

ARCHIVES HISTORIQUES DE LA COMMISSION

COLLECTION RELIEE DES
DOCUMENTS "COM"

COM (85) 121

Vol. 1985/0039

Historical Archives of the European Commission

Disclaimer

Conformément au règlement (CEE, Euratom) n° 354/83 du Conseil du 1er février 1983 concernant l'ouverture au public des archives historiques de la Communauté économique européenne et de la Communauté européenne de l'énergie atomique (JO L 43 du 15.2.1983, p. 1), tel que modifié par le règlement (CE, Euratom) n° 1700/2003 du 22 septembre 2003 (JO L 243 du 27.9.2003, p. 1), ce dossier est ouvert au public. Le cas échéant, les documents classifiés présents dans ce dossier ont été déclassifiés conformément à l'article 5 dudit règlement.

In accordance with Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community (OJ L 43, 15.2.1983, p. 1), as amended by Regulation (EC, Euratom) No 1700/2003 of 22 September 2003 (OJ L 243, 27.9.2003, p. 1), this file is open to the public. Where necessary, classified documents in this file have been declassified in conformity with Article 5 of the aforementioned regulation.

In Übereinstimmung mit der Verordnung (EWG, Euratom) Nr. 354/83 des Rates vom 1. Februar 1983 über die Freigabe der historischen Archive der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft (ABl. L 43 vom 15.2.1983, S. 1), geändert durch die Verordnung (EG, Euratom) Nr. 1700/2003 vom 22. September 2003 (ABl. L 243 vom 27.9.2003, S. 1), ist diese Datei der Öffentlichkeit zugänglich. Soweit erforderlich, wurden die Verschlussachen in dieser Datei in Übereinstimmung mit Artikel 5 der genannten Verordnung freigegeben.

RECOMMENDATION FOR A COUNCIL DECISION

authorizing the Commission to participate on behalf of the Community in the United Nations Conference on the law of Treaties between States and International Organizations or between International Organizations, and in the consultations prior to the Conference

(submitted to the Council by the Commission)

EXPLANATORY MEMORANDUM

I. The issue

1. Resolution 39/86 of the UN General Assembly¹ states that "the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations shall be held from 18 February to 21 March 1986 at Vienna".

The Conference will be based on a draft Convention prepared by the International Law Commission; in Resolution 39/86 the General Assembly "refer/red/ to the Conference, as the basic proposal for its consideration, the draft articles on the law of treaties between States and international organizations or between international organizations adopted by the International Law Commission at its thirty-fourth session" in 1982.

Among those invited to participate in the Conference, in addition to states, are: "representatives of international intergovernmental organizations that have traditionally been invited to participate as observers at legal codification conferences convened under the auspices of the United Nations".

The European Economic Community is such an organization, and has duly been sent an invitation to participate, in the form of a letter from the UN Secretary-General dated 5 February 1985.

2. Resolution 39/86 appealed to participants in the Conference "to organize consultations primarily on the organization and methods of work of the Conference, including rules of procedure, and on major issues of

¹ Annex I.

substance including final clauses and settlement of disputes, prior to the convening of the Conference in order to facilitate a successful conclusion of its work through the promotion of general agreement".

The consultations are also to address the status of the international organizations invited to participate in the Conference. The decision will be taken by the General Assembly at its next session, this autumn.

3. The consultations called for by Resolution 39/86 started with an organizational session on 28 February. A first round of consultations will take place from 18 March to 10 May, followed by further work and then a second two-week round of detailed consultations on all issues in July. Subjects discussed during the consultations will include the organization of the Conference, methods of work, participation, final clauses (including the right to become a contracting party) and dispute settlement.

As is clear from a working paper dated 20 February, prepared by the legal advisers of the Ten and the Commission in New York (Annex II), the most urgent question is to determine the rights to be enjoyed by international organizations invited to participate in the Conference under Resolution 39/86.

In the light of the foregoing, it is essential to approve the Community's participation in the consultations and the Conference and decide on the position to be adopted by the Community and its Member States.

4. In accordance with the legal advisers' suggestion, this recommendation concentrates on the issue of the status of international organizations invited to participate in the Conference under Resolution 39/86.

The Commission will be submitting a separate recommendation later on the draft articles prepared by the International Law Commission, with particular reference to the final clauses and dispute settlement.

II. Position to date

5. the Community and its Member States have taken part in all the preparatory work, and have sent the UN Secretary-General their comments on the ILC's draft articles. Both the Community and the Member States have also made various statements to the General Assembly's Sixth Committee.

In its comments, which date from 1983, the Community made the following points regarding the participation of international organizations in the Conference:

"Theoretically, several solutions are conceivable, ranging from a mere observer's status for international organizations to a role of full participation on a par with States. An intermediate solution could consist in the admittance of international organizations to an active participation in the negotiation procedure. This would correspond to the role that international organizations have been able to play in the elaboration of the present draft articles".

As the legal advisers point out, however, it has proved impossible to agree on the precise scope of the term "active participation". In 1983 and 1984 Member States called for participation by international organizations "on an appropriate basis, which would permit them to contribute effectively to the codification work of the Conference".

With consultations imminent in New York, it is thus important to work out the Community's position in detail.

III. Some points of principle

6. First a brief recap of some general considerations regarding the scope of the planned Convention as it affects international organizations.

7. The aim of the Convention is to codify the law of treaties concluded by international organizations either with states or with other international organizations. It will therefore have to be binding on international organizations.

Subject to rules of customary law, the provisions of the Convention would normally only be binding on international organizations with their consent. It is therefore essential to allow those organizations to become contracting parties to the Convention.

This applies to the Community in particular. Clearly, it cannot bind itself internationally except by its own act, in accordance with the procedure described in Article 228(1) of the EEC Treaty.

8. From the Community's point of view there is another consideration. The negotiation of a Convention codifying and developing international law on treaties to which international organizations are parties is bound to affect the external exercise of such organizations' powers even before it comes into force and is (presumably) concluded by the Community. The new Convention will undoubtedly serve as a basis for all subsequent analysis of the law of treaties, since this is an area of international law which has hitherto been neither firm nor precise; failing a specific text governing international organizations, the Community has always had to refer to the 23 May 1969 Vienna Convention on the Law of Treaties (between states). This will no longer be the case once the new Convention has been negotiated.

Accordingly, the negotiation of the Convention will affect the Community's treaty-making powers. The basic principles of the Community legal system dictate that the Community should be involved in the negotiations whether it eventually decides to ratify the Convention or not.

9. By the same token, the Community as such must participate in the consultations in New York, which will in any case be dealing with substantive issues as well as procedural questions. Resolution 39/86 expressly calls for the consultations to tackle "major issues of substance including final clauses and settlement of disputes ... in order to facilitate a successful conclusion of /the Conference's/ work through the promotion of a general agreement" (see para. 1). (Note also the timetable and agenda drawn up in New York for consultations over the coming months; see para. 3.).

10. Resolution 39/86 calls on "the participants" to take part in the consultations. If international organizations are invited to participate in the Conference, they should participate in the consultations as well.

The meeting dealing with organization of the consultation process looked for inspiration to the informal consultations which took place in 1984, and foresaw separate consultations for states and international organizations. The topics being dealt with in the present consultations, however, concern both states and international organizations, as do those to be discussed by the Conference, so it is in the Community's own interest to see that it is genuinely involved in the consultations as well. In this way both the Community and its Member States will be in a position to state their views.

IV. Participation in the Conference

11. During the consultations it will be necessary to decide in what capacity the international organizations invited to the Conference will participate, given that, as explained in paragraph 8, international organizations would have to conclude the Convention for it to be binding on them. For the Community there is the additional consideration of the effect even of an unratified accord (see para. 8).

For international organizations' participation in the Convention to be effective, their status (setting aside voting rights, which the Community and the Ten are not claiming) should be the same as that of states.

12. The legal advisers also raise the question of what position should be taken on the sponsorship rule, whereby proposals and amendments from an international organization have to be "sponsored" by one or more of the states participating in the Conference.

The Community should oppose the attempt to apply the sponsorship rules, which involves a measure of subordination incompatible with the full exercise of its legal powers. It is no surprise that the sponsorship rule was proposed by a (non-member) country which is hostile on principle to any act constituting an expression of an international organization's autonomy, and has had subordination clauses incorporated in other international accords (e.g. the ozone layer convention).

13. If it proves impossible to secure treatment equal to that of states, there must be a positive list enumerating the Community's rights in the negotiations for the Convention.

In that event it would certainly be better from the tactical standpoint to have the rights of international organizations defined without reference to observer status, which is what the country calling for application of the sponsorship rule has proposed for those organizations.

At the very least, international organizations should be accorded the right independently:

- (i) to submit proposals and put forward amendments;
- (ii) to make statements;
- (iii) to participate in the decision-making process in connection with the negotiation and approval of texts.

V. Final clauses and settlement of disputes

14. The New York consultations will be dealing primarily with the status of the international organizations invited to the Conference, but will also address other questions mentioned in Resolution 39/86, viz. "major issues of substance including final clauses and settlement of disputes".

As pointed out in para. 5, the Community and its Member States have already been involved in most of the preparatory work done on these issues by the International Law Committee and the Sixth Committee. These points, therefore, and in particular the ILC's draft articles, can therefore be referred to the Council by the Commission for discussion at a later stage.

VI. Conclusion

15. Initially, therefore, the Commission recommends that the Council decide that:

- (i) The European Community should participate in the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations.
- (ii) The European Community should participate in the consultations to be held prior to and in preparation for the said Conference.
- (iii) At the said consultations the Member States and the Community should endeavour to ensure that international organizations invited

to the Conference:

either have the same rights (except voting rights) as states

or, failing that, have the right independently to:

- submit proposals and put forward amendments,
- make statements,
- take part in the decision-making process in connection with the negotiation and approval of texts.

Recommendation for a Council Decision authorizing the Commission to participate on behalf of the Community in the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, and in the consultations prior to the Conference

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaties establishing the European Communities,

Having regard to the recommendation from the Commission,

Whereas the Community has been invited to participate in the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations;

Whereas consultations are taking place in the United Nations in preparation for the said Conference,

Whereas the procedural and substantive issues to be discussed at both the consultations and the Conference will directly affect the European Communities' exercise of their international powers, and have a bearing on the whole range of their external competence;

Whereas the Communities should therefore participate in the consultations and the Conference, with a status commensurate with their responsibilities in the field of international relations and their role in the development of international law,

HAS DECIDED AS FOLLOWS:

Sole article

1. The Commission shall participate in the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations and in the consultations provided for by Resolution 39/86 of the United Nations General Assembly.
2. The Commission shall represent the views of the Communities in consultation with representatives of the Member States and in accordance with the directives at annex, which will be supplemented in due course.

DIRECTIVES

At the consultations organized by the United Nations in preparation for the Conference of the Law of Treaties between States and International Organizations or between International Organizations, the Commission shall ensure that for the purposes of that Conference, the Communities enjoy the same rights, other than voting rights, as states.

Failing that, the Commission shall ensure that the Communities are accorded the right independently to submit proposals and amendments, make statements and participate in the decision-making process in connection with the negotiation and approval of texts.



Assemblée générale

Distr.
GENERALE

A/RES/39/86
18 janvier 1985

Trente-neuvième session
Point 131 de l'ordre du jour

RESOLUTION ADOPTEE PAR L'ASSEMBLEE GENERALE

[sur le rapport de la Sixième Commission (A/39/779 et Corr.1)]

39/86. Conférence des Nations Unies sur le droit des traités entre Etats et organisations internationales ou entre organisations internationales

L'Assemblée générale,

Rappelant sa résolution 37/112 du 16 décembre 1982, par laquelle elle a décidé qu'une convention internationale serait conclue sur la base du projet d'articles sur le droit des traités entre Etats et organisations internationales ou entre organisations internationales que la Commission du droit international a adopté à sa trente-quatrième session 1/,

Rappelant également sa résolution 38/139 du 19 décembre 1983, par laquelle elle a décidé que le cadre approprié pour l'examen définitif du projet d'articles serait une conférence de plénipotentiaires qui devrait être convoquée en 1985 au plus tôt, et est convenue de prendre une décision à sa trente-neuvième session au sujet de la date et du lieu de la Conférence des Nations Unies sur le droit des traités entre Etats et organisations internationales ou entre organisations internationales ainsi que de la participation à cette conférence,

Ayant reçu le rapport du Secrétaire général 2/ qui contient les commentaires et observations communiqués par les Etats et les principales organisations intergouvernementales internationales, conformément à la résolution 38/139 de l'Assemblée générale,

Reconnaissant qu'il importe d'assurer le succès des travaux de la Conférence en facilitant un accord général,

1/ Documents officiels de l'Assemblée générale, trente-septième session, Supplément No 10 (A/37/10), chap. II, sect. D.

Ayant à l'esprit la relation entre le droit des traités entre Etats et la question qui sera examinée par la Conférence,

Notant avec satisfaction que le Gouvernement autrichien a proposé d'accueillir la Conférence à Vienne,

1. Décide que la Conférence des Nations Unies sur le droit des traités entre Etats et organisations internationales ou entre organisations internationales se tiendra à Vienne, du 18 février au 21 mars 1986;

2. Prie le Secrétaire général d'inviter :

a) Tous les Etats à participer à la Conférence;

b) La Namibie, représentée par le Conseil des Nations Unies pour la Namibie, à participer à la Conférence, conformément au paragraphe 6 de la résolution 37/233 C de l'Assemblée générale, en date du 20 décembre 1982;

c) Les représentants des organisations qui ont reçu de l'Assemblée générale une invitation permanente à participer en tant qu'observateurs aux sessions et aux travaux de toutes les conférences internationales convoquées sous ses auspices à participer à la Conférence en cette qualité, conformément aux résolutions 3237 (XXIX) et 31/152 de l'Assemblée générale, en date des 22 novembre 1974 et 20 décembre 1976;

d) Les représentants des mouvements de libération nationale reconnus par l'Organisation de l'unité africaine dans sa région à participer à la Conférence en qualité d'observateurs, conformément à la résolution 3280 (XXIX) de l'Assemblée générale, en date du 10 décembre 1974;

e) Les représentants des organisations intergouvernementales internationales qui ont traditionnellement été invitées à participer en tant qu'observateurs aux conférences de codification convoquées sous les auspices de l'Organisation des Nations Unies à participer à la Conférence en une qualité qui sera étudiée lors des consultations visées au paragraphe 8 ci-dessous et décidée par l'Assemblée générale à sa quarantième session;

3. Invite les participants mentionnés au paragraphe 2 ci-dessus à inclure autant que possible parmi leurs représentants des experts compétents dans le domaine à étudier;

4. Décide que les langues de la Conférence seront les langues officielles et les langues de travail de l'Assemblée générale, de ses commissions et de ses sous-commissions;

5. Renvoie à la Conférence, en tant que proposition de base à examiner, le projet d'articles sur le droit des traités entre Etats et organisations internationales ou entre organisations internationales adopté par la Commission du droit international à sa trente-quatrième session;

6. Prie le Secrétaire général de présenter à la Conférence tous les documents et recommandations pertinents concernant le règlement intérieur et les méthodes de travail, compte tenu du fait qu'il importe de faciliter un accord général sur le résultat final des travaux de la Conférence, et de faire le nécessaire pour mettre à la disposition de celle-ci le personnel, les moyens matériels et les services voulus, notamment en ce qui concerne l'établissement de comptes rendus analytiques;

7. Prie également le Secrétaire général de prendre des dispositions pour assurer la présence à la Conférence, en qualité d'expert, du Rapporteur spécial de la Commission du droit international chargé de la question des traités conclus entre Etats et organisations internationales ou entre deux ou plusieurs organisations internationales;

8. Appelle les participants à la Conférence à organiser, avant la Conférence, des consultations portant principalement sur l'organisation et les méthodes de travail de la Conférence, notamment le règlement intérieur, et sur les grandes questions de fond, dont les clauses finales et le règlement des différends, afin d'assurer le succès des travaux de la Conférence en facilitant un accord général;

9. Décide d'inscrire à l'ordre du jour provisoire de sa quarantième session une question intitulée "Préparatifs de la Conférence des Nations Unies sur le droit des traités entre Etats et organisations internationales ou entre organisations internationales".

99ème séance plénière
13 décembre 1984

New York, 20 February 1985

WORKING DOCUMENTon Treaties between States and International Organisations
and between International Organisations

prepared by the Legal Experts of the Ten and the
Commission in New York

1. According to Resolution 39/86 of the UN General Assembly, the United Nations Conference on Treaties between States and International Organisations and between International Organisations will be held in Vienna from the 18th February to the 21st March 1986. The International Law Commission's 1982 draft articles for a Convention on this topic will be the basis for the work of the Conference.

A substantial effort in European coordination and cooperation will be required for the purposes of the 1986 Conference. It will require the Community and the Ten to define their general attitude towards the development of international law represented by the ILC's draft Articles as a whole, as well as to a number of specific issues of principle and of procedure which may have a direct impact on the Community's own treaty-making activities.

Because of the shortness of time before the Conference convenes in 1986 and especially in view of the consultations referred to below, this process of European coordination and cooperation will have to begin without delay. The present paper is designed as a contribution to it.

2. While it provides for discussion of an item entitled "Preparations" for the Conference at the 40th session of the G.A., the Resolution quoted above appeals to the "participants" to the Conference to organize consultations "primarily on the organization and method of work of the Conference, including rules of procedure, and on major issues of substance including final clauses and settlement of disputes".

Among those "participants" are the international organizations "which have traditionally been invited to participate as observers at legal codification conferences convened under the auspices of the United Nations". They include the European Economic Community.

Among the questions to be considered in the consultations one finds that of determining in what capacity international organizations invited to the Conference will participate in its work. This, according to the Resolution, is the only point, among the numerous questions to be discussed in the consultations, upon which the 40th G.A. must take a decision.

3. It would seem therefore that, in order to formulate the standpoint of the Community and of the Ten, one of the most urgent tasks concerns the problem of the capacity in which the European Community, together with the other organizations invited under para. 2 (e) of Res. 39/86, will participate in the Conference.

In the comments it formulated in 1982 on the ILC's Draft Articles the Community, as regards participation,

stated the following:

"Theoretically, several solutions are conceivable, ranging from a mere observer's status for international organizations to a role of full participation on a par with States. An intermediate solution could consist in the admittance of international organizations to an active participation in the negotiation procedure. This would correspond to the role that international organizations have been able to play in the elaboration of the present draft articles".

It has not proved possible to agree in New York on the further interpretation to be given to the phrase "active participation". In statements made by the Presidency in the Sixth Committee in 1983 and 1984 the problem was addressed in the following terms:

"The Ten consider that international organizations, including the European Community, should participate on an appropriate basis, which would permit them to contribute effectively to the codification work of the Conference".

This formulation resulted after intensive efforts undertaken by the Ten in New York. Nothing more precise could be obtained because of the differences in the positions held amongst the Member States and the Commission. These positions range from mere observer status and full participation without the right of vote.

The question is further complicated because some developing countries have requested that national liberation movements be accorded at least the same treatment as international organizations.

During the consultations held in U.N. fora in 1984 before and during the 39th General Assembly, the following were the main approaches explored: (1) to add specific rights of participation to a provision giving the International Organizations the status of observers; and (2) to spell out specific rights of participation to be enjoyed by the International Organizations, without specifying their status.

Thus a first problem to be addressed may consist in determining which of these two approaches is preferable. It may however be observed that if the spelling out of the rights of participation to be enjoyed by Organizations is accurate and complete, the two approaches are equivalent in practice.

However, it has been felt by some delegations that the first approach might be less favourable for the Organizations than the second, because it could be argued that the usual limited capacity of observers in codification conferences might function as a residuary rule for cases not covered by the rules attributing specific competences. Conversely, if through oversight a particular attribute was not foreseen, then under the second approach it might be argued that international organizations had no rights of participation at all in the area in question.

The second order of problems - which, at least in principle, for the reason stated before, is independent from the first - concerns which rights of participation are to be given to International Organizations.

The following rights have been discussed during the consultations:

- 1) the right to submit proposals and amendments;
- and
- 2) the right to make statements.

During these consultations, at least as regards the right to submit proposals and amendments, the limitation was proposed that such right should be exercised through the sponsorship of the proposals and amendments by a State or States participating in the Conference.

The questions raised are the following:

- a) should the two rights be recognized to International Organizations and, if so, would they be sufficient?
- b) what position should be taken in connection with the "sponsorship" rule proposed and are there variations thereof which can be envisaged (for instance: to limit the sponsorship requirement to the submission of proposals for voting?)

In addition, other questions connected to participation may be expected to be considered during the consultations. None of them has been discussed in New York. They include the following:

- 1) rights of participation on procedural questions (e.g., right to submit motions to adjourn, points of order, etc);
- 2) rights of participation in informal meetings (such as "working" and "drafting" groups);
- 3) rights of participation in procedures leading to consensus decisions.

4. In addition to the problem of participation, several questions of principle are likely to arise in the course of the consultations under the rubric "Final Clauses and Settlement of Disputes" mentioned above. Some of these questions have not previously, or at least not recently, been addressed in Community consultation. These questions of principle include the following:

- 1) how should organizations become bound by the Convention?
- 2) should participation in the Convention by organizations be relevant (and within what limits) for the entry into force of the Convention?
- 3) what rights should International Organizations have as regards reservations to the Convention?
- 4) what rights should organizations have as regards amendments?
- 5) what regime for the settlement of disputes would be acceptable to the Community? and how would this relate to the positions of the member States, notably as regards disputes involving ius cogens?

An effort of reflection with a view to determining positions seems to be still needed on these points by delegations, including those of the Ten. It must however be kept in mind that the idea of considering at least some of these questions in a "package" with the question mentioned above of the capacity in which Organizations will participate in the Conference has been evoked more than once during consultations in 1984.

5. Furthermore, amongst the issues of substance which are likely to be of principle concern to the Community and the Ten and some or all of which might be raised in the consultations under the rubric "Major Issues of Substance", are the following:

1. the treaty-making powers of international organizations and the modalities for their exercise.
2. the regime of reservations.
3. the validity and effect of treaty obligations undertaken by International Organizations, including the problem of Article 36 bis.
4. the provisions relating to ius cogens.

It may be recalled that the Community has already commented on a number of the draft articles dealing with issues of substance but those comments will need to be looked at again before the Conference takes place. Special importance has draft Article 36 bis "Obligations and rights arising for States members of an international organization

from a treaty to which it is a party". Under this article, which was prompted by the specific nature of the EEC Treaty, Member States are bound by treaties entered into by an organization, if the constituent instrument of the organization so provides.

6. Resolution 39/86 appeals to participants to the Conference to organise consultations on the organization and method of work of the Conference and on major issues of substance. Since the Community, together with other organizations, will be one of the participants, the question arises of how Community views are to be conveyed during the consultation phase. The general supposition at the United Nations is that the consultations to be held this year will, like those in 1984, be principally between states. In 1984 the UN Legal Counsel, who conducted the consultations, held separate meetings with the UN organizations, and it is probable that a similar meeting will be held this year. It would be possible therefore, if Community participation in the inter-state consultations would not be possible before the 40th Session, for the Community to convey its views separately to the Legal Counsel or to the Ambassador of Iraq if he conducts the consultations such a procedure would of course necessitate close co-ordination between the views expressed on behalf of the Community and those expressed by Member States in the consultations.