN ARTICLE IS APPROVED).WE HAVE EXPLORED WITH BRIGGS POSTSIBILITY OF RE-OPENING ART 3 WHEN ARTS 8 AND 9 ON THE ALL STATES QUESTION(WHICH HAVE NOW DEFINITELY BEEN POSTPONED TO A LATER SESSION) ARE DISCUSSED.AN ARGUMENT MIGHT BE MADE THAT THERE IS A DIRECT RELATIONSHIP BETWEEN ARTS 8,9 AND 3 BECAUSE OF THE QUESTION WHETHER A COMPONENT PART OF A FEDERAL STATE CAN PARTICIPATE IN,OR ACCEDE TO, GENERAL MULTILATERAL TREATIES IF CONSTITUTION OF FEDERAL STATE APPEARS TO SO PERMIT.BRIGGS THOUGHT THE IDEA WORTH EXPLORING FURTHER. IT MIGHT AT LEAST ILLUSTRATE PROBLEMS IMPLICIT IN PRESENT FORMULATION AND INFLUENCE SOME OF ITS SUPPORTERS.''''

UNITED NATIONS NATIONS UNIES

NEW YORK

CABLE ADDRESS · UNATIONS NEWYORK · ADRESSE TELEGRAPHIQUE

REFERENCE:

LE 245/1

The Secretary-General of the United Nations presents his compliments to the Secretary of State for External Affairs of Canada and has the honour to refer to his note LE 245/1 of 24 January 1964 relating to General Assembly resolution 1903 (XVIII) of 18 November 1963 on the question of extended participation in twenty-one multilateral treaties concluded under the auspices of the League of Nations.

In that note the Secretary-General solicited the views of His Excellency's Government on the matters referred to in sub-paragraph (c) of paragraph 3 of the above-mentioned resolution, namely, whether any of the treaties in question have ceased to be in force, have been superseded by later treaties, have otherwise ceased to be of interest for accession by additional States, or require action to adapt them to contemporary conditions. Enclosed with the said note was a list of the treaties concerned indicating those to which, according to records in the custody of the Secretary-General, His Excellency's Government had become a party. A similar note was addressed to the Governments of the States parties to any of the twenty-one treaties in question.

The Secretary-General has the honour to enclose herewith a copy of document A/5759 embodying the report prepared in accordance with sub-paragraph (d) of paragraph 3 of the same resolution on the basis of replies received in response to his inquiry.

COPY

UNITED NATIONS NATIONS UNIES

The question dealt with in the above-mentioned report has been included by the Secretary-General in the provisional agenda of the twentieth session of the General Assembly. Should His Excellency's Government wish to transmit any observations with a view to the consideration of this item by the General Assembly, the Secretary-General will be glad to issue them in a supplement to the above-mentioned report. As a matter of convenience, the treaties to which His Excellency's Government became a party are circled in blue on the list of the twenty-one treaties reproduced on pages 1 to 3 of the enclosed report.

2 July 1965

BK

UNITED NATIONS NATIONS UNIES

NEW YORK

CABLE ADDRESS · UNATIONS NEWYORK · ADRESSE TELEGRAPHIQUE

REFERENCE:

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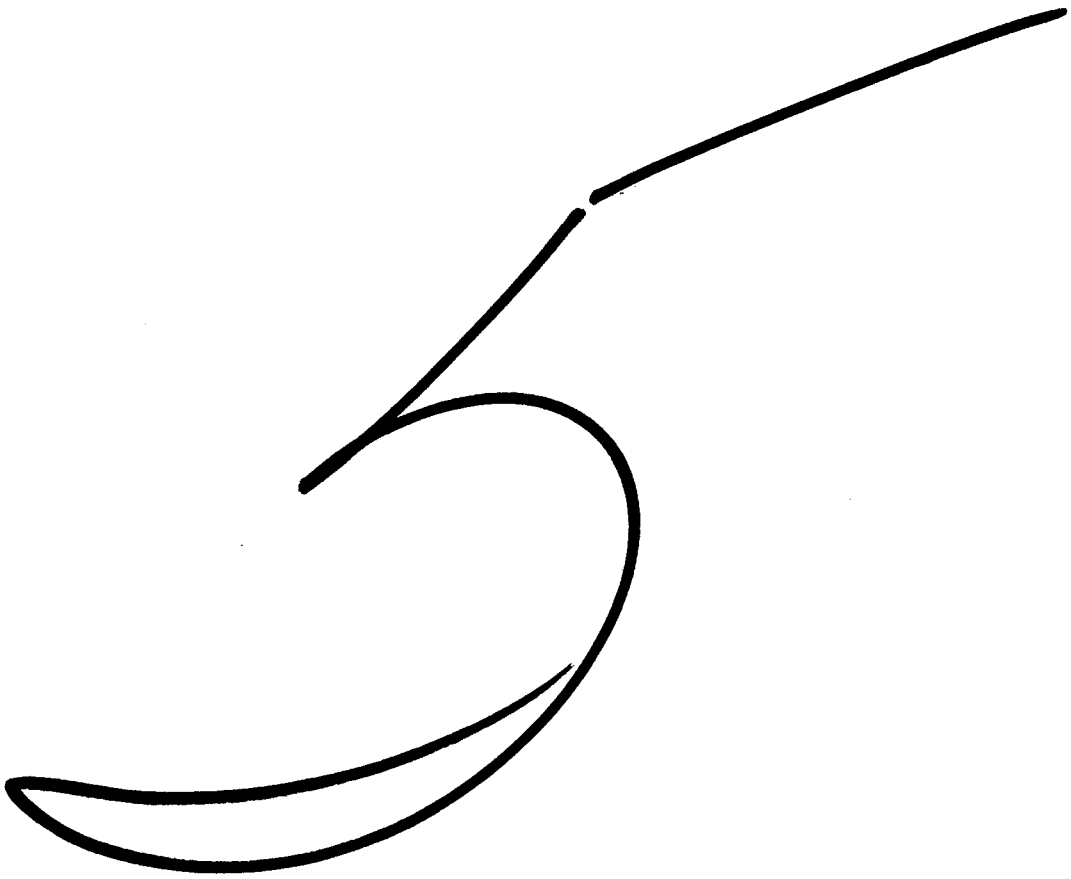

UNITED NATIONS NATIONS UNIES

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2 July 1965

BK

diary
div diary
tel file
file

MESSAGE

DATE	FILE/DOSSIER		SECURITY SECURITE
JUNE 25 1965	20-3-1-6		RESTR

FM/DE EXTERNAL OTT

TO/A	NO	PRECEDENCE
GENEVA	L-265	IMMED
INFO		

file apr

REF URTEL 669 JUNE 25/65

SUB/SUJ ILC: FEDERAL STATE ARTICLE

I HAVE SENT TO MISSION TODAY LETTER TO BEESLEY COVERING LETTER FROM MYSELF TO SIR HUMPHREY WALDOCK WHICH IN TURN COVERS A PAPER WHICH IS TO BE SUBMITTED INFORMALLY TO WALDOCK. PAPER CONTAINS MY PERSONAL VIEWS ON ARTICLE THREE. IN CASE PAPER DOES NOT ARRIVE PRIOR TO ILC DECISION ON ARTICLE THREE I WOULD LIKE BEESLEY TO INFORM WALDOCK OF MY VIEWS AS SET OUT IN THE FOLLOWING PARAGRAPH.

2. PLEASE EXPLAIN TO WALDOCK THAT I REGRET NOT BEING ABLE TO BE PRESENT FOR DISCUSSION OF ARTICLE THREE. HAD I BEEN THERE I WOULD HAVE STATED MY VIEW THAT THE BEST COURSE OF ACTION FOR COMMISSION TO FOLLOW WOULD BE TO DELETE ARTICLE THREE. IF THIS COURSE OF ACTION WERE NOT ACCEPTED BY THE ILC, MY NEXT PREFERENCE WOULD HAVE BEEN TO DELAY VOTE UNTIL NEXT SEASON.

CADIEUX

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SIG A.E.Gotlieb/mh/lmj	Legal	2-2104	SIG M. CADIEUX

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

25.6.83(U.S)

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TO EXTERNAL 669 PRIORITY

REF OURTELS 662,663 JUN24

ILC: FEDERAL STATE ARTICLE

COMMISSION TODAY REFERRED ARTICLE THREE AS A WHOLE TO THE DRAFTING CTTEE. ONLY TUNKIN LACHS BARTOS YASSEN PESSOU AND ELIAS HAS SUPPORTED THE ARTICLE AS PREVIOUSLY REDRAFTED BY DRAFTING CTTEE; ARECHAGA BRIGGS AMADO PAL RUDA TSURUOKA AND REUTER HAD ALL OPPOSED IT; AGO TODAY PRESENTED REDRAFT OF PARA2, SUPPORTED IN PRINCIPLE BY VERDROSS ROSENNE AND CASTREN WORDED AS FOLLOWS QUOTE MEMBER STATES OF A FEDERAL UNION MAY HAVE CAPACITY TO CONCLUDE TREATIES WITHIN THE LIMITS INDICATED BY THE FEDERAL CONSTITUTION UNQUOTE. WALDOCK AND ROSENNE EXPRESSED RESERVATIONS BUT WILLINGNESS TO CONSIDER AGO REDRAFT. ARECHAGA HAD PROPOSED A VOTE ON THE ARTICLE TODAY, BUT IN LIGHT OF PRESSURE BY TUNKIN GROUP AND ROSENNE, HE CONSENTED TO REFERRAL OF ARTICLE TO DRAFTING CTTEE. (BEFORE DECISION WAS TAKEN REUTER DREW ATTN TO ANTI-COLONIAL ASPECT OF PARA1 AND WALDOCK POINTED OUT THAT IT ALSO HAD QUOTE ALL STATES UNQUOTE OVERTONES).

2. IN LIGHT OF CLEAVAGE OF OPINION IN COMMISSION, IT IS DIFFICULT TO ENVISAGE AN ARTICLE LIKELY TO GAIN GENERAL ACCEPTANCE.

3. TABIBI, DE LUNA, EL-ERIAN, BEDJAOUI AND LIU ARE STILL ABSENT AND UNLIKELY TO RETURN THIS YEAR AND PAREDES IS SERIOUSLY ILL WITH A THROMBOSIS; THE COMMISSION SEEMS RELUCTANT TO TAKE DECISIONS BY VOTE ON IMPORTANT QUESTIONS UNTIL MORE MEMBERS ARE PRESENT. ***

Diary
Div diary

Legal/A.E. Gotlieb/ng

OTTAWA, June 24, 1965

Dear Alan,

Allan Gotlieb has shown me your letter of June 16. On reflection, I have come to the conclusion that course (c) referred to in your letter would be the best procedure for me to follow. I am accordingly attaching a letter to Sir Humphrey Waldock for delivery by you to him. You will note from the letter that the attached paper is being shown to him on a very informal and private basis and that it is not for circulation.

Before delivering this letter and its attachment to Sir Humphrey, I suggest that you speak to him to see whether he would welcome or be interested in receiving, on a private basis, a copy of the paper we have prepared. If he says he would, then after an interval of a day or two you could produce the letter from me and its attachment.

We have revised parts of the paper in order to strengthen it in various respects. Please read the new version of the paper and if there are any parts of it that you would like to change or that you think should be sharpened or modified, I leave it to you to make these changes at your discretion.

My best personal regards.

Yours sincerely,

M. CADIEUX

M. Cadieux

Mr. J.A. Beesley,
First Secretary,
Permanent Mission of Canada
to the European Office of the
United Nations,
Geneva, Switzerland.

24.6.53(45)

Diary
Div diary

Legal/A.E. Gotlieb/ng

PRIVATE

OTTAWA, June 24, 1965

Dear Sir Humphrey,

I regret that it will not be possible for me to be in Geneva when the Commission considers the text of Article 3 (treaty-making capacity) of the draft which it drew up in 1962. Had I been able to be in Geneva I would have wished to make a statement on this matter, expressing my views on the draft article. I thought that in view of the fact that I would not be able to attend the Commission, you might be interested in reading, on a personal and private basis, a paper which I have prepared, with the assistance of a member of the Legal Division of my Department, on the broad question of the treaty-making capacity of constituent parts of a federal union.

The paper does not deal exclusively with the question of whether Article 3 should be retained or deleted but a substantial part of the paper addresses itself to this point. The paper is a very informal one and may contain certain inaccuracies, but I thought that it might possibly be of some assistance to you in connection with your own research on the background to the particular problem and on the implications of Article 3.

I would be grateful if you would regard this paper as for your own information only and not circulate it to others.

My best personal regards.

Yours sincerely,

M. CADIEUX

M. Cadieux

Sir Humphrey Waldock,
Special Rapporteur to the
Law of Treaties,
International Law Commission,
Geneva, Switzerland

20-3-11-6

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TO EXTERNAL 662 IMMED

ILC:PROGRESS OF WORK

COMMISSION YESTERDAY CONCLUDED FIRST READING OF DRAFT ARTICLES 17 TO 40 ON SPECIAL MISSIONS(DOCU A/CN.4/179 OF APR21).THE COMMISSION CONTINUED THE TREND APPARENT LAST YEAR IN ITS DISCUSSION OF ARTICLES 1 TO 16 TO ATTEMPT TO BRING THE ARTICLES MORE INTO LINE WITH THE VIENNA CONSULAR AND DIPLO CONVENTIONS.ALL ARTICLES WERE REFERRED TO THE DRAFTING CTTEE WITH INSTRUCTIONS TO THE SPECIAL RAPPORTEUR TO REDRAFT THEM TO MAKE THEM CONFORM MORE CLOSELY TO THE VIENNA CONVENTIONS BEFORE SUBMITTING THEM TO THE DRAFTING CTTEE.

2.ON THE LAW OF TREATIES,THE COMMISSION TODAY CONSIDERED THE TIMING OF ITS RENEWED DISCUSSION OF ARTICLES 8 AND 9 DEALING WITH THE CONTENTIOUS QUOTE ALL STATES UNQUOTE CLAUSE.(WALDOCK HAS PREPARED SOME ALTERNATIVE TEXTS BUT HAS NOT RPT NOT YET SUBMITTED THEM TO THE DRAFTING CTTEE).SINCE ONLY THIRTEEN MEMBERS OF THE COMMISSION WERE PRESENT(LESS THAN QUORUM)WHEN THE ISSUE WAS DISCUSSED AND SINCE IN ANY EVENT A NUMBER OF MEMBERS INCLUDING TUNKIN AND WALDOCK EXPRESSED THE VIEW THAT THE QUESTION SHOULD BE DISCUSSED ONLY WHEN THE ATTENDANCE WAS CONSIDERABLY LARGER THAN AT PRESENT, IT WAS DECIDED TO DEFER DISCUSSION FOR THE TIME BEING. WALDOCK PROPOSED POSTPONEMENT UNTIL THE JAN MTG IN MONACO BUT THE CHAIRMAN BARTOS OPPOSED A DEFINITE DECISION AT THIS TIME ON THE GROUNDS THAT THERE MIGHT BE LARGER NUMBER OF MEMBERS PRESENT LATER

...2

IN THE SESSION.NO RPT NO DECISION WAS TAKEN NOT RPT NOT TO CONSIDER ARTICLES 8 AND 9 AT THIS SESSION BUT IT SEEMS LIKELY THAT THIS WILL BE THE EVENTUAL DECISION.

3.COMMISSION BEGAN DISCUSSION TODAY OF DRAFTING CTTEES REDRAFT OF ARTICLES 1 TO 7(CONF. ROOM DOCU 8 OF JUN4).DISCUSSION WAS BEGUN ON ARTICLE 3 ON CAPACITY OF MEMBER STATES OF FEDERAL UNIONS TO CONCLUDE TREATIES.TREND OF DEBATE WAS CLEARLY IN FAVOUR OF DELETION OF PARA2 OF ARTICLE THREE UNTIL AGO SPOKE IN FAVOUR OF AN ARTICLE INDICATING LIMITATIONS OF CAPACITY AND ONE LESS LIKELY TO CREATE PRESUMPTION OF CAPACITY.ROSENNE WHO HAD FAVOURED DELETION THEN ALTERED HIS POSITION AND WALDOCK FOLLOWED SUIT,WHILE RESERVING HIS FINAL POSITION.IT SEEMS LIKELY THEREFORE THAT THE ARTICLE WILL BE REFERRED BACK TO THE DRAFTING CTTEE FOR REFORMULATION.

4.STATUS OF REMAINING ARTICLES ON THE LAW OF TREATIES IS SET OUT IN OURTEL 663 JUN24.

Legal/A.E. Gotlieb/ng

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary

FROM / De: Legal Division

REFERENCE / Référence:

SUBJECT / Sujet: International Law Commission: Treaty-making Powers

SECURITY / Sécurité: CONFIDENTIAL

DATE: June 24, 1965

NUMBER / Numéro: RL

FILE / DOSSIER
OTTAWA 20-3-1-6
MISSION 27-1

ENCLOSURES / Annexes: 3

DISTRIBUTION

I am attaching a letter which I have just received from Alan Beesley in Geneva. The letter, which is self-explanatory, covers a paper prepared by Alan on the basis of the study carried out in Legal Division on the treaty-making powers of members of federal unions.

2. Of the courses of action which Alan Beesley suggests, it would seem to me that only course (c) is feasible. I assume that you will not be returning to Geneva so that course (a) is out. I think course (b) should also be rejected for the reasons Beesley provides. Course (c) would, however, appear to be possible. It seems to me that provided we were to get this material off very quickly, i.e. in the next day or two, we could, if you wish, ask Beesley to deliver the paper informally and privately to Waldock under cover of a letter from you. I am attaching a letter from you to Waldock, for signature, if you approve this course of action.

3. Beesley suggests in paragraph (c) that this course should not be adopted without prior consultation with Waldock. Beesley could have a word with Waldock privately and, if he seemed interested in having the paper, could hand it over to him a day or two later.

4. I have redrafted large parts of the attached paper. These parts are contained in my handwriting. I thought it would be better to list Canada as an example of a country where the components of the federal state do not have treaty-making powers rather than in a separate category, as Beesley had done. I have also tried to strengthen the basic argument in the paper which is that Article 3 should be deleted. Some useful quotations from Bora Laskin are added. The paper also tries to show that there is a contradiction in the Commission's Article 3. Independent treaty-making powers are attributes of sovereignty. They cannot exist in a federal state. The Commission's Article could give rise to the interpretation (Morin has so interpreted it) that the Commission sees no legal impediment to members of a federal union possessing independent treaty-making powers.

5. I am also attaching for your information a copy of the

Ext. 407D/Bil.
(Admin. Services Div.)

speech which Morin made in Vancouver earlier this month at the meeting of the Association of University Teachers of Law. I think the paper is worth reading. You will note the use he makes of Article 3 of the ILC's most recent draft. You will also note on page 6 the indirect reference to yourself.

6. Attached are copies of the revised paper and Beesley's earlier draft.

[A. E. GOTLIEB

Legal Division

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PAR33/24

FM GENEVA JUN24/65

TO EXTERNAL 663 IMMED

REF OURTEL 662 JUN24

ILC:PROGRESS OF WORK ON LAW OF TREATIES

BEGINS:

ARTICLES WHOSE CONSIDERATION BY THE COMMISSION HAS BEEN POSTPONED OR DECISION DEFERRED.

ARTICLE 1(PARA1,SUBPARA(B)-(G)AND PARA2)-USE OF TERMS OR DEFINITIONS.

ARTICLE 3BIS-TRANSFER OF ARTICLE 48(PROPOSAL BY SPECIAL RAPPORTEUR, A/CN.4/177,P.41).

NEW PROPOSAL-QUESTION OF AN ARTICLE ON THE CONCLUSION OF TREATIES BY ONE STATE ON BEHALF OF ANOTHER OR BY AN INTERNATIONAL ORGANIZATION ON BEHALF OF A MEMBER STATE(A/CN.4/177,P.50).

ARTICLE 8-PARTICIPATION IN A TREATY.THE COMMISSION DECIDED TO ASK THE SPECIAL RAPPORTEUR,WITH THE ASSISTANCE OF THE DRAFTING CTTEE, TO SUBMIT A NEW PROPOSAL FOR SUBSEQUENT DISCUSSION.

ARTICLE 9-THE OPENING OF A TREATY TO THE PARTICIPATION OF ADDITIONAL STATES.THE COMMISSION HAS NOT RPT NOT YET DISCUSSED THIS ARTICLE IN VIEW OF ITS CONNEXION WITH MATTERS INVOLVED IN ARTICLE8.

NEW ARTICLE-ENTRY INTO FORCE OF TREATIES WITHIN THE TERRITORY OF THE PARTIES,PROPOSED BY THE LUXEMBOURG GOVT(A/CN.4/177/ADD.1 P.37) (THIS PROPOSAL IS RELATED TO ARTICLE 55).

ARTICLES ALREADY SUBMITTED BY THE DRAFTING CTTEE TO THE COMMISSION, (CONF.ROOM DOCU NO 8).

NEW FIRST ARTICLE-THE SCOPE OF THE PRESENT ARTICLES.

...2

ARTICLE 1(PARA1,SUBPARA(A))-USE OF TERMS.

ARTICLE 2-TREATIES AND OTHER INTERNATIONAL AGREEMENTS NOT RPT NOT WITHIN THE SCOPE OF THE PRESENT ARTICLES.

ARTICLE 3-CAPACITY OF STATES TO CONCLUDE TREATIES.

ARTICLE 4-FULL POWERS TO REPRESENT THE STATE IN THE NEGOTIATION AND CONCLUSION OF TREATIES.

ARTICLE 6-ADOPTION OF THE TEXT.

ARTICLE 7-AUTHENTICATION OF THE TEXT.

ARTICLES DELETED BY THE DRAFTING CTTEE(CONF.ROOM DOCU NO 8).

ARTICLE 5-NEGOTIATION AND DRAWING UP OF A TREATY.

ARTICLES ADOPTED BY THE DRAFTING CTTEE BUT NOT RPT NOT YET SUBMITTED TO THE COMMISSION.

ARTICLE 10-(BECAME PARA2 OF ARTICLE 11).

ARTICLE 11-CONSENT TO BE BOUND EXPRESSED BY SIGNATURE.

ARTICLE 12-CONSENT TO BE BOUND EXPRESSED BY RATIFICATION,ACCEPTANCE OR APPROVAL.

ARTICLE 13(ACCESSION)AND ARTICLE 14(ACCEPTANCE OR APPROVAL-COVERED BY NEW ARTICLE 12.

ARTICLE 15-EXCHANGE OR DEPOSIT OF INSTRUMENTS OF RATIFICATION, ACCESSION,ACCEPTANCE OR APPROVAL.

ARTICLE 16-CONSENT RELATING TO A PART OF A TREATY OR TO ALTERNATIVE CLAUSES.

ARTICLES ALREADY CONSIDERED BY THE DRAFTING CTTEE BUT PENDING FINAL READING.

...3

ARTICLE 17-OBLIGATION OF GOOD FAITH IN THE CONCLUSION OF A TREATY.

ARTICLE 23-ENTRY INTO FORCE OF TREATIES.

ARTICLE 24-ENTRY INTO FORCE OF A TREATY PROVISIONALLY.

ARTICLES PENDING CONSIDERATION BY THE DRAFTING CTTEE.

ARTICLE 18,19,20,21 AND 22 CONCERNING RESERVATIONS.

ARTICLE 25-THE REGISTRATION AND PUBLICATION OF TREATIES.

ARTICLE 26-THE CORRECTION OF ERRORS IN THE TEXTS OF TREATIES FOR WHICH THERE IS NO RPT NO DEPOSITARY.

ARTICLE 27-THE CORRECTION OF ERRORS IN THE TEXTS OF TREATIES FOR WHICH THERE IS A DEPOSITARY.

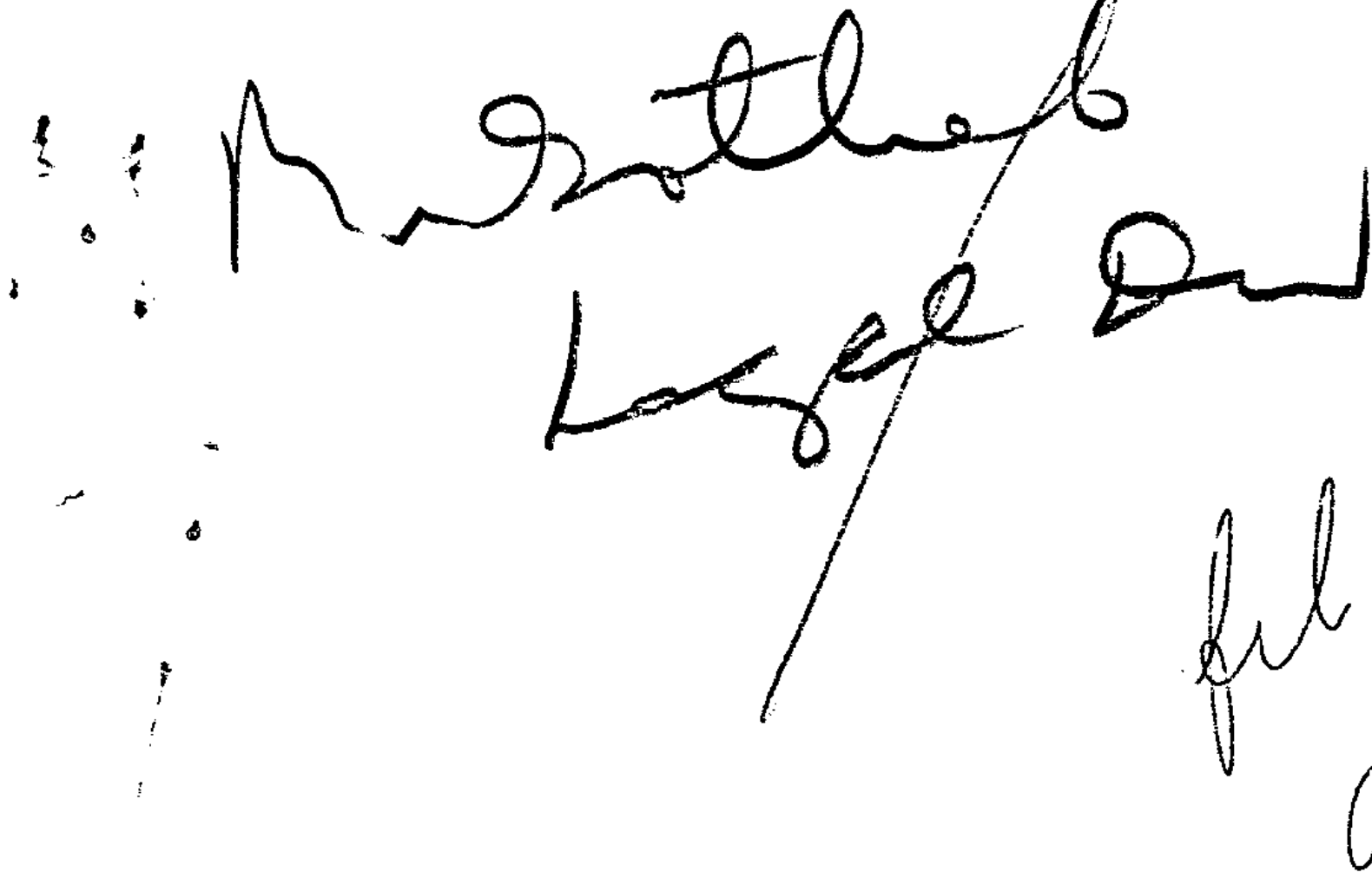
ARTICLE 27BIS-TAKING EFFECT AND NOTIFICATION OF CORRECTION TO THE TEXT OF A TREATY(PROPOSAL BY SPECIAL RAPPORTEUR,A/CN.4/177/ADD.1, P.50).

ARTICLE 28-THE DEPOSITARY OF MULTILATERAL TREATIES.

ARTICLE 29-THE FUNCTIONS OF A DEPOSITARY.

ARTICLE 29BIS-NEW ARTICLE PROPOSED BY MR ROSENNE(A/CN.4/L.108).

QUERY-ARTICLE DISTINGUISHING BETWEEN CASES WHERE THERE IS AND WHERE THERE IS NOT RPT NOT A DEPOSITARY FOR THE PURPOSES OF ANY NOTICES,COMMUNICATIONS ETC PROVIDED FOR UNDER THE PRESENT ARTICLES (DRAFTING SUGGESTION MADE BY MR TUNKIN DURING THE DISCUSSION OF ARTICLE 22,SEE:A/CN.4/SR.800,PARAS67 AND 82).ENDS.



L TO: Mr. Robertson JUN 9 REGISTRY

20-3-1-6 | 7 | 7

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cc Mr. Heeney J-10
Mr. Bottler
& file

fel

FM PERMISNY JUN8/65 CONFD

TO GENEVA 905 PRIORITY

INFO EXTERNAL

REF YOURTEL 558 JUN4 PARA7

ILC: ALL STATES FORMULA

HAVE MENTIONED TO CHINESE AMB LIU GIST OF DEBATE IN ILC OVER ALL STATES FORMULA. UNFORTUNATELY LIU HAS TO REMAIN IN NY BECAUSE OF HEAVY SCHEDULE OF SECURITY COUNCIL AND FACT THAT HIS DEPUTY IS ILL. THIS COMBINED WITH HIS PLANS TO ATTEND SAN FRANCISCO CEREMONY WILL PREVENT LIU FROM ATTENDING ILC SESSION THIS YEAR. AMB WAS APPRECIATIVE OF MSG AND SENDS REGARDS

TREMBLAY

Paper of 1965 (Easter)

File on 20-3-1-6

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THE INTERNATIONAL LAW COMMISSION AND THE
LAW OF TREATIES

PROF. JAMES F HOGG, U OF MINN. LAW SCHOOL

Introduction and Summary of Activities of the Commission in Relation to the Law of Treaties.

At its first session in 1949, the International Law Commission selected the "Law of Treaties" as a topic suitable for codification. Brierly, Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice and Sir Humphrey Waldock have served successively as special rapporteurs. Prior to 1962 the Commission's activity level on this topic was low - volumes of studies were produced by the rapporteurs but consideration thereof was spasmodic. From 1962 to 1964 however, the bulk of the Commission's time was devoted to three successive reports. The first of these, considered in 1962, dealt with the conclusion, entry into force, and registration of treaties. The second, considered in 1963, dealt with the essential validity, duration and termination of treaties. The third, considered in 1964, dealt with application, effects, revision and interpretation. The Commission tentatively framed each year's work as a separate draft. A decision whether the final proposal should take the form of one or three draft conventions was postponed pending receipt of comments by governments.

The first series of such comments has just been published by the Commission. Further consideration of the three parts together with comments of governments and discussions in the Sixth Committee and elsewhere will, presumably be taken up again at

the 1966 session of the Commission.

The Nature of the Commission's Product.

As might be expected, the product of such a large time expenditure by the Commission and its four successive rapporteurs is replete with interesting material. This is so, notwithstanding that previous drafts on treaty law have been prepared, notably the Harvard draft of 1935. The three parts provide something for everyone. There are some fine academic points, for instance, questions of what constitutes fraud sufficient to vitiate a treaty, and whether the conclusion of inconsistent treaties makes the subsequent commitment a nullity. There are some fine practical points, for instance the problems of a depositary of multilateral treaty in judging ratifications accompanied by reservations. There are some major policy problems, for instance, whether a commitment should be made to submit to compulsory arbitration any dispute concerning validity, breach or termination of treaties, and whether and to what extent the doctrine of rebus sic stantibus should be recognized. It must also be admitted that the drafts contain a substantial measure of relative minutiae.

No comprehensive survey can be attempted in this presentation. All that is offered is first, a discussion of a few illustrative highlights, and second, some considerations which might underly an evaluation of this work of the Commission.

Apparently, the most contentious provisions of the first draft are those dealing with the right of accession of a state

not originally party to the negotiations or treaty, and those dealing with reservations to multilateral treaties.

Article 8 defines, in the form of a rebuttable presumption, a right of participation to "general" multilateral treaties, unless "the established rules of an international organization" otherwise provide. Article 9 appears to go much further and purports to open multilateral treaties to accession by states "other than those to which it was originally open." A decision of two-thirds of the states which drew up the treaty, or after the lapse of an unstated number of years, two thirds of the parties to the treaty is required. By contrast, participation in a treaty "concluded between a small group of states" requires unanimous consent. An even more sweeping provision covers participation in treaties drawn up by an international organization or at an international conference convened by an international organization. The article goes on to provide a presumption of approval to any such accession by a state which fails to notify the depositary of its objection within twelve months. A safety clause is included allowing an objecting state to notify the new participant that the treaty shall not come into force between it and the new participant.

These two articles attracted considerable discussion in the Commission and attention from governments in their comments. It appears conceded that these articles fall within the rubric progressive development rather than codification. Because Article 9 states a rule rather than a presumption, the definition of "general multilateral treaty" and the distinction between such

a treaty on the one hand, and on the other a treaty "concluded between a small group of States" seems critical. This is the dividing line at which an original party can exclude additional accessions absent unanimous consent. The definition of this dividing line is vague and uncertain under the present draft - it serves to illustrate a basic problem faced by the Commission. In the face of competing views and interests, to what extent should a compromise be made in an attempt to seek wider agreement? Concealed under this article is a broad difference of policy between the Soviet Union on the one hand, and some of the western powers on the other. Broadly speaking, the communist countries favor general unlimited participation in multilateral treaties whereas we do not. Waldock attempted to distinguish three types of treaty - bilateral, plurilateral, and multilateral. "Plutilateral" indicated a treaty "open to a restricted number of parties and the provisions of which purport to deal with matters of concern only to such parties." The choice of the present phrase "small group of states" represents an unhappy compromise of the underlying problem he identified.

The second set of articles which generated considerable heat, and not for the first time, are Articles 18, 19 and 20 on reservations to multilateral conventions. These articles appear to reverse the position taken by the Commission in 1951 and reinstate, or I should say, adopt the position formulated

by the International Court of Justice. Article 29 covers the functions of a depositary and, to a certain extent, deals with the same problem. In its present form, this article requires the depositary under certain circumstances and for certain purposes to take a position as to the compatibility of a reservation with the object of the convention. As such, it may go beyond the present practice of the Secretariat.

Here again, there are latent cold war considerations. Professor Briggs emphasized in the Commission that the movement away from the uniformity rule might create a fictitious appearance of universality for the convention. He also depicted the diplomatic and propaganda problem by pointing out that the reserving state could still pose as a party to the treaty while releasing itself from the general rule of law.

Among the more lively issues in the second part of the Commission's work are the provisions dealing with the effect of constitutional limitations on the treaty making power, vitiation of a state's consent to the terms of a treaty by reason of fraud, coercion, unilateral error, and conflict with a peremptory norm of international law, and the doctrine of rebus sic stantibus. In this part of the work the Commission came close to a fundamental problem - compulsory adjudication of disputes arising out of the making, application and termination of treaties.

But first, a few words about an old academic friend - is a state party to a treaty where there has been a failure to meet

domestic law requirements for adoption of the treaty? Under the rapporteur's leadership the draft provides that heads of state, heads of government and foreign ministers have ostensible authority under international law. So does a head of diplomatic mission vis-a-vis the state to which he is accredited. Under international law an estoppel will run absent a "manifest violation" of internal law. Lest you think this deprives teachers of a happy class hour, bear in mind two things - first, the Commission has deferred consideration of problems of succession of states and governments pending a full separate draft on that topic; second, Tunkin's admonition that consent to the terms of a treaty is a democratic function involving the principle of self-determination of peoples and that therefore:

> "it [is] not sufficient that the full powers should be in order or that the treaty should be signed by the head of state or head of government and that the constitution in question should not specifically refer to the matter at issue."

The other topics previously listed each present challenging problems of definition and scope. At the very heart of these questions, however, is the old problem - who decides whether a case for denunciation, or invalidity or rebus sic stantibus applies? Waldock's original proposal might possibly have been interpreted as requiring compulsory adjudication. Tunkin made clear what without his statement would have been equally clear, that any such concept was quite unacceptable. As a result, Article 51 now provides that the parties "shall seek a solution

of the question through the means indicated in Article 33 of the Charter of the United Nations."

Time prevents further specific analysis of articles in Part III of the Commission's work.

How shall this work of the Commission be evaluated?

Comes then the question, how shall we evaluate this three year work of the Commission? In attempting to answer that question many yardsticks may or must be considered. Perhaps the first meriting attention is the Commission's own conception of the purpose to be achieved.

Starting with the Brierly report in 1949, there has been substantial disagreement about the form which the Commission's product should take. Brierly's initial decision was in favor of a draft convention, Fitzmaurice favored a code, and finally the Commission, in 1961, chose to revert to the convention format. Does anything of consequence turn on this choice? Underlying Fitzmaurice's recommendations is presumably a fear that no general consensus can be developed concerning many of the provisions set out in the drafts. The absence of such consensus would be dramatically and embarassingly established by a broad-scale refusal by states to accept the conventions, or an acceptance thereof accompanied by sweeping reservations. Discussions in the Commission and government comments to hand thus far serve to underline and support Fitzmaurice's fears. If fundamental and substantial disagreement does exist between different groups of states on many of the problems considered, would the preparation of a code as opposed to a convention make any significant contribution to the

present situation?

To state this question is to put an even more fundamental one - what useful purpose can the Commission hope to achieve through either a code or a convention on treaty law? On the one hand, spokesmen including Lachs have pointed to the lack of success of previous work of the Commission where minority viewpoints have been ignored. On the other, a statement in either form limited to formulation of areas of agreement is destined to be of limited compass and less significance. Is the Commission given a choice of restating the trite at levels sufficiently abstract to avoid specific commitment, or of stating a consensus available among a smaller group of states in terms of greater content and precision, or of striking out boldly in terms of a theoretical ideal code or convention with consequent lack of commitment from an even broader number of states? It seems that the realities of this quandary are not solved by the choice between code or convention.

Assuming a moderate middle of the road intent by the Commission, that is, to state the consensus as to exising law and practice with modest reform where substantial need is shown, has it developed any such consensus and has it suggested moderate and desirable reform?

Substantial portions of the Commission's work state residual rebuttable presumptions of intent subject to change by any contrary manifestation on the part of states party to the negotiations or treaty. Here, consensus is easiest to state, and at the same

time potentially least useful in terms of development. At this level the draft conventions have performed useful work. Moreover, the utility of the product cannot be judged solely in relation to treaties silent on the points covered and therefore subject to the rebuttable presumptions. It must be recognized that the work of the Commission can and may well make a substantial contribution to future treaty drafting. Consider for instance, not only the provisions but also the commentary and debates on accessions, reservations, ratification procedures and duties of a depositary. The drafts have provided an opportunity for some of the new states to express views about some of the existing practices. These debates may also have helped document a consensus where it exists between some states, even though such consensus falls far short of the universal. It must also be recognized however, that some of the material as to which there is broad consensus is mundane and of minor significance.

On more basic issues of policy, and the more important doctrines considered, especially those doctrines which take the form of rules of law rather than rebuttable presumptions, has the Commission developed "the law" or will it provide just another citation for both plaintiff and defendant? Is the draft stated in terms of sufficient precision to add new content to the customary norms such as they are? In framing these norms, has the Commission achieved any useful accommodation between the different groups of treaty interests represented in the world today? What contributions do the drafts make to bridging the

United States - Soviet gap? What contributions do the drafts make to creating a "new international law," sought by some nations, freed from what some of them regard as western European domination?

These questions are hardest to apply to the second of the drafts dealing with validity and grounds of termination. Herein lie the source of arguments potentially most destructive of that theoretical ideal "the sanctity of treaty obligations." Herein, a comparison of the rapporteurs' proposals, and proposals of spokesmen of the Commission, with the final draft product prove more illuminating. The suspicion is aroused, after such a comparison, that the Commission has been forced to an unhappy choice and that, with respect to a number of key articles, has been forced to resort to vagueness if not down right ambiguity in order to evade or forestall a head-on clash between different groups of states.

For instance, the Commission has recognized a measure of ostensible authority for certain state agents under international law, but Tunkin's rumblings about self-determination of peoples and the necessity of democratic participation in the conclusion of treaties provides a clear counterpoint which is out of tune with the draft. The very tender subject of the relevance of succession of states and governments to treaty obligations, heavily emphasized by representatives of newer African states is postponed for a later specific draft on that topic. We

accommodation at all has, as yet, been attempted in that area. The doctrines of error vitiating consent, and coercion have been covered. But it is doubtful whether the Commission's draft squares directly up to the contentious issues and basis of disagreement between east and west on problems of indirect or economic coercion or the Soviet doctrine of "unequal treaties." And yet the draft has adopted a limited concept of unilateral error sufficiently explicit to make that article of dubious acceptability to us.

The Commission has postponed for a later study the problem of remedies and responsibilities of states. In this way, a number of other hard issues have been postponed and not resolved in this draft.

The Commission has faced one of the most contentious doctrines - that of rebus sic stantibus or change of circumstances. But here again, the draft achieves a level of abstraction sufficient to undercut to a considerable extent, any concrete contribution to this inexact subject. On the one hand, the draft does not hue to the position advocated by Professor Briggs, namely that the operation of the doctrine is exclusively limited to executory obligations.

But more importantly, the Commission's solutions in Part II are substantially undercut by its refusal to face a cardinal problem - the absence of an independent forum to determine the justice of an asserted ground of invalidity, termination or interpretation of obligations of a treaty. Here was a chance for the

Commission to strike out boldly, for progressive development. While a number of treaties and conventions contain submissal clauses, even some of those may not be wide enough to reach many of the propositions considered in Part II, especially those going outside the text of the treaty, to the very issue of whether the treaty came into or continues in effect. An express article announcing a duty to litigate before an independent tribunal any dispute as to all of these issues would have been perhaps the most notable contribution that the Commission could make to the law of treaties. Tunkin made it clear at the outset of debate as did Lachs, that any such article would be totally unacceptable. Professor Briggs responded that without such an article, he seriously doubted whether there was sufficient novel contribution in the drafts to merit their submission to governments for further consideration. The draft finally approved makes no such contribution. It reflects a decision to compromise in order to obtain wide acceptance rather than to push for an ideal solution. Such an ideal assumes, of course, that we ourselves are prepared to accept compulsory arbitration and are doing something more than batting the breeze in castigating Tunkin and Lachs.

In evaluating this draft then, should we be content to let it sit at a relatively innocuous level of abstraction and restatement on grounds that nothing more concrete has a chance of substantial acceptance, or should we push for a much firmer

commitment recognizing that participation may then be limited to a relatively few states having a much more solid common bond of interest, background and experience? In a sense, we reach the same question bruited with respect to international organizations. Do we stand to gain more by developing firmer legal ground among a smaller number of nations having a greater common bond than we do by emphasizing the highest common factor in a world wide basis? Perhaps here, as well as in other areas, we cannot make one monolithic response. We can benefit as a world society from the statement and restatement of the highest common factor, but perhaps we can also benefit from considering a treaty on treaty law drawn up to suit the interests and common ground among smaller groups of states, perhaps organized on a regional basis. Failing to get acceptance of compulsory arbitration of all issues pertaining to validity interpretation and termination of treaties in this body, should we consider the utility of a tighter convention for a smaller group?

But this raises one more problem which the Commission has not intended to consider - to what extent are states presently prepared to draw up their treaties in terms sufficiently detailed and removed from abstraction to constitute a workable and enforceable legal text? Secondly, to what extent are states prepared to affirmatively use a system of compulsory arbitration as a normal machinery for accommodation of state differences? Studies have been made of the large number of submissal clauses included in

treaties registered with the Secretariat. The miserable flow of business to arbitral tribunals still underlines the fact that diplomatic practice has yet to accept this as a desirable machinery.

Finally, let us put the hard question - could we recommend to our government that the United States adopt any or all of these three conventions? That is another question.

Mr Robertson
Note PC's comment

Did UN Div see?

TO: Mr. [illegible]
JUN 7 1965
REGISTRY

ACTION COPY
circulate in Division, file

16 Sep L

20-3-1-6
25 1 7

FM GENEVA JUN4/65 CONFD CDN EYES ONLY

TO EXTERNAL 558 PRIORITY

INFO BONN LDN WASHDC EMBPARIS PERMISNY

ILC:ALL STATES FORMULA

ILC MADE SOME IMPORTANT ALTHOUGH NOT RPT NOT YET FINAL DECISIONS YESTERDAY ON THE QUOTE ALL STATES UNQUOTE FORMULA.AFTER THREE DAYS OF VIGOROUS AND WIDE RANGING DEBATE,COMMISSION REJECTED BOTH QUOTE COMPROMISE UNQUOTE FORMULA WHICH HAD BEEN AGREED TO IN 1962, AND A MORE EXTREME FORMULATION OF QUOTE ALL STATES UNQUOTE CLAUSE PROPOSED BY TUNKIN.A SUMMARY OF DEVELOPMENTS IS SET OUT BELOW.

2.IT WILL BE RECALLED THAT DURING FIRST READING OF PART I OF LAW OF TREATIES(CONCLUSION,ENTRY INTO FORCE AND REGISTRATION OF TREATIES),COMMISSION HAD A SERIES OF LENGTHY AND DIFFICULT DISCUSSIONS ON APPLICABILITY OF ALL STATES FORMULA TO ACCESSION TO GENERAL MULTILATERAL TREATIES,AND ULTIMATELY ADOPTED FOLLOWING FORMULATION OF ART 8(1):QUOTE IN THE CASE OF A GENERAL MULTILATERAL TREATY EVERY STATE MAY BECOME A PARTY TO TREATY UNLESS IT IS OTHERWISE PROVIDED BY TERMS OF TREATY ITSELF OR BY ESTABLISHED RULES OF AN ESTABLISHED INTERNATIONAL ORGANIZATION UNQUOTE.COMMISSION WAS DIVIDED ON QUESTION,HOWEVER,AND 1962 VOTE WAS AS FOLLOWS:12 IN FAVOUR(AGO-ITALY AMADO-BRAZIL ROSENNE-ISRAEL TUNKIN-USSR ELIAS-NIGERIA EL ERIAN-UAR CASTREN-FINLAND LACHS-POLAND PAL-INDIA YASSEEN-SYRIA VERDROSS-AUSTRIA DE LUNA-SPAIN.FIVE AGAINST:BRIGGS-USA GROS-FRANCE TSURUOKA-JAPAN WALDOCK-UK AND MYSELF.NO RPT NO ABSTENTIONS.

3.SINCE CIRCULATION OF COMMISSIONS 1962 REPORT TO GOVTS COMMENTS

...2

This will have important repercussion on Hean. Participation in League of Nations Treaties on agenda of Sixth Committee

RCH.

000638

OF A NUMBER OF COUNTRIES,PARTICULARLY USA,UK AND JAPAN HAVE REJECTED THIS FORMULATION.IN HIS REDRAFT,SPECIAL RAPPORTEUR CONSIDERED HIMSELF BOUND TO MAINTAIN THE APPROACH LAID DOWN IN 1962 FORMULATION.WHOLE QUESTION WAS REOPENED AT PRESENT SESSION OF COMMISSION DURING SECOND READING OF ARTICLE.BRIGGS MADE A VERY EFFECTIVE ANALYSIS OF ARTICLES LEGAL DEFECTS,PARTICULARLY LACK OF AN ADEQUATE DEFINITION OF GENERAL MULTILATERAL TREATIES,AND POINTED OUT THAT IT DID NOT RPT NOT REFLECT EXISTING UN PRACTICE,TSUROKA AND I SUPPORTED BRIGGS;POINTED OUT ALSO THAT FORMULATION WAS NOT RPT NOT A COMPROMISE;IT FAVOURED QUOTE ALL STATES UNQUOTE POSITION BY PERMITTING IN EFFECT A DECISION BY ONE-THIRD PLUS ONE OF THE PARTICIPANTS OF A CONFERENCE THAT ALL STATE FORMULA SHOULD APPLY TO TREATY DRAFT AT IT.WE ALSO DREW ATTN TO DIFFICULTIES QUOTE ALL STATES UNQUOTE FORMULA CREATED FOR SECGEN WHEN ACT NG AS DEPOSITORY FOR TREATIES TO WHICH ALL STATES FORMULA WAS TO BE APPLIED,AND EMPHASIZED THAT THERE WAS A SERIOUS POLITICAL PROBLEM IN ISSUE WHICH COULD NOT RPT NOT BE SIDE-STEPPED BY COMMISSION.TUNKIN LACHS BARTOS AND PAL MADE USUAL ARGUMENTS IN SUPPORT OF QUOTE ALL STATES UNQUOTE FORMULA,WITH ONLY EL ERIAN CONTRIBUTING SOME NEW IDEAS. DURING COURSE OF DEBATE THREE PROMINENT MEMBERS OF COMMISSION (AMADO AGO AND ROSENNE)WHO HAD SUPPORTED 1962 FORMULATION REVERSED THEIR DECISION ON IT.RUDA,WHO HAD BEEN ELECTED TO COMMISSION SINCE 1962 DISCUSSION ALSO SUPPORTED OUR POSITION.

4.BRIGGS FORMALLY PROPOSED DELETION OF ART I(1);TUNKIN PROPOSED ALL STATES FORMULA;AGO PROPOSED A FORMULATION REFLECTING EXISTING

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UN PRACTICE;AND A NUMBER OF MEMBERS EXPRESSED SUPPORT FOR 1962 FORMULATION.YESTERDAY ALL FOUR PROPOSALS WERE PUT TO VOTE WITH FOLLOWING RESULTS:

(A)BRIGGS PROPOSAL TO DELETE ART 8(1):TEN IN FAVOUR:(AGO AMADO BRIGGS PESSOU-DAHOMY REUTER-FRANCE ROSENNE RUDA-ARGENTINE TSUROKA WALDOCK AND MYSELF).TEN AGAINST:(BARTOS-YUGOSLAVIA CASTREN ELERIAN ELIAS LACHS PAL PAREDES TUNKIN VERDROSS AND YASSEEN).NO RPT NO ABSTENTIONS;PROPOSAL DEFEATED.(B)TUNKINS PROPOSAL,CONSISTING OF ONE PARA STATING SIMPLY THAT IN THE CASE OF GENERAL MULTILATERAL TREATIES ALL STATES HAVE THE RIGHT TO ACCEDE TO IT,PLUS A SECOND PARA STATING THAT ACCESSION TO SUCH TREATIES WOULD NOT RPT NOT RAISE QUESTIONS OF RECOGNITION AND A THIRD PARA STATING THAT ARTICLE WOULD NOT RPT NOT BE RETROACTIVE:FIVE IN FAVOUR:(BARTOS EL ERIAN LACHES PAL AND TUNKIN.);THIRTEEN AGAINST: (AGO AMADO BRIGGS CASTREN ELIAS PAREDES PESSOU REUTER ROSENNE RUDA TSUROKA WALDOCK AND MYSELF;TWO ABSTENTIONS:(VERDROSS AND YASSEEN; PROPOSAL DEFEATED.(C)AGOS PROPOSAL THAT ANY STATE TAKING PART IN DRAWING UP OF A MULTILATERAL TREATY OR INVITED TO CONFERENCE AT WHICH IT WAS DRAWN UP MAY BECOME A PARTY TO TREATY,AND THAT ANY STATE TO WHICH TREATY WAS MADE OPEN BY ITS TERMS MAY BECOME A PARTY TO A MULTILATERAL TREATY:NINE IN FAVOUR(AGO AMADO BRIGGS REUTER ROSENNE RUDA TSUROKA WALDOCK AND MYSELF;NINE AGAINST: (BARTOS CASREN EL ERIAN ELIAS LACHS PAL PAREDES TUNKIN YASSEEN; 2 ABSTENTIONS:(PESSOU VERDROSS;PROPOSAL DEFEATED.(D)PRINCIPLE EMBODIED IN 1962 FORMULATION AS SET OUT IN PARA2 ABOVE:(NINE IN

...4

FAVOUR:(BARTOS CASTREN EL ERIAN ELIAS LACHS PAL TUNKIN VERDROSS YASSEEN);TEN AGAINST:(AGO AMADO BRIGGS PAREDES PESSOU REUTER RUDA TSUROKA WALDOCK AND MYSELF);ONE ABSTENTION:(ROSENNE.PROPOSAL DEFEATED.

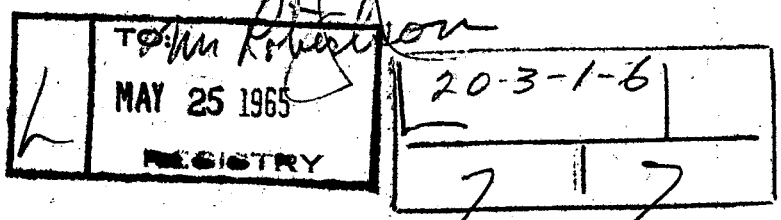
5.SOME FURTHER DISCUSSION ENSUED AS TO POSITION WHICH OBTAINED IN LIGHT OF DEFEAT OF ALL FOUR PROPOSALS,AND IT WAS FINALLY AGREED THAT SPECIAL RAPPORTEUR,IN CONSULTATION WITH DRAFTING CTTEE, WOULD ATTEMPT A NEW FORMULATION,TAKING INTO ACCOUNT DEBATE ON QUESTION AND VOTES TAKEN.SUPPORTERS OF QUOTE ALL STATES UNQUOTE FORMULA ARGUED THAT COMMISSION OF QUOTE ALL STAHES UNQUOTE FORMULA ARGUED THAT COMMISSION HAD EXPRESSED A CLEAR DESIRE TO HAVE AN ARTICLE OF SOME SORT ON QUESTION,BUT ROSENNE AMADO AND I POINTED OUT THAT NO RPT NO SUCH CONCLUSION COULD BE DRAWN.

6.IT IS TOO EARLY TO SAY WHAT WILL BE EVENTUAL OUTCOME OF COMMISSIONS DELIBERATIONS ON THIS QUESTION.IT IS UNLIKELY THAT FUTURE VOTES WILL BE AS FAVOURABLE,SINCE SEVERAL SUPPORTERS OF ALL STATES FORMULA(DE LUNA ARECHEGA TABIBI AND NEW ALGERIAN MEMBER) WERE ABSENT YESTERDAY WHEN VOTE WAS TAKEN.IT SEEMS CLEAR HOWEVER THAT 1962 FORMULATION HAS BEEN DISCREDITED AND THAT IT HAS BEEN DEMONSTRATED THAT ANY SIMILAR FORMULATION STANDS LITTLE CHANCE OF PROVING GENERALLY ACCEPTABLE.

7.FOLLOWING FOR PERMISNY:PLEASE BRING FOREGOING TO ATTN OF CHINESE AMBASSADOR LIUAS IT MAY AFFECT HIS PLANS CONCERNING ATTENDANCE AT SESSION

CADIEUX

ACTION COPY



FM GENEVA MAY21/65 RESTR

TO EXTERNAL 507

FOLLOWING FOR ROBERTSON(LEGAL DIV)DE BEESLEY

WE SHALL FORWARD TO YOU BY NEXT DIPO BAG COPY OF TREATY SECTIONS COMMENTARY DATED MAY1/64 ON WALDOCKS THIRED REPORT OF LAW OF TREATIES.WE HAVE ONLY ORIGINAL COPY HOWEVER OF LEGAL DIV COMMENTARY DATED MAY8/64 ON SPECIAL MISSIONS WHICH WE ASSUME WILL BE REQUIRED HERE FOR THIS YEARS CONSIDERATION OF SUBJECT.''''

20-3-1-6
2 | 7

FM GENEVA MAY26/65 CONFD NO RPT NO DISTRIBUTION

TO EXTERNAL 524 IMMED

FOR GOTLIEB FROM CADIEUX

ILC

DE ARECHAGA AND A FEW OTHERS WHO HAVE DISCUSSED IN THE DRAFTING CTTEE SECTION 2 OF ART 3(CAPACITY) WOULD LIKE TO DELETE THIS PARTICULAR PROVISION. WHEN MATTER IS DISCUSSED AGAIN IN COMMISSION THEY WOULD LIKE TO HAVE MY SUPPORT. IT WOULD HELP ME VERY MUCH IN THIS UNDERTAKING IF YOU COULD LET ME HAVE SOONEST YOUR MAGNUM OPUS ON TREATY PROCEDURE RELATING TO PROVINCES. PART THAT WOULD BE PARTICULARLY VALUABLE IS THAT RELATING TO PRACTICE FOLLOWED BY OTHER FEDERATIONS E. G. SWITZERLAND GERMANY AUSTRALIA ETC. A GOOD DEAL OF THE RECORD OF THIS MATERIAL COULD I THINK USEFULLY BE PUT ON RECORD HERE. '''''

FILE
TEL FILE
DIARY
DIARY

DEPARTMENT OF EXTERNAL AFFAIRS, CANADA

OUTGOING MESSAGE

RETURN TO LEGAL DIV. DOC

DATE	FILE		SECURITY
MAY 26 1965	20-3-1-6		CONFD
	7	7	

FM: EXTERNAL

NUMBER	PRECEDENCE
L-201	OPIMMED

TO: GENEVA

INFO:

Ref.: YOURTEL 524 MAY 26

Subject: ILC

ROLLOWING FOR CADIEUX FROM GOTLIEB

I HAVE SENT YOU REGISTERED AIRMAIL SPECIAL DELIVERY COPY OF STUDY ON TREATY MAKING POWERS. I AGREE THAT SOME OF MATERIAL RE PRACTICES FOLLOWED BY OTHER FEDERATIONS COULD USEFULLY BE BUT ON RECORD. I DO NOT RPT NOT SEE ANY NEED TO RETAIN ART 3 SECTION 2. IN FACT I THINK THAT THIS SECTION SHOULD BE DELETED BECAUSE IT FAILS TO DESCRIBE ACCURATELY REQUIREMENTS WHICH MUST BE ~~NECESSARY~~ met IF ENTITY IS TO HAVE CAPACITY IN INTERNATIONAL LAW.

2. Part I of commentary was sent registered air mail special delivery May 25.

LOCAL DISTRIBUTION NO STD

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SIG ..... NAME	LEGAL	2-2104	SIG GOTLIEB NAME A.E. GOTLIEB

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000644

TRANSMITTAL SLIP

By Bag

TO: Under-Secretary of State for External Affairs
OTTAWA Attn: Legal Division(Mr.Robertson)

FROM: Canadian Permanent Mission, GENEVA

Security: CONFIDENTIAL

Date: May 21, 1965

Air or Surface: Air Bag

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The documents described below are for your information.

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20-3-46

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Copies	Description	Also referred to:
1	Commentary on Waldock's Third Report on the Law of Treaties	

Ext. 250/Eng. (Rev. 10/51)
(Admin. Services Div.)

(Instruction on Reverse Side)

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CONFIDENTIAL

May 1st, 1964.

Commentary on Waldock's Third Report on the Law of Treaties

INTRODUCTION

In this Third and last report, the special rapporteur proposes to cover (a) the application and effect of treaties (including conflicts), (b) the revision of treaties, and (c) the interpretation of treaties. Waldock notes that the application of treaties overlaps with state responsibility and, as responsibility for the breach of a treaty obligation does not appear to be materially different from the breach of any other form of international obligation, he has excluded provisions relating to the principles of responsibility, and specifically of reparation for failure to perform treaty obligations. Accordingly, unlike Fitzmaurice is his earlier work, Waldock has not gone into the difficult areas of legitimate reprisals and legitimate self defence. In addition, Waldock has omitted from his study of the effects of treaties on third states, any examination of how far successor states may constitute exceptions to the pacta tertiis rule, leaving this area for consideration in the context of state succession. It is on this basis presumably, that he excludes the topic of the unity and continuity of the state.

Waldock's draft is not nearly as detailed as Fitzmaurice's earlier work in the same area. In part, this probably reflects the change in form from an expository code to a convention and in part, the deliberate non involvement in certain overlapping areas as mentioned above. Furthermore, Waldock has not enunciated - at least in that

section of his report we have received to date-certain of Fitzmaurice's "fundamental principles governing treaty obligations" such as the supremacy of international law over domestic law (although this particular subject may yet appear in the third section of Waldock's report covering the interpretation of treaties), and the relationship of obligations to rights. This latter proposition seems a superfluous statement of the obvious and its deletion therefore unlamented.

The important doctrinal questions arising in this section of Waldock's report appear to be the following:

(a) The duty to refrain from acts calculated to frustrate the object of the treaty, and the supremacy of international over domestic law (Article 55). It is concluded that support should given to the principle of supremacy of international law over domestic law in this context and elsewhere should it appear in the latter and as yet unpublished sections of Waldock's Third report.

(b) Pacta teritiis and its admissable exceptions (Articles 61-63).

It is concluded that Waldock's espousal of the stipulation pour autri should be supported, and that his formulation concerning objective régimes should be regarded as a notable contribution in a difficult area but one that is not free from difficulty especially with regard to the concept of tacit consent.

(c) Conflicting Treaty Obligations (Article 65).

It is concluded that support should be given to Waldock's formulation that the concept of relative priority rather than nullity should govern conflicts of treaty obligations.

... 3

Section I - The application and Effects of Treaties

Article 55 - Pacta Sunt Servanda (pages 7-10)

Some two thirds of the way through his draft articles, the Rapporteur has now enunciated the primordial rule of treaty law - pacta sunt servanda. It is open to question whether this provision should not in due course be moved up to the beginning of the Articles. Waldock points up the fact that the concept of pacta is ultimately not a legal obligation but one of good faith and he refers to numerous instances where international tribunals have insisted upon good faith in the interpretation and application of treaties.

Paragraph 2 of the Article provides that a party must refrain from "Any acts calculated to prevent the due execution of the Treaty or otherwise to frustrate its objects". The key word is "calculated" which suggests that to run afoul of this paragraph, a party must intend to frustrate the execution of the treaty. This mens rea may be a difficult to establish. Waldock's formulation also raises the problem of acts that are not colourable but clearly have the effect of frustrating the execution of the treaty. Should a party be able to act in such a way as to effectively frustrate the treaty whether the act was calculated with this purpose in mind or not? Such was the question faced by the International Court in the Guardianship of Infant's Case (I.C.J. 1958, p. 55). Fitzmaurice discussed the Guardianship case under the principle of the supremacy of international law over domestic law. The question raised by the Guardianship case can be stated as follows: A treaty between two states is concerned with subject matter A. However, there is a law in one of the states on subject matter B which although technically distinct, may if applied, result in consequences

contrary to those apparently contemplated by the treaty. Fitzmaurice, while doubting that the Court intended to question the principle of the supremacy of international law over domestic law, notes with approval the remark of Judge Lauterpacht, who dissented on this point, that a state is not entitled to cut down its treaty obligations in relation to one institution by enacting in the sphere of another institution provisions whose effect is such as to frustrate the operation of a crucial aspect of the treaty. Fitzmaurice accordingly included a subparagraph in his draft stating that international law was to prevail over any local law irrespective of the particular subject matter, and whether or not it purported to relate specifically to the treaty or to the class of matter covered by the treaty.

The majority opinion of the Court in the Guardianship Case held that inspite of points of contact and of encroachments, the Convention did not include within its scope the subject matter of the domestic law in question. Accordingly there was no failure to perform the obligations of the Convention. However, much weight was placed on the recognized existence of l'ordre public as an implied condition of treaties dealing with questions of private international law and conflict of law. In Judge Lauterpacht's view, the concept of l'ordre public must be regarded as a general principle of law in the field of private international law. Fitzmaurice noted these remarks favourably and provided in his Articles as one of the conditions justifying non performance, that parties were not obliged to implement a treaty relating to topics of private international law, where to do so would be contrary to the juridical concepts of l'ordre public as applied by their courts. Waldock has no so far mentioned this concept but it may arise in his last section on the interpretation of treaties.

As has been pointed out, the relationship of international law to domestic law is particularly relevant to Canada where the provincial legislatures could enact legislation which had the effect of frustrating the operation of treaties implemented by Parliament pursuant to Section 91 of the B.N.A. Act. While the reasoning employed by the majority of the Court in the Guardianship case might provide a convenient excuse for Canada in such cases, its extensive use would throw Canadian treaty relations into a most uncertain state, causing the federal government embarrassment vis-à-vis foreign states and political difficulties vis-à-vis the provinces. It seems clearly preferable in this context that the provinces should not be encouraged to believe that actions by them to frustrate treaties implemented by the federal government under section 91 are excusable at international law, and accordingly, that we should support the absolute supremacy of international law over domestic law.

Such a course would be consistent with the position taken when the Commission earlier discussed the effect of internal law concerning the competence of a state to enter treaties (Article 31).

Paragraph 4 of the Article 55 states that failure to carry out the obligations of a treaty engages a state's international responsibility. It is perhaps open to question whether this paragraph can be construed as creating a basis of obligation separate from that of the treaty. If a state's ~~is~~ default of an obligation under a treaty is condoned by the other party, is the defaulting state excused of its responsibility under this paragraph? Probably such a case would fall within Waldock's qualification referring to a failure which is justifiable or excusable under the general rules of international law.

Article 56 The Inter Temporal Law (pages 11-14)

In the Island of Palmas arbitration, Judge Huber stated that "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at a time when a dispute in regard to it arises or falls to be settled". This has become known as "the intemporal law" and has been incorporated by Waldock in Article 56, viz: a treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up. In paragraph 2 Waldock postulates the compliment of this rule; subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied. However, Waldock draws attention to the difficulty the second provision may create arising from the uncertain relationship between the two branches of inter temporal law. He points out that in the light of the evolution that has been taking place in the law regarding coastal waters and the continental shelf, this problem cannot be dismissed as academic. A question arising from the North Atlantic Fisheries Arbitration is whether the parties to an old treaty in using the word "bay", intended it to mean bays as then understood, and delimited in international law (assuming hypothetically that there had been a legal concept of a bay at the time), or did they mean any waters then or in the future that might be considered by international law to be bays under the sovereignty of a coastal state? While this type of problem may be likely to arise in a law of the sea context, it surely is a fairly classical question of interpretation. For example, an agreement might concern "dwellings", and after execution, the accepted definition of "dwellings" might be broadened to include garages; did the agreement cover garages? or in

Waldock's words, did the parties mean dwellings then, or did they mean any structure which in future might come to be considered by law to be dwellings? The Treaty of Washington provided for the entry of fish products into the U.S. from the "Dominion of Canada". Subsequent to the Treaty, British Columbia joined Confederation and the question then arose as to whether the Dominion of Canada meant the territory of Canada in 1871, or the territory that was included in Canada at the time of application of the treaty in 1875. The law officers of the Crown ruled that the expression "Dominion of Canada" was to be governed by the state of the parties as at the date of signature and "cannot now receive a wider construction from the fact that additional territory has since been added to the Dominion" (O'Connell, "The Law of State Succession", finds this case hard to reconcile with British practice concerning the extension of treaties to newly acquired territories).

Article 57 Application of Treaty Provisions Ratione Temporis

Waldock has here postulated the accepted principle that unless a treaty expressly or impliedly provides otherwise, its provisions apply only with respect to facts or matters arising while the treaty is in force. Perhaps the most useful part of this Article is the clear statement in paragraph 2 of the Commentary that the parties are capable of giving retroactive effect to a treaty. Occasions on which it is desired to give retroactive effect to Canadian treaties are not infrequent, but up to now there has been no clear authority for this proposition. The second paragraph of the Article states that the termination of a treaty does not put an end to the rights and obligations of the parties under the treaty with respect to facts or matters which arose while it is in force. We are not certain that

this provision means what Waldock presumably intended it to mean; namely, that the parties, other than by consent, are not free to undo after the treaty has been terminated, those things they did while the treaty was in effect. The wording of the special rapporteur might be interpreted as going rather further and, for example, supporting the proposition that rights in rem created by treaty continue notwithstanding the termination of the treaty. While this is undoubtedly true with regard to certain exceptional types of agreements such as treaties of cession, it is not these exceptional cases that Waldock seems to have in kind. Perhaps Waldock should be asked to elaborate on this paragraph of Article 57.

Article 58 - Application of a Treaty to the Territories of a Contracting State (pages 21-28)

A treaty applies with respect to all the territory for which a party is internationally responsible unless a contrary intention is manifested. As Waldock states, such a rule seems essential if contracting states are to have any certainty and security as to the territorial scope of each other's undertakings. The question most frequently arises with regard to colonies or "non-metropolitan" territories. Up to the present time, there has been scope to argue that non-metropolitan territories are not automatically bound by a treaty binding the metropolitan power, although Waldock alleges that state practice does not appear to justify the conclusion. It seems most desirable that the law be certain on this point and Waldock proposes the adoption of the logically more attractive rule.

If this rule were to have retroactive effect, which we assume is not the case, it would of course be relevant to any deter-

mination of whether British treaties concluded prior to say 1931, are binding on Canada and thus continue to be binding on this country. Generally, we have started from the premise that such treaties do continue to bind Canada unless it can be demonstrated that they had no relevance to Canada at the time they were concluded. Australia and New Zealand seem to have taken a similar position. Waldock notes the use of federal state clauses as evidence of his general proposition that states are presumed to enter into engagements with respect to all their territory. He notes in passing that proposals for the introduction of federal state clauses drawn up within or under the auspices of the United Nations have not with opposition in recent years.

Article 59 Extension of a Treaty to the Territory of a State with its Authorization (pages 29-32)

This Article lays down that when a party to a treaty-either a state or an organization - is duly authorized by another State to bind its territory, and the other parties are aware of the authorization, the treaty applies to the territory of the third state provided that such was the intention of the parties. The Article looks primarily to the situation such as Switzerland and Liechtenstein, where the larger state sometimes includes the smaller in its treaty relations. However, Roxburgh points out in his monograph "International Conventions and Third States", that such rights and duties as the third state may incur by virtue of its special legal relationship to one of the contracting parties, as well as by virtue of agency (see Article 60), do not result merely from the operation of the treaty but arise by virtue of the law of status and agency, and therefore like state succession, belong not to the present discussion but to discussions of

...

those branches of the law. This reasoning has much appeal and Waldock could be asked perhaps why he distinguishes in treatment state succession which he excludes from his study, and the situations envisaged in Article 59 and 60.

Article 59 raises the question of whether a treaty made by an international organization is binding upon the constituent members of the organization. Waldock does not take a stand on this issue which probably does not need to be resolved in this context. However, it occurs to us that as a practical measure, more care should be taken in drafting such instruments so that the intention of the parties on this question is clearly manifested. From the Canadian point of view, more attention should probably be paid to treaties being concluded by international organizations of which this country is a member. As a strictly ~~policy~~ practical matter, we would think that if Waldock's proposal is to be the rule, members of organizations will want to ensure that they have an opportunity to comment on the treaties at the drafting stage. With this in mind, we might wish to raise this point in NATO and OECD Councils after the Commission has finished its work.

Article 60 - Application of a Treaty concluded by one State on behalf of Another (pages 32-35)

Waldock has drawn a distinction between a treaty that is made applicable to a third state (the previous article) and the situation where the third state through the agency of one of the parties becomes itself a party to the treaty. The distinction perhaps does not warrant separate articles and it is suggested that the subject be compressed into two paragraphs of the same article. In this Article Waldock again discusses the question of international organizations.

He points out that especially in the economic sphere, an organization may wish to conclude a treaty on behalf of its member states in such a manner as to place them individually in the position of parties to the treaty. Waldock refers to the International Court decision in the Southwest Africa Case and in which there were sharp divisions in the Court as to the legal basis of the mandate, some considering it a treaty and some a legislative act by the Council of the League. In the Northern Camerons case, which went off on another ground, there were references by members of the Court which left open the questions of the true juridical nature of the relationship of members of the United Nations to the trust agreement.

However, as the agreements in these two cases were made with members of the Organization, they raise special problems which Waldock leaves to the Commission's study on the Relations between States and Inter-Government Organization. In paragraph 2 of the Article, the rapporteur provides for the general case and declares that an international organization duly authorized by its constituent instrument or by its established rules may conclude a treaty in the name both of the organization and its member states.

Article 61 - Treaties Create Neither Obligations nor rights for Third States (pages 35-40)

This sets out the well known rule of pacta tertiis - agreements neither impose obligations nor confer benefits upon third states - which has achieved the status of an independent rule of customary international law. Differences of opinion arise however, as to how far the rule admits of exceptions and this is the subject of the next two Articles.

Article 62 - Treaties Providing for Obligations or Rights of Third States (pages 41-59)

This Article seeks to lay down the general conditions under which a state may become subject to an obligation or entitled to a right under a treaty to which it is not a party. It does not cover the question of whether certain kinds of treaties are to be regarded as having "objective" effects. In his commentary, Waldock refers to the private law analogies of trust and the "stipulation pour autri" which have had an influence on the thinking of jurists, but concludes that it is by no means clear that the admission of exceptions to the rule of pacta tertiis in State practice or in international jurisprudence, has been directly based on such analogies rather than on the consent of states and the "requirements of international law".

Paragraph 1 deals with the imposition of obligations by the consent of the third state. The granting of this consent is regarded as creating a collateral agreement, and the true juridical basis of the third state's obligation is not the treaty but this collateral agreement.

Paragraph 2 deals with the creation of rights in favour of third states. Some writers (especially Rousseau and McNair) believe that while a treaty can certainly confer, either by design or by its incidental effects, a benefit on a third state, the latter can only acquire an actual right through some form of collateral agreement between it and the parties to the treaty. Waldock sides with the opposing view that a treaty may confer an enforceable right on a state not a party to it - a view he believes recent practice and the jurisprudence of international tribunals justifies. He proceeds to

examine with considerable thoroughness recent jurisprudence touching on the question and comes to the conclusion that there is nothing in international law to prevent two or more states from effectively creating a right in favour of another country. Waldock's formulation makes the creation of the third party right dependent upon the condition that the parties to the treaty should have had a specific intention to confer an actual right as distinct from a mere benefit. So long as the particular provision remains in force, the third state possesses the right of which it may or may not avail itself. In so stating the rule, Waldock rejects the conditions sometimes advanced that the treaty must designate the beneficiary stateby name, and that there must be a specific act of acceptance by the third state. Finally, Waldock suggests that the stipulation pour autri is subject to amendment or termination at the will of the parties to a treaty unless there is evidence of intention to confer an irrevocable right on the third state or there is a specific collateral agreement.

Much of the controversy surrounding the stipulation pour autri is concerned with the intention of the parties. Whether the parties have adequately manifested their intention will always be a potential source of argument, but Waldock recommends the Commission take the notable step of establishing unequivocably the competence of treaty partners to create stipulations pour autri.

Article 63 - Treaties Providing for Objective Régimes (pages 60-80)

Waldock next moves to a more difficult area, namely those treaties which are alleged by their very nature to have "objective" effects, that is, effects erga omnes. This class is made up of the treaties either creating international régimes for the use of a waterway

or a piece of land, or attaching a special régime to a particular territory or locality, including treaties of cession and boundary treaties. The essential question is whether this objective character derives from a general duty to recognize and respect situations of law or of fact established under a valid and lawful treaty, or from the particular nature of the treaty, or from the subsequent recognition or acquiescence of other states, or indeed from a combination of these elements. It is Fitzmaurice's view that these apparent exceptions can mostly be accounted for on some independent legal basis that does not involve postulating that the third state is or becomes directly obliged or entitled by the treaty itself. He admits nevertheless, that these qualifications or "quasi-exceptions" constitute in the aggregate a considerable gloss on the pacta tertiis rule.

Waldock analyzes a number of situations including the Antarctic Treaty, the Berlin Act of 1885 establishing a régime for the Congo, The Suez Convention of 1888, the rights of passage in the Kiel Canal established by the Treaty of Versailles (The Wimbledon Case), the permanent neutralization of Switzerland in 1815 by the Congress of Vienna, the Aaland Islands Convention of 1856, and, mandates and trusteeships. From these several categories of treaties, Waldock draws the common thread of an intention by the parties, in the general interest, to create a régime of general obligations and rights for a territory or locality which is subject to the treaty making competence in one or more of the parties. In Waldock's view, the significent fact is that one or more of the parties has a particular competence with respect to the subject matter of the treaty.

A case of a different kind is that of international organizations. Waldock notes that in the Reparation for Injuries Opinion,

the International Court appears to have found that a general international organization is a special form of international settlement, and that a vast majority of the numbers of the international community have the necessary competence to give such an objective personality to such an organization. Waldock then turns to treaties ceding territory, boundary treaties etc. and points out that it is the dispositive effect of the treaty rather than the treaty itself which produces objective effects. Fitzmaurice includes such cases under what he calls the duty to respect valid international acts not infringing the legal rights of third states.

Writers are divided on whether a treaty can have objective effects upon third states as they are on the stipulation pour autri. Waldock is himself not without doubts, and suggests that the Commission could decide to limit its proposals to the statement of pacta tertiis in Article 61 and to the stipulation pour autri exceptions formulated in Article 62, and to leave aside all other cases as being essentially cases of custom or recognition not falling within the purview of the law of treaties. Alternatively, Waldock suggests that there may be a case for attributing special effects to treaties where the parties both have territorial competence with respect to the subject matter of the treaty, and have the intention to create a general régime in the general interest. Waldock proposes the introduction of the principle of tacit consent, and formulates his rule to declare that there exists a special category of treaties which, in the absence of timely opposition from other states, will be considered to have objective effects with regard to them. In limiting his rule to cases where the territorial power participates in or consents to the creation of the régime Waldock intentionally excludes general law making treaties such as the Geneva law of the sea conventions and the Nuclear Test Ban Treaty, which

feels belong to a separate category.

Roxburgh has pointed out that "tacit consent" can mean either the acceptance, by conduct implying consent, of an offer of contractual relationship, or the acceptance of a rule of international law which has arisen from the consent of "the family of nations" tacitly given. He argues that the concept of tacit consent in the second sense is an important source of the rules of international law. As there is no legislature to create or amend the body of international law, every single rule of international law must be proved solely by reference to the consent of the community, and the device of implied consent is of great assistance in establishing this consent. Thus, a rule which was originally introduced by express agreement between certain parties may, in the process of time be extended by the consent of the contracting states and of third states into a rule of international law, binding upon those states which have tacitly consented to it. The rights and duties so acquired by third states are not contractual rights and obligations, but rights and obligations which owe their origin to the fact that the treaty supplied the basis for the growth of a customary rule of law (see Commentary on Article 64 below).

One of the areas in which this type of argument is likely to affect Canada is with regard to international rivers. While there is probably no customary rule whereby all states are entitled to free navigation on international rivers, it might be possible to argue that third states have acquired rights by the tacit consent of the parties to navigation treaties, or in other words, that rules of customary law have arisen from treaties.

The device of tacit consent in the first sense mentioned by Roxburgh (that of an implied acceptance of an offer of a contrac-

tual relationship) was opposed in the 6th Committee at the 17th Session of the General Assembly by Italy and certain Latin American states on such grounds as that some states could constitutionally only assume international obligations that had been approved by their legislatures, and the consent for such states could therefore never be tacit. Notwithstanding this argument, the Commission at is 15th Session accepted the limited application of the tacit consent device for the purpose only of determining whether the Secretary General should be authorized to receive in deposit instruments of acceptance from members of the United Nations or the specialized agencies.

The Communists have already made it clear that in their view certain treaties such as the Austrian State Treaty and the Declaration on the Neutrality of Laos, are to be regarded as jus cogens, which seems to amount to a recognition that norms can be binding in international law irrespective of consent. Accordingly, the Communists can probably be counted on to support the concept of tacit consent as a juridical device to bring their support for jus cogens into line with the consensual theory of international legal obligation.

In paragraph 4 of his draft, Waldock also touches on the question of the competence of the parties to modify or terminate the régime and concludes that following the general opinion of states during the Suez crisis in 1956, those states which are substantially interested in the functioning of the régime should be allowed a voice in its amendment or termination.

Article 64 Principles of a Treaty extended to Third States by Formation of International Custom (page 80)

Waldock suggests that in addition to law-making treaties, the operation of purely contractual treaties may be extended by custom

to third states which he does not however, regard as a true case of the legal effects of treaties on third states. This Article therefore merely preserves this possibility. Waldock's inclusion of a reference to custom appears to be a concession to those writers who argue that while the pacta teritiis rule is to be applied rather strictly, a treaty can become the basis of a rule of customary law, if the states which are concerned with its stipulations come to conform habitually with them, under the conviction that they are legally bound to do so. In this case, third states acquire rights and incur obligations which were originally conferred and imposed by treaty but have come to be conferred and imposed by rule of law.

Article 65 Priority of Conflicting Treaty Provisions (pages 81-105)

This subject was discussed at the 15th Session of the Commission in the context of the validity of treaties. However, at the suggestion of Waldock the Commission decided to consider the subject further in the context of the application of treaties and therefore stood the subject over to the present Session. The majority of the Commission shared Waldock's view that leaving aside the case of conflict with jus cogens, the fact that a treaty is incompatible with the provisions of an earlier treaty, does not deprive the latter treaty of validity. Some members however, (particularly the Communists) expressed doubts as to the validity of a treaty which conflicts with a prior treaty neutralizing or demilitarizing a territory (e.g. Laos and Austria), or embodying a political settlement of great importance.

Before the core problem of treaty conflict is reached, Waldock discusses and disposes of a number of cases which apart from

Article 103 of the Charter, do not in his view, require special mention in this Article:

1. Where conflict with rules of jus cogens is involved, it is resolved by an independent principle set out in Articles 37 and 45:

2. Where there is conflict between two treaties with all the parties to the earlier treaty also parties to the latter treaty, the question is one of amendment or termination of the earlier treaty.

3. The International Court, viewing the Charter simply as a treaty, has held that Article 103 is not binding upon non-members. As a result, doubt and differences of view exist as to the effect of Article 103 where the treaty is between a member of the United Nations and a non member. Relevant considerations are the near unversability of United Nations membership which reduces the scope of the doubt; and the fact that some of the Charter provisions embody rules of jus cogens. The problem remains however and Waldock has decided that the best solution is merely to provide that the rules laid down in this Article are subject to Article 103.

4. Some treaties contain clauses which purport to determine the relation of their provisions to other treaties entered into by the contracting states. (eg. Convention on the Liability of Operators of Nuclear Ships).

(a) The only limitation on the effectiveness of such provisions relating to earlier treaties is that parties to a treaty containing a clause purporting to override an earlier treaty which does not include all the parties of the earlier agreement, clearly cannot effectively deprive a state which is not a party, of its rights under the earlier treaty.

(b) A more difficult problem arises with regard to clauses which purport to override future treaties inconsistent with it, where the parties to the first are not the same as the parties to the second. (If the same parties are involved, the clause is of no significence for the parties are clearly capable of modifying their own agreement). In Waldock's view, the chief legal relevance of such a clause appears to be in making explicit the intention of the parties to create an "integral" or "interdependent" treaty régime not open to contracting out. Waldock argues that any treaty laying down "integral" or "interdependant" obligations not open to contracting out (eg. the Kellog-Briand Pact, the Genocide Convention and the Nuclear Test Ban Treaty), must be regarded as containing an implied undertaking not to enter into subsequent treades which conflict with these obligations and thus that in case of conflict, a tacit agreement that the earlier treaty shall prevail.

The core problem of conflicting treaty obligations is now reached; some but not all the parties to a treaty participate in the conclusion of a new treaty which conflicts with their obligations under the earlier treaty. In such cases the pacta tertiis rule precludes the later treaty from depriving the other parties to the earlier treaty of their rights under that treaty. Waldock continues to view the question as one of priority of obligation and quotes some pages of his last report in support of this conclusion. He comments that in the present condition of international law, the matter is likely to be

best resolved on the plane of the legal responsibility and not of the competence of the offending state. The burden of Waldocks formulation then is again that the concept of relative priority rather than nullity should govern conflicts of treaty obligations.

In the light of trends at recent meetings of the Commission however, it is doubtful whether any view will be adopted that is inconsistent with Tunkin's position. The Communist made it clear at the last Session that they were unwilling to agree to a general rule which would allow states the right to enter into treaties inconsistent with earlier ones (subject only to the engaging of international responsibility). While it may therefore not prove possible to secure the adoption of Waldock's views in this field, it is to be hoped that the Commission can at least avoid taking the retrogressive step of espousing the position of the Communists (and in earlier years Lauterpacht) that treaties which conflict with earlier treaties falling within an unspecified class, are void. In addition to the case of conflict with jus cogens which is the subject of a separate article, there are already the possibilities of nullity because of a lack of capacity, and violation of the principle of good faith.

In this limited area, the facts and the consequent nullity of the offending treaty are likely to be easily ascertainable and thus amenable to consideration by a political forum. Beyond this however, controversy is almost inevitable and until a judicial procedure for the resolution of disputes is agreed to, the extension of the rule of nullity is likely to aggrevate rather than ease political differences At the very least however, the Communists should be obliged to provide a precise definition of this new class of treaties to which they would extend the rule of nullity.

A minor exception in Waldock's formulation is that parties to the later treaty are not entitled to invoke the treaty against a state party to both earlier and later treaty, if the former is aware that in concluding the later treaty, the offending state is violating its obligations under the earlier one. Waldock has failed to mention the obvious difficulties of this type of provisions; how is knowledge of the earlier treaty established? Is registration with the United Nations sufficient? If so, all member states are presumably on notice of the treaty relationships of all the members of the United Nations and seemingly obliged to review its negotiating partner's treaty relationships to ascertain the limits on its freedom to bind itself. While logically attractive, this provision places a heavy onus on contracting states that is quite unrealistic for most states in practice will be unable or unwilling to carry out the review required if they wish to be certain that they will be entitled to invoke the treaty.

Article 66 Application of Treaties to Individuals (Pages 106-109)

As a general rule, treaties are applied to individuals through the contracting states and through the instrumentality of their respective national legal systems. There are, however, a number of treaties which have provided special international tribunals or procedures for applying to individuals, rights or obligations arising under treaties (eg. Article 304 of the Treaty of Versailles establishing Mixed Arbitual Tribunals). Article 66 sets out the general rule and this exception.

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cc: 20-5-2-1

COMMENTARY FOR USE AT THE 17th SESSION OF THE

INTERNATIONAL LAW COMMISSION

W.F

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: Mr. M. Cadieux

FROM / De: J. A. Beesley (GENEVA PERMIS)

REFERENCE / Référence:

SUBJECT / Sujet: Action taken by ILC on Draft Articles on Law of Treaties

SECURITY / Sécurité: Restricted

DATE: May 21, 1965

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OTTAWA 20-3-1-6
MISSION 7/7

ENCLOSURES / Annexes

DISTRIBUTION

Legal Div.

ILC Seminar

In opening the 17th Session, the Deputy Director of the European Office of the United Nations announced that the ILC had arranged a seminar from May 10-21 on international law, which he hoped would constitute the first step towards the establishment of a centre of legal studies at the European Office. Raton, the Legal Adviser to the European Office, subsequently explained that the seminar was arranged to help implement resolution 1968 (XVIII) on technical assistance and international law. Some discussion followed about the possibility of providing travel funds for future seminars since this year only two students from outside Europe had been able to attend. Attached is a list of the participants from which it will be noted that half of them are from Eastern European countries, together with their itinerary.

Election of Officers

2. The first question considered by the Commission was the election of officers. Mr. Bartos was elected Chairman, de Aréchaga as First Vice-Chairman, Reuter as Second Vice-Chairman, and Elias as Rapporteur.

Documentation and Records

3. The next question discussed (very briefly) was the documentation and records of the Commission. Paredes complained that the system of summarizing speeches in English and subsequently translating them into Spanish resulted in faulty reports, due to the double process of translation, and asked that notes be taken in the language of the speaker. He also pointed to the difficulties in following the progress of the articles through their various changes in numbering and incorporation into other articles, and recommended that the text of the article being discussed be always reproduced at the beginning of the report on the Commission's discussion of it. Briggs, de Luna, Rosenne

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and Yasseen all supported Paredes on the question of reproducing the texts but Rosenne recommended, and the Commission agreed, that the question be examined by the Chairman and officers in consultation with the Secretariat rather than have a decision reached hastily. De Luna supported Paredes on the Spanish language question and the Chairman suggested that the Secretariat be asked to consider this question as well as the other, and a report made to the Commission's officers.

Adoption of the Agenda

4. The next question considered was the adoption of the agenda. Ago proposed that consideration of the filling of the casual vacancy be deferred for a time to enable the Commission to give thought to the matter. (Subsequently, as reported in our telegram No. 477 of May 18, the Algerian, Mohammed Bedjaoui, was elected.) Briggs seconded the proposal that the election be deferred and it was so decided. The provisional agenda was therefore adopted as follows:

1. Filling of a casual vacancy in the Commission (Article 11 of the Statute) (deferred)
2. Law of treaties
3. Special missions
4. Relations between States and inter-governmental organizations
5. Question of the organization of future sessions
6. Dates and places of the meetings in winter and summer 1966
7. Co-operation with other bodies
8. Other business

Co-operation with Other Bodies

5. Rosenne then reminded the Commission that at its previous session they had considered the question of the exchange of documentation with other bodies. He hoped the Commission would establish a small committee for this purpose. Subsequently a committee was set up composed of Ago, Lachs, Pessou, Rosenne and Ruda.

Form of Commission's Work on Law of Treaties

6. The next question discussed was the general one of the form of the articles. Although the question had been thoroughly canvassed before in the Commission, the doubts expressed by some governments as to whether the Commission's work on the Law of Treaties should take the form of a Convention brought about a further discussion. Nearly all the members of the Commission felt it necessary to comment on the question. All speakers supported the decision of the Commission taken in 1961 to prepare a single set of draft articles on treaty law designed to serve as a basis for a

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Convention, and the Commission's previous decision to this effect was confirmed.

Second Reading of Articles

PART I - CONCLUSION, ENTRY INTO FORCE AND REGISTRATION OF TREATIES

General Comments

7. The general trend of thinking in the Commission (not shared by Ago and not wholly shared by Bartos, Rosenne, Ruda or de Aréchaga) seems to be that (a) many of the draft articles should be shortened and simplified considerably, and much of the detail omitted; (b) the emphasis should be on substantive legal content and purely procedural questions and descriptive articles should be eliminated to the extent possible (i.e. the draft articles partake too much of the codification approach); (c) some more logical re-arrangement of the articles is required (although views differ on what the arrangement should be); (d) a number of articles and parts of articles which might be desirable in a code may be unnecessary in a draft convention; and (e) the aim should be to produce substantive residual rules rather than to cover every contingency however remote. (The Swedish comments have made quite an impact.) This general approach is resulting, in almost every case, in the draft articles being referred to the Drafting Committee for reformulation. Thus far the Drafting Committee has produced no new articles. (The Drafting Committee is composed of: Chairman, de Aréchaga; members, Ago, Briggs, Elias, Lachs, Reuter, Tunkin, Waldock and Yasseen.)

Article 1 (Definitions)

8. Two questions were raised in the discussion of this article: firstly, the order of the various provisions, and secondly, the applicability of the articles to treaties to which subjects of international law other than States were parties. The Special Rapporteur pointed to the inconsistency between the definition of a treaty appearing in article 1 and the provisions of part 1 of article 2. A number of secondary questions were also discussed, such as the deletion of the enumeration of kinds of treaties appearing in parenthesis in paragaph 1(a); the inclusion of the phrase "governed by international law"; the replacement of the word "any" by the word "and" before the words "international agreement"; and the possible addition of a reference to an intention of parties to bind themselves and the omission of the word "international" before the word "agreement". Another question discussed was the distinction between treaties and agreements, during which Elias referred to "the present dispute between the Federal Government of Canada and the Provincial Government of Quebec on the question whether international agreements could be concluded with a foreign State by a province". (See paragraph 35 of Summary Record 777 of the debate on May 5; see also further comments of Elias during discussion of article 3, page 43 of SR 779.)

9. The Commission decided to refer paragraph 1 (a) to the Drafting Committee; to delete paragraph 1(b); and to defer consideration of

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paragraphs 1(c) to 1(g) until a later stage of the discussion of related articles. Paragraph 2 was also deferred for later consideration, including the new formulation of the Special Rapporteur appearing in document A/CN.4/177 page 34.

Article 2 (Scope of the present articles)

10. The Special Rapporteur had proposed a new formulation in document A/CN.4/177 page 35. Throughout the discussion of article 1, members of the Commission referred to the related questions covered by article 2, and some differences of views occurred on whether or not the scope of the articles included subjects of international law other than States.

11. It was decided that the new formulation of the article be referred to the Drafting Committee.

Article 3 (Capacity to conclude treaties)

12. Article 3 provoked considerable discussion. The Special Rapporteur proposed its deletion and the members of the Commission were divided on the question of the desirability of retaining an article on treaty-making capacity, with a small majority in favour of retaining it. In order to avoid a hasty decision on the question it was decided that the Commission should not for the time being vote on article 3; that the words "and by other subjects of international law" and also paragraph 3 of the article should be omitted; and that the rest of the articles should be referred to the Drafting Committee.

Article 3 (bis) (Transfer for article 48 to the "general provisions" proposed by the Special Rapporteur - Doc. A/CN.4/177, page 41)

13. At the Special Rapporteur's recommendation the article was considered briefly in a very general way, but the feeling of the majority of the members of the Commission was that consideration of the article should be postponed to a later stage in the discussion of the article, and it was so decided.

Article 4 (Authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty)

14. The Commission is having considerable difficulty with this article, which was much criticized by governments. The Special Rapporteur had proposed a new formulation of this article (Document A/CN.4/177, page 49). Mr. Castren proposed a redraft (Conference Room Document No. 1 of May 11). A number of members of the Commission criticized the various drafts on the grounds that they still contained some elements of a code, and a number pointed out that the essential question was evidence of formal authority rather than the substantive question of actual authority. Although there was some feeling that the article could be dropped and its contents transferred to other places in the draft, it was decided that the article be retained for the time being. It was referred to the Drafting Committee, with the instructions: first, to include in it a provision on the specific cases of the Head of State, the Head of Government and the Foreign Minister; secondly, to draft the general provisions on other representatives on the lines suggested by Amado and others (stating the rules of international law on the subject, and deleting paragraphs 4 and 5 of the new article and paragraph 6 of the old article); and, thirdly, to abridge and simplify the whole text: (see paragraph 84 of SR 780.).

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The Question of an Article on the Question of Treaties by One State on Behalf of Another or by an International Organization on Behalf of a Member State

15. El Erian asked whether the Commission proposed to take a decision on the question raised on page 50 of the Special Rapporteur's Report (A/CN.4/177). In the view of the Special Rapporteur, if there was to be an article on this subject it ought to be placed just after the draft article on capacity, but he favoured its omission, as did El Erian and Rosenne. Reuter, Ago and Amado felt a decision should be postponed until a later stage of the discussion; Tunkin formally proposed that this be done, and it was so decided.

Article 5 (Negotiation and drawing up of a treaty)

16. The Special Rapporteur had proposed a new formulation (A/CN.4/177 page 55). Some discussion occurred as to whether the article should be retained or deleted on the grounds that it was purely procedural and descriptive. The Commission was divided on the question, with a slight majority in favour of deleting the article, but Ago formally proposed that it be referred to the Drafting Committee; Bartos supported the proposal and it was so decided.

Article 6 (Adoption of the text of a treaty)

17. The Special Rapporteur had proposed a revised text contained in A/CN.4/177, page 59. Some discussion occurred on whether the article embodied a useful residual rule or whether the questions it covered should be left to the mutual agreement of States. It was decided to retain the article for the time being, but to refer it to the Drafting Committee.

Article 7 (Authentication of the text), Article 10 (Signature and Initialling of the Treaty), Article 11 (Legal Effects of a signature)

18. It was agreed at the suggestion of the Special Rapporteur that articles 7, 10 and 11 be discussed together. (It was agreed that a discussion of Articles 8 (Participation in a treaty) and 9 (The opening of a treaty to the participation of additional states) be postponed for the time being; Rosenne put certain questions to the Secretariat concerning article 8, the answers to which are contained in the two documents attached dated 12 May and the third document dated 17 May.

19. The discussions of articles 7, 10 and 11 ranged largely around the question of the choice between two systems of approach to the article, the descriptive system (that of article 10) criticized by some members of the Commission as being too code-like, and the substantive system which would concentrate on the force of acts and their legal effects and would not retain very much of the existing article 10. The interventions of Ago, Tunkin, Reuter and Tsuroka (SR 783) provided a good discussion of the problem. Tunkin felt that all three articles contained descriptive elements and unnecessary detail, and could be simplified, eliminating the descriptive material and the contents couched in terms suitable to legal norms. What was required was a residuary rule on the legal effects on the acts of authentication, signature and initialling due to the wide variation in practice. The structure of the

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three articles should reflect the three stages in the treaty-making process, authentication, initialling and signatures, the last two of which overlap. Rigid rules on signature and initialling should be avoided. Ago accepted Runkin's approach. Reuter considered that the Special Rapporteur's proposal, based on the functional rather than the formal method, provided an adequate basis for discussion. Tsuroka stressed as usual the practical approach to the problem from the point of view of States and chanceries having to deal with the results. He hoped the Drafting Committee would choose its terminology carefully so as to avoid those expressions which could be interpreted in different ways. The Special Rapporteur considered that it was not necessary to exclude either functional or formal methods in favour of the other but felt the Drafting Committee could resolve the difficulty. He proposed that articles 7 and 11 be retained, and what required retention from article 10 could be incorporated in article 11 or 7 but that there be no special article on initialling. It was agreed that articles 7, 10 and 11 be referred to the Drafting Committee for reformulation in the light of the discussion.

Article 12 (Ratification)

20. This article provoked a wide ranging discussion extending over three sessions. At the suggestion of the Special Rapporteur, he included his revised proposals (set out in A/CN.4/177 pages 96-99) in one paper, Conference Document No. 2 of May 13. The major question discussed was whether a treaty is to be considered in principle to be subject to ratification unless a contrary intention is disclosed or whether the rule was the reverse. Article 12 had been fairly strongly criticized by governments and it was necessary, in the view of the Special Rapporteur, that the Commission make up its mind whether or not to lay down a basic residual rule. He had provided in his reformulation alternative (A) setting out a presumption in favour of ratification, and alternative (B) setting out a presumption the other way. There was a division of views between the Commission members on whether the requirement of ratification should be the general rule or the exception, with some members holding that it was not necessary to make a choice. Tunkin and Reuter argued against the presumption in favour of ratification. Bartos suggested that, whereas great powers preferred no ratification as it enabled them to put pressure on smaller States, the smaller States preferred to have the safeguard of ratification. Tunkin's views were generally supported by Castren, Lachs and de Luna, with most of the other members of the Commission supporting alternative (B) setting out a presumption that ratification is needed. Ago supported the approach of the Special Rapporteur but proposed a new text, set out in Conference Room Document No. 3 of May 14, providing for ratification where the treaty so provides, or the intention appears from the nature and form of the treaty, and where it appears from the full powers or the preparatory work or the circumstances, and providing that signature alone shall suffice where the same criteria indicate that it shall. It was decided that the article be referred to the Drafting Committee together with the proposal of Ago and with no very precise instructions as to the reformulation.

Article 13 (Accession), Article 14 (Acceptance or approval), Article 15 (the procedure of ratification, accession, acceptance and approval), Article 16 (Legal effects of ratification, accession, acceptance, and approval)

21. All these articles were discussed this week. Each of them gave

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rise to some difficulties but none raised basic policy divergencies such as those encountered in article 12. Although the Summary Records for this week's meetings are not out yet, the following is a summary of the discussions based on my notes.

22. Regarding article 15, once again there was a difference of views within the Commission as to whether the article should be maintained or deleted. (as recommended by the Government of Japan). Some discussion occurred also on whether it was necessary to provide for the relatively rare case where there were two alternative texts between which the ratifying State must choose. There was considerable discussion also on whether the article should be concerned with the means of ratification or the act of ratification itself. Tunkin argued very effectively in favour of formulating a flexible residual rule rather than make an attempt at applying rigid rules about when and how signatures are required. Ago took the contrary view and considered it useful to have the various aspects of the procedures spelled out. It was agreed that in sending article 15 to the Drafting Committee an attempt would be made to formulate a residual rule.

23. Regarding article 16, the Special Rapporteur proposed that the Commission not discuss article 16 as such but consider it as consequential of article 15 and delete it in order to use its gist in article 15. The majority of the Commission agreed with his proposal and it was decided that the article be deleted and that the Drafting Committee should incorporate its substance elsewhere, probably in article 15.

24. Regarding article 17, after some discussion of the best order of work from this point on, it was agreed to discuss article 17 next, then articles 23 and 24, then articles 8 and 9 and then the question of reservations.

Article 17 (The rights and obligations of States prior to the entry into force of the treaty)

25. The Special Rapporteur had proposed a new formulation in document A/CN.4/177, at page 113. The Commission has not concluded its consideration of this article, but it seems clear that there is a division of views within the Commission on several of its aspects, namely, (a) whether the obligation of good faith should be confined to situations where there has been signature of the treaty, leaving no obligation where there has been negotiation only, or whether negotiation itself engages the obligation of good faith; (b) whether the article should be redrafted so as to give it greater precision, or whether some degree of flexibility is desirable; and (c) whether the ten-year time limit contained in paragraph 2 should be retained. In essence, the debate is as to whether or not this article should reflect existing law or whether it should incorporate the development of new law. At the close of the session, Bartos made a very strong statement pointing out that whereas two years ago the Commission had taken a bold and constructive approach, it now seemed to be shying away from development in favour of mere codification. He said that the Commission had not been fearful of progressive development on the third and fourth Conventions on the Law of the Sea, and that they should not be fearful

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now. The Commission could not ignore comments of governments but it should not lend excessive weight to them. (He stated also that he had learned that there were comments being made in the corridors to the effect that the comments of certain States, notably the Latin Americans, were not being given enough weight and he wished to draw this to the attention of the Commission.)

J. A. BEESLEY

J. A. Beesley

P.S. You may be interested to know that the Commission today decided not to have a meeting on Friday, May 28, as the Special Rapporteur was unable to be present on that date.

Ch. Bolliet b
Mr. Copithorne re legal adv
to note + file
P.Ch.

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BACKGROUND RELEASE

INTERNATIONAL LAW COMMISSION TO MEET IN GENEVA
~~11 MAY-17 JULY~~

THE INTERNATIONAL LAW COMMISSION WILL CONTINUE THE WORK OF CODIFICATION AND PROGRESSIVE DEVELOPMENT OF THE LAW OF TREATIES AT ITS SIXTEENTH SESSION WHICH OPENS IN GENEVA NEXT MONDAY, 11 MAY, AND CONTINUES UNTIL 17 JULY.

IN ADDITION, IT WILL CONTINUE ITS WORK ON SPECIAL MISSIONS AND ON RELATIONS BETWEEN STATES AND INTER-GOVERNMENTAL ORGANIZATIONS.

IN ITS CONSIDERATION OF THE LAW OF TREATIES, THE COMMISSION WILL HAVE BEFORE IT THE THIRD REPORT (DOCUMENT A/CN.4/167) OF ITS SPECIAL RAPPORTEUR, SIR HUMPHREY WALDOCK, WHILE ON THE TOPIC OF MISSIONS IT WILL HAVE BEFORE IT A REPORT (DOCUMENT A/CN.4/166) BY ANOTHER SPECIAL RAPPORTEUR, MILAN BARTOS.

SIR HUMPHREY WALDOCKS REPORT CONTAINS A GROUP OF DRAFT ARTICLES RELATING TO THE APPLICATION, EFFECTS, REVISION AND INTERPRETATION OF TREATIES. HIS FIRST TWO REPORTS, PRESENTED AT THE FOURTEENTH AND FIFTEENTH SESSIONS OF THE COMMISSION RESPECTIVELY, CONTAINED ARTICLES ON THE CONCLUSION, ENTRY INTO FORCE, REGISTRATION, INVALIDITY AND TERMINATION OF TREATIES. ON THE BASIS OF THESE REPORTS, THE COMMISSION ADOPTED ARTICLES ON THOSE SUBJECTS.

MR. BARTOS REPORT CONTAINS DRAFT ARTICLES ON QUESTIONS RELATING TO AD HOC DIPLOMACY, NAMELY TO TEMPORARY ENVOYS ENTRUSTED WITH SPECIAL MISSIONS FOR LIMITED PURPOSES. THE REPORT STATES THAT IN ITS STRICT SENSE AD HOC DIPLOMACY SHOULD BE UNDERSTOOD TO APPLY ONLY TO STATE AGENTS HAVING THE FOLLOWING CHARACTERISTICS:

(A) THEY MUST BE DELEGATED OR APPOINTED BY A STATE FOR THE PURPOSE OF CARRYING OUT A SPECIAL TASK WITH RESPECT TO ANOTHER STATE; (+agreed to by the receiving state)

(B) THEIR MISSION MUST NOT BE REGARDED AS PERMANENT BUT MUST BE LINKED TO THE PERFORMANCE OF A SPECIFIC TEMPORARY FUNCTION; (opposé - permanent)

(C) THEIR TASK MUST CONSIST OF REPRESENTING THE STATE AS THE LAWFUL HOLDER OF SOVEREIGNTY VIS-A-VIS THE OTHER STATE, AND MUST NOT BE CONCERNED WITH MATTERS IN WHICH THE STATE DOES NOT APPEAR AS THE HOLDER OF SOVEREIGNTY OR WITH RELATIONS WITH PARTICULAR INDIVIDUALS OR BODIES CORPORATE WHICH ARE SUBJECTS OF PUBLIC INTERNATIONAL LAW.

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ACCORDING TO THE PROVISIONAL AGENDA FOR THE FORTHCOMING SESSION (DOCUMENT A/CN.4/164) OTHER MATTERS WITH WHICH THE COMMISSION WILL HAVE TO DEAL ARE: THE FILLING OF CASUAL VACANCIES; THE QUESTION OF THE CONTINUATION OF THE PRESENT SESSION; THE QUESTION OF THE ORGANIZATION OF FUTURE SESSIONS; THE DATE AND PLACE OF FUTURE SESSIONS, AND CO-OPERATION WITH OTHER BODIES.

THE VACANCIES ON THE 25-MEMBER COMMISSION HAVE ARISEN THROUGH THE FACT THAT TWO OF ITS MEMBERS, LUIS PADILLA NERVO (MEXICO) AND ANDRE GROS (FRANCE), HAVE BECOME JUDGES OF THE INTERNATIONAL COURT OF JUSTICE.

THE 23 PRESENT MEMBERS OF THE COMMISSION ARE: ROBERTO AGO (ITALY), GILBERTO AMADO (BRAZIL), MILAN BARTOS (YUGOSLAVIA), HERBERT W. BRIGGS (UNITED STATES), MARCEL CADIEUX (CANADA), ERIK CASTREN (FINLAND), ABDULLAH EL-ERIAN (UNITED ARAB REPUBLIC), TASLIM O. ELIAS (NIGERIA), EDUARDO JIMENEZ DE ARECHAGA (URUGUAY), VICTOR KANGA (CAMEROON), MANFRED LACHS (POLAND), LIU CHIEH (CHINA), ANTONIO DE LUNA (SPAIN), RADHABINOD PAL (INDIA), ANGEL M. PAREDES (ECUADOR), OBED PESSOU (DAHOMEY), SHABTAI ROSENNE (ISRAEL), ABDUL HAKIM TABIBI (AFGHANISTAN), SENJIN TSURUOKA (JAPAN), GRIGORY I. TUNKIN (USSR), ALFRED VERDROSS (AUSTRIA), SIR HUMPHREY WALDOCK (UNITED KINGDOM), MUSTAFA KAMIL YASSEEN (IRAQ).

THE PRESENT MEMBERS OF THE COMMISSION WERE APPOINTED FOR A FIVE-YEAR PERIOD BEGINNING 1 JANUARY 1962. THEY ARE NOT GOVERNMENT REPRESENTATIVES BUT SIT IN THEIR PERSONAL CAPACITY AS EXPERTS. THEY ARE ELECTED BY THE GENERAL ASSEMBLY FROM A LIST OF CANDIDATES NOMINATED BY THE GOVERNMENTS OF THE MEMBER STATES OF THE UNITED NATIONS.

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INTERNATIONAL LAW COMMISSION

FOLLOWING FOR USSEA:

SORRY YOU ARE UNABLE TO COME TO GENEVA AT THIS TIME. EXPLANATIONS SENT TO WORLD VETERANS FEDERATION.

2. WE HAVE NOTED YOUR PRESENT PLANS FOR ATTENDANCE AT ILC AND WILL PASS THIS INFO ON TO THE CHAIRMAN. A NUMBER OF YOUR COLLEAGUES HAVE EXPRESSED THE HOPE THAT YOU WILL BE ABLE TO ATTEND, PARTICULARLY THE BRIT MEMBER, SIR HUMPHREY WALDOCK, WHO, WHILE AWARE OF YOUR HEAVY RESPONSIBILITIES AS USSEA, IS VERY CONSCIOUS OF THE FACT THAT USSR, POLAND AND YUGOSLAVIA ARE STRONGLY REPRESENTED BY THEIR FOREIGN MINISTRY LEGAL ADVISERS AND THAT STRONG WESTERN REPRESENTATION IS ALSO NEEDED (NOT RPT NOT PROVIDED BY USA AND FRENCH ACADEMIC MEMBERS, WHILE ISRAEL FOREIGN MINISTRY LEGAL ADVISER CANNOT RPT NOT BE COUNTED ON ON ALL ISSUES.) IT IS POSSIBLE THAT RECENT DEVELOPMENTS IN VIETNAM COUPLED WITH POST-KHRUSHCHEV SHIFTS IN SOVIET POLICY MIGHT RESULT IN A MORE POLITICAL SESSION THAN IN PAST FEW YEARS. GIVEN ALSO THE IMPORTANCE BOTH LEGALLY AND POLITICALLY OF THE SUBJECTS TO BE DISCUSSED, IT IS HOPED THAT YOU WILL BE ABLE TO ATTEND PART OF THE SESSION, AS INTENDED.

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