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Legal Advisers and International Organizations - Background Papers - I

ASIL

Bellagio  
Meeting

August  
1967  
Background  
Papers

L. Nurick

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PARTICIPANTS

## LEGAL ADVISERS AND INTERNATIONAL ORGANIZATIONS

Meeting, August 1967

### Participants

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- Sir Kenneth Bailey, C.B.E., Q.C., High Commissioner of Australia  
in Canada
- Werner Boulanger, Director, Legal Division, International Atomic  
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- Z. Caha, Assistant Director-General, International Bureau, Universal  
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- J. P. Dobbert, Office of the Legal Counsel, Food and Agriculture  
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- Alexander Elkin, formerly Legal Adviser, Organisation for European  
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- Gerald F. FitzGerald, Senior Legal Officer, International Civil  
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American Society of International Law

LEGAL ADVISERS AND INTERNATIONAL ORGANIZATIONS

Meeting, August 26-31, 1967

DECISIONS AND OTHER MEASURES TAKEN  
BY THE INTERNATIONAL ATOMIC ENERGY AGENCY

by Werner Boulanger  
Director, Legal Division  
International Atomic Energy Agency



Decisions and other measures taken  
by the International Atomic Energy Agency

The ability of the International Atomic Energy Agency (IAEA) by decision or other suitable means to effect action or omission by one of its Member States or their nationals is determined legally by the Agency's Statute and other legal instruments based thereon, and factually by its special field of work. Under its Statute (Article III.A), the Agency has two main functions:

- a) To promote research on, and development and practical application of, atomic energy for peaceful uses throughout the world,
- b) To protect humanity against the dangers emanating from the radioactive properties of nuclear materials on the one hand and against the possibility of their use for military purposes on the other.

With regard to the "promoting" activities of the Agency, no problems will normally arise from decisions, proposals, or advice. These measures will, as a rule, be in the interest of Member States or their nationals; they would therefore have little reason not to accept them.

The same is true of the Agency's activities in the field of protection of health and safety. There, the standards and regulations are developed by the Agency in close cooperation with Member States. The practice in formulating safety standards is to organize meetings of experts to consider drafts prepared by the Secretariat. The panel members are specialists from Member States and other interested international organizations. The draft regulations elaborated by the panel are communicated to the Member States for comment. The standards and regulations are then submitted to the Agency's Board of Governors for approval. They are published with the Board's authorization and constitute international standards designed to serve as a basis for national legislation and regulations. In regard to Member States these standards and regulations are only recommendations; they are,

however, under the Agency's Statute, binding with regard to its own operations and may, by agreement, become binding with regard to projects undertaken with the Agency's assistance (Article XI). In this latter case the Agency can satisfy itself about the observance of any health and safety measures prescribed either through an expert, who frequently assists in the project on the spot, or through its inspectors mentioned below.

A similar procedure was used when the need arose to facilitate the international transport of radioactive substances by establishing uniform safety regulations. Following a 1959 resolution of the Economic and Social Council of the United Nations, the Agency convened two panels to formulate regulations dealing with the transport of radioisotopes, radioactive ores and residues of low specific activity on the one hand and with the transport of large radioactive sources and fissile materials on the other. Again experts from member countries and representatives of various international organizations participated in this work. The international standards for the transport of radioactive materials were approved by the Board of Governors in September 1960 for application to the operations of the Agency and to those undertaken with its assistance; the Board also invited Member States to use these regulations as the basis for developing their own national regulations and the organizations concerned to apply them to the international transport of radioactive materials. The Transport Regulations were reviewed, from 1962 to 1964, in a number of meetings organized by the Agency of experts from Member States and representatives of a large number of interested organizations. The Revised Regulations were approved by the Board of Governors in 1964 and published in May 1965. They now provide a lasting framework of principles and rules, supplemented by appropriate technical data, for the safe transport of radioactive materials by land, water and air. In order to keep the technical aspects up-to-date in the light of new knowledge and experience gained, the Director General of the Agency was authorized by the Board of Governors to make the changes of detail which would prove necessary from the technical viewpoint, without infringing the principles and rules approved by the Board. Proposed changes must be brought to the notice of Member States 90 days in advance, and the Agency will take due note of the observations or information communicated to it.

The Agency's Transport Regulations are also used as the basis for transport regulations issued by international organizations competent for transport by rail, road, inland waterways, sea and air. Thus the International Regulations Concerning Carriage of Dangerous Goods by Rail (RID) established by the Central Office for International Railway Transports in Berne, which apply in 24 countries in Europe and the Near East, were revised on the basis

of the IAEA's Regulations. The Maritime Safety Committee of IMCO approved in February 1966 Provisions Relating to the Transport of Radioactive Substances by Sea conforming to the revised IAEA Regulations. The Committee recommended that the Member States of IMCO and the Governments which had participated in the 1960 Conference on Safety of Life at Sea should adopt these draft provisions as the basis for their national regulations. The IATA Regulations Relating to the Carriage of Restricted Articles by Air have also been revised to take into account the fact that several countries among the principal producers of radioisotopes are in the process of adopting the IAEA Regulations for their national airline networks.

The examples given above show how, by close cooperation between the IAEA and experts from member countries and from other organizations and with member governments, IAEA standards for the protection of health and safety and for the transport of radioactive substances become international as well as national standards. This means that the problem of putting into effect a decision of the IAEA in a Member State will scarcely arise.

The real problems may, theoretically, be assumed to present themselves mainly in connection with the application of the Agency's safeguards system. Under this technical term we understand the activities

"designed to ensure that special fissionable and other materials, services, equipment, facilities, and information made available by the Agency or at its request or under its supervision or control are not used in such a way as to further any military purpose; and to apply safeguards, at the request of the parties, to any bilateral or multilateral arrangement, or at the request of a State, to any of that State's activities in the field of atomic energy" (Art.III.A.5).

This provision of the Statute clearly indicates that the "controls" by the Agency are applicable only with the prior consent of a Member State given in the form of an agreement with the Agency. Such an agreement can be:

a) A Project Agreement under Article XI of the Statute, by which a Member or group of Members requests "the assistance of the Agency in securing special fissionable or other materials, services,

equipment and facilities necessary for research on, or development or practical application of, atomic energy for peaceful purposes". Such an agreement must include "undertakings by the Member or group of Members submitting the project: (i) that the assistance provided shall not be used in such a way as to further any military purpose; and (ii) that the project shall be subject to the safeguards provided for in Article XII, the relevant safeguards being specified in the agreement " (Art. XI.F.4);

b) A Safeguards Transfer Agreement, whereby at the request of two or more Member States the safeguards functions envisaged in a bilateral or multilateral agreement for cooperation between them are transferred to the Agency. Such agreements were concluded with the USA and 19 of its partners, the United Kingdom and Denmark, and Canada and Japan;

c) A Unilateral Safeguards Submission Agreement by which the Member State submits all or part of its nuclear activities to Agency safeguards. Such agreements were concluded with the USA for four reactors and the United Kingdom for the Bradwell nuclear installation.

The details for Agency controls are contained in the safeguards agreements or in supplementary agreements thereto. They consist of a bookkeeping system for source material (natural uranium and thorium) and special fissionable material (Pu-239, U-233, U-235) and periodical reports. Their main and generally best known feature are, however, the inspections on the spot carried out by Agency inspectors appointed with the concurrence of the Member State. The rights and obligations of such inspectors as well as of Member States are spelled out in detail both in the Statute and in the documents approved by the Board of Governors (The Agency's Safeguards System - 1965 - (INFCIRC/66) and its extension to reprocessing plants (GC(X)/INF/86) and the Inspectors Document (GC(V)/INF/39).

While it can be assumed that a Member State, when concluding a safeguards agreement, has every intention not to violate it, this may,

for one reason or another, change later on. Due to a change of policy a State may wish to escape from its obligations under the safeguards agreement. The violations of the agreement may take the following form:

- (1) Use of safeguarded items to further any military purpose - commonly referred to as a "diversion";
- (2) An interference with the control system in order to conceal a diversion;
- (3) An interference with the control system for some other reason, which may range from convenience (avoiding the burden of making reports), to embarrassment (at an unexplained loss), to nationalistic pride (objecting to outside checks). Of course what appears to be a violation based on one of these grounds could really be one based on a desire to conceal an actual diversion and therefore the control authority might have to treat it as such;
- (4) Some other violation of any provision of the safeguards agreement - e.g. the violation of the patent clause of a Project Agreement.

Both the sanctions to be used by the Agency in case of non-compliance as well as the procedures for them are regulated in Article XII.C of the Statute. If an inspector finds any "non-compliance" with the terms of a safeguards agreement, he must report to the Director General of IAEA who "shall thereupon transmit the report to the Board of Governors". The Board must then determine whether or not it finds any non-compliance to have occurred. If its finding is positive it must call on the Member State to remedy forthwith such non-compliance. The Board must also report its findings to all Member States as well as to the Security Council and General Assembly of the United Nations. If the State does not comply within a reasonable time, the Board may take the following measures:

- (a) Direct that all assistance being provided by the Agency or by its Member States be curtailed or suspended;
- (b) It may call for the return of materials and equipment made available to the State;
- (c) It may also suspend the Member from the exercise of the privileges and immunities of membership, in accordance with Article XIX.B.

The measures envisaged under (a) and (b) will of course be effective only if and to the extent that the Member State is receiving assistance by or through the Agency and if it does not refuse to return material and equipment already received. The only real sanctions may be those taken by the Security Council or the General Assembly of the United Nations pursuant to the Board's report.

It seems too early to speculate on what powers of decision the Agency will have once a non-proliferation treaty has entered into force. The safeguards agreements which, under the Treaty for the Prohibition of Nuclear Weapons in Latin America, will have to be concluded between Latin American States and the Agency may give some indication of future developments. They will very probably follow to a large extent the existing system which, while using the Agency's technical expertise for the control mechanism, leaves the final political decisions to the proper political bodies of the United Nations.

Werner Boulanger

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What  
can  
there  
be

Why

CAHA

American Society of International Law

LEGAL ADVISERS AND INTERNATIONAL ORGANIZATIONS

Meeting, August 26-31, 1967

DECISIONS OF THE UNIVERSAL POSTAL UNION

by Z. Caha

Assistant Director-General, International Bureau  
Universal Postal Union



D e c i s i o n s  
of the Universal Postal Union

- I. Introduction
- II. Acts of the Union
  - (1) General
  - (2) Structure of the Acts. Their approval at international level
  - (3) Approval of the Acts at national level
  - (4) Reservations
  - (5) Amendment of the Acts
- III. Other Decisions
  - Authentic Interpretation of the Acts
    - (1) Congress
    - (2) Executive Council
    - (3) International Bureau

Bern, July 1967

Decisions  
of the Universal Postal Union

I. Introduction

1. Within the field of activity<sup>1</sup> of the Universal Postal Union (UPU), a distinction can be made between decisions:

- (a) as regards the body: decisions of Congress, of the Executive Council (EC), of the Management Council of the Consultative Committee for Postal Studies (MC/CCPS), of the Training Committee (TC) and the "decisions" of the International Bureau (IB);
- (b) as regards the form and legal quality of the decision: clauses of international treaties concluded by member countries<sup>2</sup> (Acts of the UPU), interpretation of Acts of the UPU, resolutions and recommendations (voeux, i.e. formal opinions).

2. The various UPU bodies use different kinds of decisions according to the powers conferred upon them. Thus Congress, which is primarily the legislative body, is alone competent to conclude treaties governing various postal services.<sup>3</sup>

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<sup>1</sup> The UPU's basic fields of activity are the following:

- (a) normal activity, i.e. the regulation of the international postal service, which is operated by the Postal Administrations of the member countries;
- (b) activity carried out by the UPU bodies with the cooperation of the member countries and relating to the improvement of the postal service (studies on various technical postal problems, the organization of the training of officials of Postal Administrations and UPU technical assistance);
- (c) activity assigned to the UPU by the UN as a mandate and carried out by UPU bodies (UNDP technical assistance).

<sup>2</sup> The term "countries" or "member countries" is the official title in the UPU.

<sup>3</sup> The basic Act of the Union provides for the possibility of convening administrative conferences to deal with questions of an administrative character (Constitution, Article 16). It has been suggested that administrative conferences could be entrusted, inter alia, with the revision of purely technical Acts, such as the Agreements, which would considerably facilitate the work of Congress. However, this idea, which was considered by the UPU Executive Council in connection with the simplification and acceleration of the work of Congress, was not adopted. It is true to say that there are no administrative conferences in the UPU (CE 1966, Doc 7, p. 2 (English text)).

In administrative matters, both Congress and the other bodies use resolutions and recommendations. For interpretation, see paragraph 33.

3. As regards the main criterion of the subject-matter of this study, namely "The Legal Scope of Decisions within the Member States of an International Organization", this paper deals firstly with the international postal treaties concluded within the framework of the UPU (the Acts of the Union), because these are the only decisions directly binding upon the member countries. The other kinds of decision of the UPU bodies will then be discussed, especially in so far as they relate to the members of the UPU.

## II. The Acts of the Union

### (1) General

4. The position of the postal service in most member countries (as a monopoly and a State prerogative) has, from the foundation of the UPU, made it necessary for its members to conclude agreements at intergovernmental level. All postal activity, which includes in the first place the transport of postal items from one country to another, if necessary through the instrumentality of third party member countries, has the following characteristic features:

- (i) Interdependence of Postal Administrations and reciprocity in their mutual relations.
- (ii) Uniformity of transport conditions, especially as regards rates and responsibility. This uniformity is expressed in technical language in Article 1 of the UPU Constitution:

"The countries adopting this Constitution comprise, under the title of the Universal Postal Union, a single postal territory for the reciprocal exchange of letter-post items."

However, this uniformity is flexible enough to enable the Administrations to adapt their services to the conditions of the international service (e.g., they have adequate latitude for fixing the international basic rates, and various ancillary services are only optional).

- (iii) Freedom of transit, which is guaranteed throughout the entire territory of the Union, is only the logical consequence of the first two characteristics. It is the keystone of the entire operation of the international service (see Constitution, Article 1 (1) ad fin.: "Freedom of transit is guaranteed throughout the entire territory of the Union").

5. The legal consequences of the special character of postal activity governed at international level are summarized in the postulate of the single legal basis for relations between all Postal Administrations - in other words, by the simultaneous entry into force of the Acts of the Union enacted by a Congress and the parallel abrogation of the corresponding Acts of the previous Congress (Article 31 (2) of the Constitution). This concept to some extent ignores the legal documents which create the member countries' formal commitments as regards the Acts of the UPU. As legal status is sometimes lacking, it is the de facto situation which is the determining factor for the countries' relations with the UPU. This de facto situation is the basis of a concept generally recognized by the UPU, namely the "tacit ratification" of the Acts of the Union: implementation by a UPU member country of the Acts of the Union is sufficient for it to be considered a member of the Union with full rights. This "tacit ratification" is all the more important because never in the history of the Universal Postal Union have all the member countries ratified the Acts of the Union that have been enacted by a Congress.

6. The Acts of the Union are as follows:

- (a) Constitution of the Universal Postal Union and its Final Protocol
- (b) General Regulations of the Universal Postal Union and their Final Protocol
- (c) Universal Postal Convention, Final Protocol and Detailed Regulations
- (d) Agreement Concerning Insured Letters and Boxes, Final Protocol and Detailed Regulations
- (e) Agreement Concerning Postal Parcels, Final Protocol, Detailed Regulations, Final Protocol
- (f) Agreement Concerning Postal Money Orders and Postal Travellers' Cheques, Detailed Regulations
- (g) Agreement Concerning the Giro Service, Detailed Regulations
- (h) Agreement Concerning Cash-on-Delivery Items, Detailed Regulations
- (i) Agreement Concerning the Collection of Bills, Detailed Regulations
- (j) Agreement Concerning the International Savings Bank Service, Detailed Regulations
- (k) Agreement Concerning Subscriptions to Newspapers and Periodicals, Detailed Regulations

7. Before the 1964 Vienna Congress, the Acts referred to under 6 (a), (b) and (c) constituted the "Universal Postal Convention", which, like all the other Acts, was renewed by each Congress. As the Convention was the organic document of the UPU (it is in fact the Charter of that international organization, i.e. the

existing Constitution), the legal question arose whether the UPU itself is legally reborn at every Congress. This view, though logical, created certain legal difficulties which have been overcome in practice by the concept of "tacit ratification" to maintain the continuity of the Union. As stated in paragraph 5, there have been, in the history of the UPU, countries which, during a number of regimes inaugurated by the various Congresses, have performed no legal action (signature, accession or ratification) signifying a legal relationship with the UPU. On the other hand, they have admittedly always implemented the Acts of the Union, and have never been regarded as having left it.

(2) Structure of the Acts and Their Approval at International Level

8. As regards the structure of the Acts and their approval at international level, the following points should be mentioned:

- (a) The main Acts (Constitution, Convention, General Regulations and Agreements) are always concluded on behalf of the Governments of the member countries, whereas the Acts containing executory provisions of a technical nature (the Detailed Regulations of the Convention and Agreements) are concluded on behalf of their Postal Administrations. This distinction, which goes back to the origins of the Union (Treaty of Bern, 1874, Article 13), was intended to avoid burdening Congress unnecessarily with purely technical and minor questions, and to leave it entirely to postal experts to revise these provisions at administrative conferences. However, Congress acquired the habit, from the very foundation of the Union, of revising the Regulations itself and submitting them for signature at the same time as the other UPU Acts. This difference in the legal nature of the UPU Acts had the result that the UPU does not require confirmation in a specific form of the signatures appended by the representatives of the Administrations when the Regulations are revised. Accordingly, in many countries the signatures of persons who signed as representatives of the Administration are not confirmed, and the Acts in question are not included in the ratification procedure to which the other Acts are subject.<sup>1</sup>

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<sup>1</sup> Cf. note 3 to paragraph 2, on administrative conferences.

- (b) As regards their structure and the obligations imposed, the Acts of the Union deal with the relations between Postal Administrations.<sup>1</sup> Quite exceptionally, individuals are only referred to in provisions dealing with the responsibility of the sender of a postal parcel. This structure of the Acts of the Union makes it necessary for their provisions to be repeated in various national regulations governing the postal service, the "legal status" of which (in virtue of postal laws and orders issued by the Government, or postal regulations issued by the Postal Administration) depends upon each country's constitutional regulations.<sup>2</sup>
- (c) Lastly, a distinction must be made between the compulsory and the optional international postal service. Each member country of the UPU has to implement the Universal Postal Convention (and its Detailed Regulations). Before the 1964 Vienna Congress, both the organic provisions (the present Constitution) and the letter-post provisions (the present Convention) formed a single treaty (the Universal Postal Convention). The division effected at Vienna raised some extremely complex legal problems, which have been solved in two different ways, one at international level and the other at national. The simultaneous existence of an organic Charter, on the one hand, and a treaty governing the compulsory activity of the UPU member countries, on the other, and the need, at national level, to submit for constitutional approval a treaty declared compulsory at international level, raised problems the solution of which, on the practical plane, can be regarded as a happy compromise.

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<sup>1</sup> The Convention and Agreements contain the basic rules applicable to the various postal services. All operational provisions liable to vary and therefore of a purely administrative nature are confined to the Detailed Regulations.

<sup>2</sup> A Postal Administration proposed at the 1952 Brussels Congress that the structure of the Acts of the Union should be adapted to that of national legislation, the criterion of which is the postal customer (this would mean transferring all the compulsory provisions for users to the Convention and Agreements, and retaining the provisions concerning Postal Administrations only in the Detailed Regulations). Although the Brussels Congress decided to proceed with the rearrangement of the Acts on that basis, it has never been possible to distribute their contents on those lines (1952 Brussels Documents, I, p. 68; II, pp. 311 and 312).

The General Regulations, the Convention and its Regulations were declared "compulsory Acts" in order to maintain the situation which existed before the 1964 Vienna Congress. All the member countries were then obliged to accept not only the whole of the provisions governing the organization and operation of the Union, but also the general provisions of the international postal service and those relating to the letter-post service. This makes for a clearer distinction between this Act and the Agreements, which are optional.

The fact that the General Regulations, the Convention and its Detailed Regulations are compulsory at international level does not exempt member countries from having the Acts approved at national level in accordance with their constitutional rules, in conformity with Article 25 (3). Also, the principle of "tacit approval" applies in the case of a member country which has not formally approved the said Acts but nevertheless applies them. However, this is only additional to the obligation which already exists in the Constitution.

The optional service is governed by various Agreements. Once member countries have acceded to an Agreement, they are obliged to implement it. It seems unnecessary to go into details in this connection.

- (d) In view of what is said at (a) and (c) above, it can be stated that the Constitution which was concluded at Vienna in 1964 at the Fifteenth Congress, and came into force on 1 January 1966<sup>1</sup>, creates the permanent legal basis of the UPU. The question of "legal renewal" no longer arises.<sup>2</sup>

Such a situation makes superfluous the concept of tacit ratification (approval) of the Convention and General Regulations. The member countries, by implementing these Acts, are merely applying the provisions of Article 22 (2) and (3) of the Constitution.

(3) Approval of the Acts of the Union at National Level

9. As regards the necessity for the Acts of the Union to be approved at national level, it is worth while mentioning below the changes made in the draft Constitution before it was submitted to the Vienna Congress. The following are the comments of the Expanded Executive and Liaison Committee ("Documents de la CEL élargie 1959", p. 413):

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<sup>1</sup> For the full text, see UN Juridical Yearbook 1964, pp. 195-202.

<sup>2</sup> Constitution, Article 22: Acts of the Union

- "1. The Constitution is the basic Act of the Union. It contains the organic rules of the Union.
- "2. The General Regulations embody those provisions which ensure the application of the Constitution and the working of the Union. They shall be binding on all member countries.
- "3. The Universal Postal Convention and its Detailed Regulations embody the rules applicable throughout the international postal service and the provisions concerning the letter-post services. These Acts shall be binding on all member countries.
- "4. The Agreements of the Union, and their Detailed Regulations, regulate the services other than those of the letter post between those member countries which are parties to them. They shall be binding on those countries only.
- "5. The Detailed Regulations, which contain the rules of application necessary for the implementation of the Convention and of the Agreements, shall be drawn up by the Postal Administrations of the member countries concerned.
- "6. The Final Protocols annexed to the Acts of the Union referred to in paras. 3, 4 and 5 contain the reservations to those Acts."



10. "Although in principle we are in favour of abolishing the notion of 'ratification' in the Acts of the Union, we considered it preferable to retain this method of approval for the Constitution, because the decision to cooperate within the framework of the UPU raises fundamental questions which depend upon national sovereignty. We also wanted to respect tradition and take into account the directives of the Ottawa Congress, according to which ratification would be retained for the implementation of the organic provisions of the Union.

11. "For the approval of the other Acts, finding a sound solution was a more complicated matter. The resolution of the Ottawa Congress provided that the Expanded ELC was to devise a method of putting the technical measures into force that should be simpler and more rapid than ratification as provided for in the Ottawa Convention. However, as the choice of procedure for approving international treaties depends essentially upon the constitutional laws of the member countries, efforts to find a satisfactory solution encountered almost insuperable obstacles:

"(a) When preparing its first preliminary draft, the Subcommittee for the General Review of the Convention did not deal with the question of approval so far as the Convention and the General Regulations were concerned; it merely considered the implementation of these two Acts as sufficient proof of approval by the appropriate national authorities. It should be noted that there seemed to be no reason why this implementation should cause legal or practical difficulties, inasmuch as the Convention and General Regulations were declared 'compulsory Acts' by Article 19 of the Constitution.

"(b) This basic solution was not approved by the Expanded Committee. A number of delegations considered that it was impossible not to provide expressly for the approval of the Convention and the General Regulations. It was argued that an express provision was necessary to protect the interests of member countries of the Union whose constitutional law required the approval of international treaties.

"(c) For that reason, the text finally adopted was that which appears in Article 23 (3) of the Constitution, which refers, not to 'ratification', but simply to 'approval' of the Acts of the Union other than the Constitution. This provision enables countries whose constitutional laws so permit to consider themselves bound simply by their plenipotentiaries' signature at Congress, or to approve Acts other than the Constitution by a simpler system than ratification as at present provided for.

11. "Lastly, it should be mentioned that some countries saw in the existence of the binding clause in Article 19 of the Constitution an incompatibility with countries' untrammelled right to approve or not to approve a treaty. This objection was overruled by the Committee, which refused to admit the existence of such incompatibility for a number of reasons, including the existence of a similar provision in the ITU Convention, which makes the Administrative Regulations compulsory while also submitting them for the approval of the appropriate national authorities (see ITU Convention, Montreux 1959, Article 15)."

#### (4) Reservations

12. The technical character of the Acts of the Union, on the one hand, and the fact that Congress decisions are taken by majority vote - a majority which depends upon the Act in question - on the other, determine the method of settling the admissibility of reservations. In the Report on the Work of the Union, 1963, the International Bureau of the UPU published some comments on reservations to the UPU's Acts. These comments are also given in the United Nations Juridical Yearbook 1964 (pp. 269-270). The gist of them is given below.

13. "Doctrine, which defines a reservation as a unilateral act by a State at the time of signature, ratification or adherence to a treaty with a view to excluding or altering the effect of certain provisions of this treaty in regard to the said State, is divided on the question of the legal significance of reservations, and more especially on their acceptance by the other States which are parties to a treaty, in cases where the treaty itself is silent on the matter.

14. "These theories are not of great interest to the UPU, precisely because the Vienna Constitution settles the problem by providing, in Article 22 (6), that any Final Protocols annexed to the Acts of the Union shall contain the reservations to these Acts.

15. "This provision will make it necessary for countries that wish to avail themselves of a reservation to submit it in the form of a proposal and have it confirmed by Congress for insertion in the Final Protocol of the Act to which it relates. The Constitution thus officially confirms the practice that has been in force since the London Congress in 1929 and arose out of a resolution of that Congress (Documents of the London Congress, Vol. II, p. 155).

16. "This being so, it must be admitted that it is not possible for a member country to make new reservations after signature of the Acts of Congress, unless it subjects the reservation to the procedure for amendment of the Acts in the interval between Congresses, to complement the Final Protocol of the Act concerned.

17. "We are inclined to believe, however, that at the time of admission of a new member country, or of adherence to an unsigned Act, the member country concerned may avail itself of an existing reservation. It would, in fact, be an arbitrary act to refuse a country the benefit of a reservation enjoyed by some other member country, although the grounds may be different. Let us say rather that the approval of a reservation by Congress is more a matter of the admissibility of the text of the reservation than of the beneficiary country."

18. As the reservations take into account the particular situation of the Administration of each member country which has made them, a situation recognized by the other parties in the form of a Final Protocol as mentioned under 14 above, there is no provision expressly authorizing the other member countries which are parties to an Act of the UPU to apply the Act in question as regards the Administration of the reserving country with the same reservation. There is, of course, nothing to prevent a member country from making a counter-reservation, but this has never occurred.

19. The waiving of a reservation existing in favour of a member country does not need to be submitted for approval. In this case, a communication made through the International Bureau for the benefit of the Administrations of member countries is enough. However, if it is desired, between Congresses, to alter the reservations appearing in the Final Protocol, unanimity is necessary, assuming that the alteration is admissible (see e.g., Article 69 of the Convention).

20. "With regard to the unilateral declarations by which member countries react to a given political situation or handle their relations with some other State, they are not, properly speaking, reservations. Consequently, they are not subject to any particular procedure, and may be submitted at any time.

21. "In Vienna, in 1964, several countries submitted declarations of a political nature at the time of signature of the Acts. Congress decided that these would be published at the same time as the Acts of the Vienna Congress and, in accordance with Article 101 (5) of the General Regulations of the UPU, notified to the member countries of the Union through diplomatic channels, together with the decisions taken by Congress (i.e., Acts of the Union and other decisions)."

(5) Amendments to Acts of the Union

22. The Acts of the Union can be amended either in Congress or between Congresses when only the technical Acts are concerned (excluding the Constitution and General Regulations). The amendments are made on the basis of formal proposals, which can only be submitted by the Postal Administrations of member countries, the Executive Council or, as regards proposals submitted in

Congress, by the CCPS Management Council<sup>1</sup> in accordance with the procedure described in the General Regulations. As to amendments to Acts of Congress, they must be adopted by the requisite majority, which is laid down in each of the Acts which it is proposed to amend. As stated above, because the amendments to the technical Acts of the Union are very numerous<sup>2</sup>, all the Acts, except the Constitution, are totally renewed at every Congress; they are treated in the normal way for the conclusion of treaties, i.e., they are signed and then ratified or approved according to each member country's constitutional rules. They go into force simultaneously after a fairly long period, generally twelve to eighteen months after Congress.

23. The General Regulations of the UPU authorize Postal Administrations to amend the Acts of the Union between Congresses. Each Act lays down the majority necessary for a proposal to become executory; generally speaking, the majority required for the adoption of an amendment between Congresses is higher than that required for meetings of Congress. Thus substantive amendments require in principle unanimity of the votes cast.<sup>3</sup> Less important provisions can be amended by two-thirds of the votes cast, and a simple majority is required for drafting amendments and for an authentic interpretation.

24. Amendments adopted by a referendum among Postal Administrations take effect as regards all member countries three months after notification; they require no further act of approval.

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<sup>1</sup> The Management Council's capacity to make proposals is doubly restricted: firstly, the proposals must arise directly out of opinions expressed by the Council or out of the conclusions of studies it has carried out, and secondly, the proposals must be approved by the Consultative Committee for Postal Studies, a body consisting of all the member countries and subordinated to the Management Council.

<sup>2</sup> Recent Congresses have had to consider as many as 1,500 proposals.

<sup>3</sup> The proposal submitted at the 1964 Vienna Congress, in favour of the abolition of the unanimity rule, was rejected (Vienna Documents, I, p. 348; II, pp. 980 and 981).

25. The procedure for amending Acts between Congresses, laid down in Articles 119-122 of the General Regulations, is at present very little used. It may be pointed out that, out of ninety-one amendments adopted since the creation of the UPU, fifty-nine were accepted during the first twenty-five years of its existence. Since 1947 there have only been six minor amendments; this can be explained by the virtual perfection of the technical Acts, which no longer need urgent amendments, and by the legislative role of the Executive Council. The latter body is instructed by Congress to carry out various studies, most of them of a legislative nature.<sup>1</sup> Amendments to the Constitution, in particular, can only be made in Congress.

26. In addition to the ordinary procedure described above, there exists in practice a short-term extraordinary consultation in which Administrations are sometimes informed that those which do not reply within the time-limit laid down will be considered to have accepted the suggestion. However, this procedure cannot be applied to any amendment of the texts of the Convention or Agreements (including their Regulations). It is prescribed for urgent cases when, for instance, temporary exceptions or derogations are proposed (e.g., a consultation about compiling land and sea transit rate statistics). Very recently, there were consultations about some most important questions (such as exceeding the ceiling of the Union's ordinary annual expenditure). This procedure has been criticized by some members of the UPU, on the ground that it was a derogation from the provisions of the Ottawa Convention, which fixed the annual ceiling for the period during which the Ottawa Acts would be in force.

#### Alteration of the Constitution

27. The sponsors of the creation of a UPU Constitution, while considering that it would have a certain stability and would remain unaltered, provided a number of variations in the article dealing with amendments.

28. It is interesting to note that after lengthy discussion by the body responsible for preparing a draft Constitution, and also at the Vienna Congress, the latter adopted the same solution as that adopted for the other Acts renewed at Congress.

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<sup>1</sup> For example, the Vienna Congress instructed the EC to make some forty studies, most of which will have to be terminated by formal proposals to Congress.

29. Article 30 of the Constitution reads as follows:

Amendment of the Constitution

1. To be adopted, proposals submitted to Congress and relating to this Constitution must be approved by at least two-thirds of the member countries of the Union.
2. Amendments adopted by a Congress shall form the subject of an additional protocol and, unless that Congress decides otherwise, shall enter into force at the same time as the Acts renewed in the course of the same Congress. They shall be ratified as soon as possible by member countries and the instruments of such ratification shall be dealt with in accordance with the procedure laid down in Article 26.

30. The alternative texts which were not adopted by Congress were as follows:

Alternative 1: "Amendments adopted<sup>1</sup> shall come into force as regards all member countries when they have been accepted by two-thirds of the member countries in accordance with their constitutional rules."

Alternative 2: "Amendments adopted by the procedure laid down in paragraph 1<sup>1</sup> shall come into force as regards all member countries when they have been accepted by two-thirds of the member countries in accordance with their constitutional rules, within a period fixed by Congress; this period must not be less than six months from the date on which Congress closed. Member countries which have not notified their acceptance within this period shall be considered as abstaining<sup>2</sup>".

31. Thus the classical rules for the creation of commitments arising out of international treaties were not applied.

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<sup>1</sup> Approval in Congress by two-thirds of the member countries represented at it.

<sup>2</sup> For the discussion about amendments to the Constitution, see "Documents de la Commission exécutive et de liaison (élargie) 1959", pp. 414-416, and the 1964 Vienna Congress documents, Vol. II, pp. 1002 and 1003.

### III. Other Decisions

32. Decisions other than the legislative Acts of the Union developed considerably after the Union was given, firstly, new bodies, and secondly new activities.<sup>1</sup> In this paper we shall be concerned only with the most important bodies of the Union, omitting those whose activity is limited to a well-defined field and whose decisions are only optional as regards the member countries, namely the opinions of the CCPS Management Committee and the recommendations of the Training Committee.

#### Authentic Interpretation of the Acts

33. The authentic interpretation of the Acts between Congress is expressly entrusted to the Postal Administrations of the member countries, and is effected by referendum (see, e.g., the Vienna Convention, Article 69 (2) (c), (ii)). After an interpretation by the Executive Council had been challenged, the Union decided in 1953 that only interpretations approved by referendum are binding. However, duly adopted interpretations by Congress - a prerogative inherent in legislative bodies - are also binding.<sup>2</sup>

34. All other interpretations which any UPU body may have to give - especially the Executive Council or the International Bureau (which gives its opinion on a question, whether in dispute or not, at the request of the parties concerned: see Article 112 (2) of the General Regulations)-are not binding.

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<sup>1</sup> At the outset (1874) there were only the Universal Postal Congress and the International Bureau; in 1947 (Paris Congress), the Executive and Liaison Committee (the present Executive Council) as an administrative body representing the Union between Congresses; then, in 1957 (Ottawa Congress), the Consultative Committee for Postal Studies, an advisory body responsible for technical, economic and operational studies, together with its executive body, the Management Council, were set up (see now Articles 17 and 18 of the Constitution and 102, 104 and 105 of the General Regulations); lastly, in 1964 (Vienna Congress), a Training Committee composed of four members of the EC and four members of the CCPS Management Council, under the chairman of the Executive Council, was set up (1964 Vienna Congress, Resolution C 12).

<sup>2</sup> Interpretations have not been much favoured by the UPU. The only authentic interpretation between Congresses since the Second World War was in 1954, and related to air-mail correspondence. Congresses do not use this type of decision.



35. Some comments on other decisions of Congress, the Executive Council and the International Bureau are given below:

(1) Congress

36. Originally, Postal Congresses had a purely legislative function; now that their activity covers, inter alia, the administrative field of the UPU, decisions in that field generally take the form of resolutions, which are binding upon the bodies to which they relate.<sup>1</sup> Among the resolutions which are binding upon member countries should be mentioned those adopted by virtue of an express provision in the Acts (e.g., the Resolution of the Vienna Congress voted in accordance with Article 21 (4) of the Constitution and dealing with the assignment of member countries to a number of contribution classes to defray the expenses of the Union).

37. Congress recommendations and formal opinions are in no way binding upon the Administrations with which they are mainly concerned. They are sometimes the outcome of a proposed amendment to the Acts which was not adopted, but the object of which deserves the attention of Postal Administrations.

38. It should be noted that, for the first time in the history of the Union, member countries received from the Austrian Government notification of all the decisions taken by the Vienna Congress.<sup>2</sup> All the decisions of that Congress have also been published together with the respective Acts.<sup>3</sup>

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<sup>1</sup> See, e.g., Resolution C 22, on the immediate implementation of the provisions adopted by the Vienna Congress in connection with the Executive Council and the CCPS Management Council; Resolution C 18, containing the approval of the CCPS studies programme and its implementation; Resolution C 12, on the organization of vocational training; Resolution C 14, on the organization of the work of the International Bureau, etc.

<sup>2</sup> Hitherto, only Acts drawn up by Congress were notified through diplomatic channels.

<sup>3</sup> At the same Vienna Congress, political declarations made unilaterally by various delegations during Congress or on signing the Acts were for the first time grouped together under the title "Declarations Made on Signature of the Acts". These are not strictly "decisions", since Congress did not have to state its views about them.

(2) Executive Council

39. The powers of the Council are laid down restrictively in the Acts (see, e.g. Article 102 of the General Regulations). The Council has a certain power of decision, but this is limited to clearly defined fields relating mainly to the internal operation of the Union and its bodies (considering the Union's budget in accordance with the General Regulations, Article 102 (5) (j) (i), etc.).

40. In the postal field, the Council is empowered to prepare studies on questions assigned to it by Congress or adopted on its own initiative. However, in principle it is not authorized to take decisions on the basis of the results of such studies if the decisions would commit UPU members. At the most, the Council can draft proposed amendments to the Acts for submission to Congress or submit them to a referendum of member countries between Congresses.<sup>1</sup>

41. The Council can also make recommendations of an optional nature to the Administrations of member countries.<sup>2</sup>

(3) International Bureau

42. The International Bureau, a permanent body serving as a liaison, information and consultation body for Postal Administrations (Article 20 of the Constitution), is not empowered either to take decisions regarding the postal service or even to make proposals for the amendment of the Acts. As part of its activity, it can be instructed to make studies or to state its views on simple questions, but these views are purely advisory; similarly, the views expressed by the Bureau at the request of Administrations are purely for information and, as such, in no way binding.

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<sup>1</sup> The Vienna Congress entrusted the Council with some forty legislative and administrative studies. The same Congress also had to consider a large number of proposals by the EC for the amendment of the Acts. At the moment, the Council has just submitted to the Administrations of member countries a proposed amendment to an article in the Detailed Regulations of the Convention, the amendment of which is necessary owing to the measures taken in virtue of Article 108 of the General Regulations, which deals with the languages used for publishing the Union's documents.

<sup>2</sup> See, e.g., the recommendation on the use of a new postal form - IB circular 155/1966.

43. A UPU member country and its Postal Administration may be bound:

- (a) directly by a Resolution which is simply the implementation of the provisions of the Acts (e.g., of Article 21 (4) of the Constitution). Such cases are very rare, and they have the character of an administrative act. It can be said that, in principle, the Acts of the UPU give the bodies of the Union no power to draw up clauses which would be binding upon member countries or their Postal Administrations;
- (b) by an interpretation of the Acts adopted by the Administrations between Congresses;
- (c) indirectly, as members of a collective body, by decisions affecting that body or adopted by it.

DOBBERT

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AMERICAN SOCIETY OF INTERNATIONAL LAW

SECOND CONFERENCE  
OF LEGAL ADVISERS AND OTHER OFFICIALS OF  
INTERNATIONAL ORGANIZATIONS

The International Civil Aviation Organization -  
A Case Study in the Implementation of Decisions  
of a Functional International Organization

by

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Foreword

This paper describes the experience of the International Civil Aviation Organization in the implementation of its decisions and is entitled: "The International Civil Aviation Organization-A Case Study in the Implementation of Decisions of a Functional International Organization".\*

The subject is examined under three broad headings: (1) Technique of making decisions legally binding and practically effective; (2) Techniques available <sup>in ICAO</sup> to encourage compliance with decisions, and (3) Specific topics and questions. Item (1) is concerned with the theories underlying the effectiveness of decisions of international organizations working in the functional field. Item (2) examines the methods of adoption of ICAO regulatory material and the process followed in its implementation. Item (3) discusses various topics and questions posed by the sponsor of the conference for which the paper was prepared; it gives a sampling of ICAO experience in the implementation of a wide variety of decisions including decisions other than those concerned with the adoption of regulatory material.

Briefly, ICAO is a specialized agency in relationship with the United Nations, established under the Convention on International Civil Aviation (Chicago, 1944),\*\* with some 114 contracting states now belonging to it and having jurisdiction over matters pertaining to international civil aviation. One of the important tasks of ICAO is to adopt technical regulatory material and regional plans with a view to ensuring the safety, efficiency and regularity of international civil aviation. ICAO is also active in the economic and legal fields, and also performs a substantial amount of work under the United Nations Development Programme.

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\* The paper was prepared for presentation to a conference of legal advisers and other officials of international organizations, held under the auspices of the American Society of International Law, at Bellagio, Italy, from 26 to 31 August 1967, to discuss the subject: "Decisions of International Organizations: Effectiveness in Member States".

\*\* 34 U.N.T.S. 295(1948).

## I. Technique of making decisions legally binding and practically effective

### 1. Preliminary comments

The theme of the Conference is: "Decisions of international organizations: effectiveness in member states". This theme may be examined in relation to the decisions classified in different ways and the classifications may vary from organization to organization. The decisions of a functional international organization like ICAO may be classified and examined under various headings of which the following are examples:

#### (1) Form

Treaty, organizational decision, resolution, recommendation and consensus.

#### (2) Subject-matter

Constitutional, administrative, technical, economic, legal and technical assistance.

#### (3) Terms

- Hortatory: Such decisions do not impose legal obligations; but the extent to which they influence the behaviour of a state is important.
- Binding: Such decisions impose legal obligations.
- Mixed: Such decisions contain both hortatory and binding provisions.<sup>1</sup>

The decision of an international organization will be effective to the extent to which it can be implemented. The prospects of implementation will be affected by such variable factors as the following: Time of adoption of decision; issues involved; nature of

size of majority, unanimity, states voting for and against, abstentions; language in which decision framed; methods and means available for implementation; extent to which expectations of member states of organizations are raised by decision<sup>2</sup> and sanctions.

No attempt is made here to comment on the foregoing items in detail; but some of them will come up for consideration in the discussion below.

## 2. Extent to which decisions are binding

There has been much discussion concerning the extent to which decisions of international bodies are to be considered to be legally binding upon member states of international organizations. One commentator writes of "the rather indefinite line that separates binding from non-binding norms governing international behaviour".<sup>3</sup> Much depends on whether the decisions are concerned with the internal operations of the organizations (states will usually accept financial obligations under the regular budget for regular operations)<sup>4</sup> or with important substantive issues in respect of which the constituent instrument gives certain powers to the decision-making body. The form of the decision, the variables applicable to it and the sanctions for non-compliance are important factors in assessing the extent to which a resolution is binding. Many resolutions are couched in hortatory terms which clearly put them into the class of recommendations in relation to states; but they may, at the same time, contain binding instructions for subsidiary bodies of the organization.

A distinction can be made between "law-creating" and "law-applying" resolutions of an international organ.<sup>5</sup> There are relatively few of the latter in international bodies if constitutional and internal housekeeping resolutions are disregarded. As to the latter, there is authority for the proposition that resolutions dealing with

the internal operations of the United Nations have the status of law.<sup>6</sup> But even if resolutions are not backed up by legal sanctions, i.e., sanctions expressly stated in the constituent instruments of the organization concerned, they could nevertheless be called "law-making" in a broad sense on the ground that reasonable community expectations with respect to the behaviour of states in conformity with these resolutions are a much more important indication of the existence of law than is the formal language accompanying the standard-setting act.<sup>7</sup>

The technique for making decisions legally binding can vary widely and may be shaped in some cases by the form of the decision, i.e., the enacting language, the extent to which the decision has a solid foundation in the constituent instrument itself, and in others on the preparation and adoption of a solemn instrument opened for signature and ratification in due course. These items, too, will be examined in relation to ICAO.

Leaving aside other types of decisions (involving, for example, the adoption of conventions) by international deliberative organs, it may now be of interest to examine the varied language used in some of the resolutions of the 15th Session of the ICAO Assembly<sup>8</sup> and then to consider typical Council resolutions and decisions. If this material is examined in the light of the above general considerations, it is seen that not too many ICAO decisions have binding force.

Decisions of the ICAO Assembly run the gamut from hortatory resolutions addressed to states, through instructions to subsidiary organs of ICAO, to resolutions binding on states and concerned with the adoption of the budget and scale of assessments on states. By



way of example, here are varied terms taken at random from the resolutions of the 15th Session of the Assembly: "urges the Governments" (A15-1); "reiterates its request ... to recipient States" (A15-4); "draws the attention of recipient States" (A15-4); "reminds recipient States" (A15-4); "reaffirms the validity of Resolution..." (A15-4); "reaffirms the need for user and provider Contracting States to give serious consideration" (A15-5); "invites States to examine"(A15-5); "strongly condemns" (A15-7); "requests all nations and peoples of the world" (A15-7); "urges South Africa to comply" (A15-7); "declares that the Appendices...constitute the consolidated statement of continuing air navigation policies" (A15-8); "resolves" (A15-8 and Appendices, but the various sub-resolutions to the main resolution are mostly hortatory); "encourages Contracting States" (A15-21); "resolves that the Contracting States should continue to review periodically their national procedures and practices" (A15-23); "that the Contracting States should report to ICAO" (A15-23); "resolves that ... there is hereby authorized for expenditure ... " (Budget Resolution) (A15-26); "resolves that the budget appropriations shall be financed as follows: ... by assessment on Contracting States" (A15-26); "directs the Council" (A15-1); "requests the Council" (A15-1) and "requests the Secretary General" (A15-1).

Save for the budgetary resolutions, it could hardly be said that merely because resolutions of the Assembly include such words as "resolves" and "declares", they are binding on member States of ICAO. Many resolutions of the Assembly are directed to the Council and "request" it, "instruct" it, "invite" it to do certain

things or "approve" action taken by the Council. States could be indirectly affected, though not necessarily bound by, some of these resolutions which, for example, might bind the Council to procure certain information from States.

It may also be observed that many decisions of the Assembly will be found in reports of its various committees and commissions as approved by the Assembly in plenary meetings and will not be in the form of a resolution.

The practice of the ICAO Council (a 27-member body) in making decisions is to adopt formal resolutions only rarely. When formal resolutions or declarations are adopted, they are intended to have a considerable moral effect. For example, the Council has adopted formal resolutions in relation to the interpretation of Article 5<sup>10</sup> of the Convention, the elimination of burdensome insurance requirements, the elimination of double taxation in relation to certain aspects of international air transport<sup>11</sup> and the use of international airports by many types of international civil aviation without any unnecessary restrictions.<sup>12</sup>

Of specific interest are the Council resolutions used for the adoption of Annexes to the Convention. These resolutions are founded on specific provisions of the Convention which spell out the procedure for the adoption of Annexes. They have changed but little since their original pattern was established in 1948.

The extent to which they are binding will be discussed later.

3. Sanctions and the question of practical effectiveness of a decision

The form of the decision does not tell the whole story of the extent to which it is binding. It is also necessary to examine the question of sanctions for non-compliance with, or non-implementation of, the decision by States.

On the national level, a powerful inducement to a citizen to comply with a law is the sanction stipulated for non-compliance, the sanction often being in the form of a fine or imprisonment or both. Since the members of intergovernmental international organizations are sovereign states, relatively few written sanctions are found in the constituent instruments of these organizations.

Much of the writing on the subject of practical effectiveness of the decisions of international organizations has been about the effectiveness of the resolutions of the United Nations General Assembly where the political content is high and effective sanctions, apart from power considerations, low.<sup>13</sup> A number of authors, however, have examined the effectiveness of decisions of functional international organizations, e.g., those concerned with communications and welfare.<sup>14</sup> Here, the international sanctions will reside in the non-participation of the non-conforming member state in the benefits flowing from observance of the norms stipulated in decisions of the organization.<sup>15</sup> In writing of the International Monetary Fund, one author draws the distinction between legal sanctions (e.g., those which the organization itself may impose or which other member countries may take) and natural sanctions which, through the nature of the activity in question, will result from non-compliance with its laws.<sup>16</sup> A breach of economic laws could lead to economic ruin and of aeronautical laws, to a disastrous accident. Some of the legal and natural sanctions found in the case of ICAO decisions will be examined later.

Sanctions other than the above would include the following: direct retaliation by governments concerned; adverse reaction of governments other than those immediately concerned; political criticism from non-complying government's own constituents; sense of having breached the moral norm inherent in the law-maker (i.e., the organization) as the representative of the community expectations.<sup>17</sup>

One may now consider what has been called the "normative function of the organized international community".<sup>18</sup> If this community establishes an international organization to enact norms for the performance of a particular activity (e.g., international

civil aviation), enactment of these norms, depending on the clarity of their definition and the form in which they are enacted, will raise community expectations of compliance with them even where, in the interests of flexibility, states are permitted to contract out. It follows that if states wish to participate in and benefit from that particular form of activity, they ought to recognize and observe these norms as the price of their participation.<sup>19</sup> This involves the "sanction of reciprocity".<sup>20</sup> Non-compliance with the norm entails a disentitlement to enjoyment of the activity in the company of other states belonging to the norm-establishing organization.

ICAO has a large normative function, although a limited legislative role, in so far as concerns the adoption of some of its technical normative<sup>21</sup> material. By far the greater part of its decision-making power in this regard is concerned with the adoption or approval, as the case may be, of standards, recommended practices and procedures as well as regional plans for equipment and services in respect of which states are free to file differences.

True, there is a formal desirability of notification of non-compliance by a state with regulatory material due to the lessening of community expectations in the event of non-compliance by that state. But notification is also substantively desirable in order that those engaged in international air navigation may know the technical conditions under which the flight of an aircraft is going to be performed at any particular point in the ICAO constituency.

Before the discussion on sanctions is closed, it will be appropriate to give the following examples of sanctions in the Chicago Convention that would serve to bring about compliance with decisions of the Assembly and Council:

(1) Failure to pay, within a reasonable period, contributions to the regular budget voted by the Assembly may lead to suspension of voting power in the Assembly and in the Council.<sup>22</sup>

(2) A contracting state will not recognize as valid certificates of airworthiness and certificates of competency and licenses of personnel issued or rendered valid by another contracting state in which the aircraft is registered unless the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to the Convention.<sup>23</sup>

The standards in question would be those adopted by the Council and found in Annex 1 (Personnel Licensing) and Annex 8 (Airworthiness). Non-compliance of a state with the standards adopted by the Council for the certificates and licenses concerned would lead to the non-recognition of these documents for the purposes of international air navigation. The Convention provides for endorsement of certificates and licenses, which fail to satisfy the international standards<sup>24</sup> and prohibits the aircraft or personnel concerned from participating in international air navigation, except with the permission of the state or states whose territory is entered.<sup>25</sup>

(3) Depending on the circumstances, under Chapter XVIII of the Convention, a final and binding decision on a disagreement concerning the interpretation or application of the Convention and its Annexes may be rendered by the Council, the International Court of Justice or an arbitral tribunal.<sup>26</sup>

The Convention provides for compliance with such a decision and stipulates the following penalties:

- If the Council has decided that an airline of a contracting state is not conforming to a final decision as described above, each contracting state undertakes not to allow the operation of the airline through the airspace above its territory. <sup>27</sup>

- The Assembly shall suspend the voting power in the Assembly and in the Council of any contracting state that is found in default under the provisions of Chapter XVIII. <sup>28</sup>

The fact that a disagreement concerning the interpretation or the Convention or of application of/an Annex (which is, through a Council decision, adopted and subsequently becomes effective and applicable) can be brought before the Council could be an incentive to compliance with the Convention and, in the case of Annex, with the related Council decision adopting it.

One may now turn to a detailed consideration of the pursuance of the objective of the practical effectiveness of decisions under various headings.

4. Pursuance of objective through adoption of

(1) New treaty

Inter-governmental conventions and agreements have been adopted by an ICAO body or by conferences held under the auspices of ICAO. All of these documents have been subject to ratification, adherence, acceptance or some form of consent of the states concerned. Examples of such documents are:

- Convention on the International Recognition of Rights in Aircraft, adopted by the Assembly at its second session at Geneva in 1948. <sup>29</sup>
- Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, adopted at an International Conference on Private Air Law, held under the auspices of ICAO at Rome in 1952. <sup>30</sup>

- Agreement on North Atlantic Ocean Stations adopted at an International Conference held under the auspices of ICAO at Paris in 1954.<sup>31</sup>

(2) Organizational decision

Examples of an organizational decision in ICAO might be the action taken by the Assembly or Council in adopting their rules of procedure which are binding on states participating in meetings of those bodies (Chicago Convention, Arts. 49 (d) and 54 (c)).

(3) Resolution

In ICAO there are resolutions of the Assembly, various resolutions of the Council and those emanating from various subsidiary bodies (e.g., Air Navigation Commission, divisional meetings, regional meetings, meetings of the Legal Committee, conferences). None of the resolutions of bodies below the level of the Council would have binding force, though the Air Navigation Commission adopts some <sup>normative</sup> regulatory/material to which the contracting-out principle applies.

(4) Recommendation

Recommendations may be adopted by bodies such as those listed in the preceding paragraph. They are not binding.

(5) Consensus

The use of the consensus<sup>32</sup> process is increasing in ICAO as elsewhere in the UN family,<sup>33</sup> though the decisions reached through this process are no more or no less binding than decisions reached through other processes.

5. Encouragement of governments

(1) Coordination of policies

A good example of a resolution encouraging governments to coordinate policies is the Assembly resolution containing the

consolidated statement of continuing ICAO policies relating specifically to air navigation.<sup>34</sup> Many

provisions of this resolution in effect urge governments to adopt the same policy in regard to specified matters.

(2) Enactment of consistent municipal legislation

The very purpose of the adoption of Standards, Recommended Practices and Procedures, and other regulatory material, by ICAO, is to encourage governments to enact consistent municipal legislation which will include this material. Thus, the forewords to ICAO Annexes contain the following note:

"Use of the text of the Annex in national regulations:

The Council, on 13 April 1948, adopted a resolution inviting the attention of Contracting States to the desirability of using in their own national regulations, as far as practicable, the precise language of those ICAO Standards that are of a regulatory character and also of indicating departures from the Standards, including any additional national regulations that were important for the safety or regularity of air navigation."

Obviously, much of the material in the Annexes cannot be incorporated textually into national regulations and some of the provisions will require amplification. (e.g., certain provisions of Annexes 6 - Operation of Aircraft and 8 - Airworthiness of Aircraft). But a great number of the Annex provisions, especially those in Annex 2 - Rules of the Air, can be found, without textual change, in national regulations.<sup>35</sup>

Conventions on air law adopted by ICAO-sponsored conferences can lead to consistent municipal legislation.<sup>36</sup> Countries of the British Commonwealth tend to append the text of a convention as a schedule to enabling legislation.<sup>37</sup> In the United States, however,



ratification of, or adherence to, a convention makes it the law of the land without the necessity of enabling legislation.<sup>38</sup>

Certain decisions of the Council not concerned with SARPS\* can produce consistent municipal legislation. For example, the definition of scheduled international air service adopted by the Council in 1952<sup>39</sup> has been incorporated in the national laws of some contracting states or used by states in practice.<sup>40</sup>

6. Inducement of governments to undertake formal obligations to act

The various ways in which governments are induced by ICAO to undertake formal obligations to act will become apparent from what is stated in the discussion on implementation below.

7. Circumstances in which the "binding" decision (whether cast as a treaty or an action formally approved by prescribed voting procedures in the international organization) becomes directly effective upon the nations of member states without the requirement of further government action

The Council resolved, in adopting Annex 2 (Rules of the Air) in April 1948 and Amendment No. 1 to that Annex in November 1951,<sup>41</sup> that the Annex constituted "Rules relating to the flight and manoeuvre of aircraft" within the meaning of Article 12 of the Convention. Over the high seas these rules apply without exception since Article 12 provides, inter alia, that

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\* Standards and Recommended Practices.

"Over the high seas, the rules [meaning the rules of the air] shall be those established [by the Council] under this Convention."

Therefore, when the Council adopts rules of the air and declares that they are applicable over the high seas, they apply to aircraft of ICAO contracting states and the air crew on board without any further implementing action being required on the part of those states other than to take steps to ensure compliance by their aircraft and crew members with the rules so applicable.<sup>42</sup>

A Council decision which adopts and provides for the eventual coming into effect and applicability of international standards on personnel licensing (Annex 1) can, through the operation of Articles 39 and 40 of the Convention, bind persons to comply with that decision provided that the state issuing or validating the license has not filed with ICAO differences relating to the standards which the Council decision makes otherwise applicable to the class of license or certificate concerned. Thus, according to Article 39, any person holding a license who does not satisfy in full the conditions laid down in the international standards relating to the class of license or certificate which he holds shall have endorsed on or attached to his license a complete enumeration of the particulars in which he does not satisfy such conditions. Admittedly, the state has to intervene in order to make the endorsement on the license. But once the endorsement exists, the Convention applies directly to the holder of the endorsed license and stipulates, in Article 40, that no personnel having such a license "shall participate in international [air] navigation, except with the permission of the state or states whose territory is entered".

Another example of a binding decision being directly applicable to a national of a contracting state would be the imposition of a penalty (namely, denial of permission to fly internationally) on an airline of a contracting state where the airline is not conforming to a decision rendered by the Council in the case of a dispute concerning the interpretation or application of the Convention or its Annexes.<sup>43</sup>

Such a case of non-compliance has not yet arisen.  
in ICAO

## II. Techniques available/to encourage compliance with decisions

### 1. General

The question of implementation of ICAO decisions will now be examined in detail. Routine decisions of the Assembly and Council request states to take appropriate action and to advise the Secretariat of the action taken. Similarly, certified copies of conventions adopted at meetings held under the auspices of ICAO are sent to states with the request that they become parties to these documents.<sup>44</sup> Requests in regard to matters such as the foregoing may also be made orally through contact of Secretariat officials with national officials. These are all relatively routine techniques.

It is in the area of implementation of the ICAO normative material (standards, practices, procedures and air navigation plans for facilities and services) that ICAO has developed detailed techniques for implementation. Because ICAO experience in this kind of implementation has been so vast, the relevant techniques will now be described in detail. Before this description is given it will be necessary to examine the ICAO normative material

and the method of its adoption and approval as the case may be.

2. ICAO regulatory material and air navigation plans

With a view to securing the highest practicable degree of uniformity in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation, ICAO adopts international standards, recommended practices and procedures dealing with a wide range of subjects.<sup>45</sup> It also approves regional plans covering facilities and services required for air navigation.<sup>46</sup> The various types of the foregoing material will now be discussed.

(1) International Standards and Recommended Practices (SARPS)

These are adopted by the Council in accordance with Articles 54 (1), 37 and 90 of the Convention on International Civil Aviation and are designated, for convenience, as Annexes to the Convention. A two-thirds vote of the Council is required for adoption of an Annex. The uniform application by contracting states of the specifications comprised in the International Standards is recognized as necessary for the safety or regularity of international air navigation, while the uniform application of the specifications in the Recommended Practices is regarded as desirable in the interest of safety, regularity or efficiency of international air navigation. Knowledge of any differences between the national regulations or practices of a state and those established by an International Standard is essential to the safety or regularity of international air navigation. In the event of non-compliance with an International Standard, a state has, in fact, an obligation, under Article 38 of the Convention, to notify the Council of any differences. Knowledge of differences from Recommended Practices may also be important for the safety of air navigation and, although the Convention does not impose any obligation with regard thereto, the Council has invited contracting states to notify such differences in addition to those relating to International Standards.

(2) Procedures for Air Navigation Services (PANS)

These are approved by the Council for worldwide application. They comprise, for the most part, operating procedures regarded as not yet having attained a sufficient degree of maturity for adoption as International Standards and Recommended Practices, as well as material of a more permanent character which is considered too detailed for incorporation in an Annex, or is susceptible to frequent amendment, for which the processes of the Convention would be too cumbersome. As in the case of Recommended Practices, the Council has invited contracting states to notify any differences between their national practices and the PANS when the knowledge of such differences is important for the safety of air navigation.

(3) Regional Supplementary Procedures (SUPPS)

These have a status similar to that of PANS in that they are approved by the Council, but only for respective application in the eight geographical regions<sup>48</sup> established by ICAO both to cater for different types of flying operations and to facilitate detailed planning of needed facilities and services to support these operations. They are prepared in consolidated form, since certain of the procedures apply to overlapping regions or are common to two or more regions. More often than not the SUPPS are approved by the President of the Council under delegated authority. If states have differences in respect of SUPPS, they are encouraged to notify them to ICAO.

(4) Regional Plans

Plans for the eight ICAO regions include the enumeration of many tens of thousands of facilities to be established and operated or services to be rendered, at points that ICAO regional meetings have defined and that the Council has approved, after review of the reports of these meetings by the Air Navigation Commission.

Under the Convention each state is individually responsible for providing the recommended facilities and services within its territory, albeit "so far as it may find practicable" (Article 28). But financial and technical resources vary widely between states in a region and this poses a problem in implementation of regional plans.

(5) Development of SARPS, PANS and SUPPS

The development of SARPS and PANS will serve to indicate the great extent to which states are consulted in advance of their becoming applicable and this in itself is a step towards implementation.

(a) Divisional-type meetings (open to all contracting states), panels of limited membership and other bodies prepare recommendations for SARPS and PANS, or for amendments thereto. The steps in this operation are broadly as follows:

Air Navigation Commission

- The / decides that such a meeting should be held and a final decision thereon is taken by the Council.
- States are consulted on the agenda and comment on advance documentation.
- Documentation from the Secretariat, contracting states and international organizations is placed before the meeting.
- The report of the meeting is reviewed by the Air Navigation Commission in the light of comments received from states, international organizations and the Secretariat.
- The finalized SARPS and PANS are submitted to the Council for adoption or approval as the case may be.

(b) The Council adopts the SARPS in a formal manner and the resolution of adoption stipulates, inter alia:

(i) Effective date: This is the date by which the Annex becomes effective unless in the meantime the majority of the contracting states have indicated their disapproval. <sup>50</sup> To date, there has been no such indication of disapproval.

(ii) Date of applicability: This is the date by which contracting states are to be ready to implement and, if unable to do so, are obliged to notify ICAO of differences between their own national practice and that established by the international standards contained in the Annex.<sup>51</sup> This gives the other contracting states notice of the inability of the notifying/<sup>state</sup> to satisfy community expectations arising out of the adoption of Annexes and amendments thereto. In practice, states are requested to notify differences with regard to Recommended Practices since, as stated above, knowledge of these differences may be important for the safety of air navigation.

(c) PANS and SUPPS (which being concerned with the detailed application of SARPS, need not originate as recommendations of meetings) are approved (not adopted) by the Council, there being no two-thirds majority vote required for approval of this material as in the case of the adoption of SARPS.<sup>52</sup>

Since the fact of the approval of the PANS and SUPPS leads to community expectations in regard to the way in which air navigation will be carried on, here also there is a functional need for the notification of differences. Therefore, states are requested to notify differences to PANS and SUPPS, even though not obliged to do so under the Convention.

(6) Development of Regional/<sup>Air Navigation</sup> Plans

The plans for air navigation facilities and services needed in a region and for regional procedures to be applied are developed at Regional Meetings as recommendations to the Council<sup>53</sup> and, after review by the Air Navigation Commission, are approved by the Council.

(7) Normative material on facilitation of international  
air transport

The ICAO normative material on facilitation of international air transport is developed and adopted in a manner similar to that applicable to technical items. Annex 9 to the Convention contains Standards and Recommended Practices on facilitation of international air transport. These provisions aim at (i) eliminating all unessential documentary requirements, (ii) simplifying and standardizing the remaining forms, (iii) providing certain minimum facilities at international airports and (iv) simplifying handling and clearance procedures.<sup>54</sup>

2. Implementation of ICAO normative material

(1) Introduction

From its very inception, ICAO has been pre-occupied with the necessity for effective implementation of its normative material in the technical field and Regional Plans. This pre-occupation is reflected in policy resolutions on the subject adopted at the major sessions of the ICAO Assembly and in the constant effort by the subsidiary organs and the Secretariat to translate policy into action.



The process of implementation begins even before the decision adopting or approving the material to be implemented becomes applicable. Thus, in the case of amendments to an Annex, states will be consulted on the agenda for the meetings (whether of a division open to all contracting states or a panel of limited membership) at which the draft amendments will be prepared. The states are asked to send comments on the working papers, are free to participate in divisional-type meetings, are consulted by the Secretariat on all reports emanating from these and other meetings and have their comments considered by the Air Navigation Commission which approves draft amendments for submission to the Council. States are also given an opportunity to disapprove material adopted by the Council<sup>56</sup> and will, in any event, be given many months' warning before an amendment becomes applicable. In addition, prior to adoption or approval of the material there will be a careful evaluation of its necessity and the cost of implementation.

The basic steps in the implementation process will emerge from the ensuing discussion. The exact steps may vary depending on whether SARPS, PANS, SUPPS or Regional Plans are involved.

In the case of SARPS, PANS and SUPPS, the Council and the Air Navigation Commission keep the progress in implementation under constant review and file reports with the Assembly which, in turn, adopts related up-to-date policy statements on implementation.<sup>57</sup> An outline of some of the problems encountered in the implementation process and of some of the solutions suggested from time to time will be found below.

As to Regional Plans, there is a constant attempt to remedy deficiencies in the plans for facilities and services required for international air navigation in the eight ICAO regions. The Assembly

receives reports on this subject and also adopts up-to-date statements. A Special Implementation Panel was established by the Assembly in 1956<sup>59</sup> as a temporary body to examine the adequacy of Regional Plans and to make appropriate recommendations. As this was a thorough-going examination, the problems uncovered by it and the suggested solutions found in its report will be given below. This group was succeeded by a Standing Group of the Council on Implementation established in 1960 to keep the question of implementation of Regional Plans under review.<sup>60</sup>

(2) Implementation of SARPS and PANS-Problems and solutions

The problems arising<sup>in</sup>/the implementation process and the solutions therefor can vary depending on whether or not the SARPS are associated with Regional Plans. Nevertheless, in the interest of developing a composite statement of these problems and solutions, no attempt will be made to discuss them under two separate headings depending on whether or not the SARPS concerned involve Regional Plans.<sup>61</sup>

The difficulties for states to keep their regulations and operating instructions amended to conform to the current provisions of ICAO Annexes (SARPS) and PANS are not inconsiderable; and, as already stated, there are special difficulties where this regulatory material is directly associated with the implementation of Regional Plans which involve the cost of furnishing facilities and services.

After the SARPS and PANS have been adopted or approved by the Council the following sequence of actions is required:

(a) Proper changes made by states and in good time in their regulations and instructions. This involves:

(i) The embodiment of SARPS and PANS in the national legislation or regulations;

(ii) The preparation of manuals or operating instructions under enabling legislation;

- (iii) Distribution of ICAO texts for use at installations.
- (b) The practical application by states of the changes. This entails instructing personnel and, perhaps, obtaining or modifying equipment.

#### Problems

The problems arising in the implementation of SARPS and PANS include:

- (a) Difficulties in establishing national aviation legislation due to lack of personnel skilled in the preparation thereof.
- (b) Difficulties in the administration of national air navigation regulations. Here, it is noted that there is a need for consistent administrative decisions based upon expert knowledge of what is required, the exercise of considerable executive power, and the support of properly drawn detailed aviation legislation. In addition, there must be a constant enforcement of national aviation legislation by highly qualified persons and many such persons.
- (c) The inability of states to cope with frequent amendments to ICAO regulatory documents due to the frequency and sophisticated nature of the amendments and the voluminous and scattered ICAO documentation resulting therefrom. This results in a considerable backlog of unimplemented material.
- (d) The many cases where procedures (e.g., for air traffic services, communications and meteorology) on the national level are many years out of date both at air navigation installations and the headquarters of the national civil aviation department. In 1965, it was estimated in ICAO that perhaps 25% of ICAO contracting states had been able to maintain the operating instructions at their installations essentially in step with ICAO, another 25%

were using instructions that were one to three years out of date and the remaining 50% were even further out of date.

- (e) The lack of complete coordination among SARPS and PANS.
- (f) The lack of funds in certain states for providing trained personnel, services and equipment.
- (g) Particular national, regional and environmental conditions which can affect implementation.
- (h) The necessity of translating the highly technical language of the regulatory material from the ICAO texts (in English, French or Spanish) into the local language or languages of the implementing state.

#### Possible solutions

Possible solutions for solving the problems just mentioned include the following:

- (a) Increase the national administration's capability of taking necessary action on all amendments to SARPS and PANS. This can be done through such varied means as: ICAO Secretariat missions to states; United Nations Development Programme projects; the preparation of guidance documents (manuals, circulars, etc.) that would assist states in the organization of departments concerned with such activities as airworthiness, operations and personnel licensing and in the drafting of specific national regulations; bilateral arrangements of developed states with developing states; regional and inter-regional projects; regional civil aviation training centres; informal implementation meetings on certain subjects (e.g., aeronautical maps); development of common services to serve two or more states and special regional teams on implementation.

(b) Decrease the frequency and number of amendments. The advantage of slowing the pace of amendments would be that it would assist the administrative handling of amendments on the national level and the institution of amended practices at operating installations. Although this solution has been discussed in ICAO circles, it has been rejected because basic ICAO documents must keep up with the most advanced developments and techniques. ICAO specifications should not be allowed to become obsolescent in a dynamic industry. Otherwise, difficulties could arise in areas of high density traffic and complex traffic. Indeed, in those areas states introduce new practices and procedures long before equivalent provisions are included in ICAO documents.

(c) Reduce the content of Annexes to broad basic material. Although the transfer of the more detailed material to PANS would simplify the administrative processing of amendments in many states, the problem of bringing the amended practices into actual use would not be greatly reduced.

(d) Consider the possibility of having two sets of specifications: one simplified and stable, the other complex and flexible. Requirements for stability and flexibility could be reconciled. But the argument against this is that it would constitute a retrograde step. The objective should be to attain universal implementation of a single comprehensive set of specifications. Any downgrading of the specifications in respect of less demanding areas would penalize operators.

The essential elements to be borne in mind in considering any change in policy would be

- (i) The highest level of stability for areas of low traffic density;
- (ii) A high degree of flexibility for areas of high traffic density;
- (iii) Compatibility between the practices in high density and low density areas to ensure satisfactory services to aircraft traversing more than one and to permit a satisfactory inter-working of the ground services network.

But if points (i) and (ii) are valid, the present concept of a basic document for worldwide application in all its detail, kept up to date by amendments of the same character, will not survive. True, a change so as to bring about more stability would put implementation within the capability of the administration in areas of low density traffic; but the documents would not continually reflect the most advanced practice. Unfortunately, the latter is what happens in practice in many administration in areas of low density traffic.<sup>62</sup>

The advantages of flexibility are that of the quick amendment of the basic documents in application to areas of high density traffic, since they could be designed for those areas alone. In theory, the practice in the two types of areas would be different, although compatible.

The Assembly, in 1965, introduced a form of flexibility into the implementation process. It requested the Council to seek measures that will facilitate the task of states in instituting current ICAO practices and procedures at their operating installations. The Assembly further stated that, in developing such measures the Council, after considering the possible impact upon contracting states, may deviate from present policies and practices relative to the content, applicability and amendment of the Annexes and PANS, other than the provisions of the Convention, if it found such deviation unavoidable in order to accomplish the objective. After ascertaining that the action would be acceptable to states, the Council was to give effect to any such measures, to the extent practicable, without further action of the Assembly.<sup>63</sup>

### (3) Reporting of differences or intent to comply

A prime difficulty faced by states in notifying ICAO of the extent to which they comply or do not comply with regulatory material is that if the yardstick against which to measure non-compliance which leads to the filing of differences. The Secretariat gives advice to states, as appropriate, on whether or not their practices constitute differences from ICAO SARPS and PANS. Nevertheless, the view has been expressed that there is a need to develop detailed guidance

material on the reporting of differences, preferably in the form of clear criteria enabling states to determine readily whether or not their individual practices constitute differences. This would be particularly useful to new contracting states. An early step in this direction was taken as long ago as 1950, when the Council adopted a set of principles governing the reporting of differences from ICAO Standards, Practices and Procedures. (See Appendix "A" hereto)<sup>64</sup>

(4) Assembly policy statements on the implementation of SARPS and PANS

The process of implementation of SARPS and PANS is the object of careful study by the Assembly at its triennial sessions. The Assembly policy statement, adopted in 1965, concerning the formulation of SARPS and PANS, contains much material on their implementation. Even in setting the policy concerning formulation of the SARPS and PANS, the resolution is concerned with their eventual implementation. Thus, after defining the expressions "Standard" and "Recommended Practice",<sup>65</sup> the resolution contemplates a high degree of stability in SARPS so as to achieve necessary stability in national air navigation regulations; a limitation of amendments, an effort to ensure complete co-ordination among SARPS and PANS, and freedom of the Annexes from errors or defects of language; consideration by States of recommendations for SARPS and PANS or amendments thereto for a period of three months prior to adoption or approval by the Council and detailed comments of the states on these recommendations; the establishment of the date for disapproval so as to allow study by states during the full period of three months provided in Article 90 of the Convention and the fixing of dates of applicability of SARPS in such a way that sufficient time will be allowed to enable states to complete their arrangements for implementation thereof.

The Resolution also provides that, in considering measures relating to the application of the provisions of the Annexes, such steps as may be feasible should be taken to ensure that the preparation of standards involving the provision and operation of facilities and equipment, whilst ensuring safety and regularity, takes into account the importance of securing the correct balance between the economic aspects of, and the operational requirements for, such standards.

It is further provided that a programme for the application of amendments to SARPS and PANS should be followed so that the relevant national regulations of Contracting States will not be required to be amended more frequently than at intervals of one year,<sup>66</sup> departures from this policy taking place only in exceptional circumstances.

Having thus established a policy concerning the development of the SARPS and PANS which paves the way for their eventual implementation, the Assembly then proceeds to adopt a policy statement specifically concerned with their implementation. The Council is instructed to encourage and foster the implementation of SARPS and PANS and to assist states in such implementation, using all available **United Nations Programme of Technical Assistance,**<sup>67</sup> means, including the technical advice and expert assistance from the Regional Offices, and the training activities of the Air Navigation Bureau.<sup>68</sup>

The Resolution indicates that emphasis is to be placed on the application of SARPS and PANS in specified fields. In the case of the implementation of programme relating to aeronautical information services and charts, attention is drawn to use to be made of formal and informal regional meetings, experts' assistance to states/<sup>and</sup> the common use by states of facilities on the basis of bilateral or multilateral agreements.



States are to continue and where necessary intensify their efforts to apply, at their operating installations, practices and procedures that are in accordance with the current SARPS and PANS.

States are to consider the practicability of modifying the internal processes by which they give effect to the provisions of SARPS and PANS, if such modification would expedite or simplify the processes or make them more effective.

States are urged to report to ICAO in respect of their territories all cases of non-compliance with, or incomplete implementation of, SARPS and PANS and, at suitable intervals, to provide the Organization with reports on the progress made in implementing SARPS and PANS or on the reasons for non-implementation. The notifications by contracting states of their intent to comply with or differ from the SARPS and PANS are to be made as fully effective as possible and contracting states are to be kept currently informed of such notification by: a) requests by ICAO for reports from states who have fully reported or have never reported; (b) prompt issuance of notification as supplements to the relevant documents. The outstanding differences are to be monitored by the Organization with the object of encouraging the elimination of those differences that are important for the safety of air navigation or are inconsistent with the objectives of the international standards.

Closely linked to the foregoing policy statement is<sup>an</sup> Assembly Resolution<sup>70</sup> which permits the Council to deviate from present policies and practices relative to the content, applicability and amendment of the Annexes and PANS, other than the provisions of the Convention, if it finds such deviation unavoidable in order to facilitate the task of states in instituting current ICAO practices and procedures at their operating installations.

(5) Publications used by ICAO as an aid in the implementation ~~process~~  
of SARPS and PANS

ICAO prepares various publications as an aid in the implementation process. These publications include the items described below.

Supplementary material published with Annexes

The Annexes contain attachments which, in some instances, include material as a guide to the application of the Annexes.

ICAO Field Manuals

Field manuals published by ICAO are also an aid in implementation. These derive their status from SARPS and PANS from which they are compiled. They are prepared primarily for the use of personnel engaged in operations in the field, as a service to those contracting states that do not find it practicable, for various reasons, to prepare them for their own use.

Technical manuals

ICAO-prepared technical manuals provide guidance and information in amplification of the SARPS and PANS, the implementation of which they are designed to facilitate. For example, Doc 7192-AN/857 Part GEN-1 Training Manual Part GEN-1 - Licensing Practices and Procedures (1963) contains detailed information for guidance in the implementation of personnel licensing specifications found in Annex 1 (PEL). Illustrative of the details involved in the implementation process are some of the main chapter headings, thus: the role of the personnel licensing section (PEL) in a civil aviation administration; laws and regulations governing licensing; elements of a license; technical training in relation to licensing; technical examinations and their relation to licensing; the action of licensing and licensing staff. The publication contains no less than twenty detailed appendices.

ICAO Circulars

ICAO Circulars make available specialized information of interest to contracting states and some of them are of direct use in the implementation process. For example, CIRCULAR 53-AN/47/3 Flight Crew Fatigue and Flight Time Limitations, 3<sup>rd</sup> ed., 1964, pp. 155, contains detailed material on the implementation of paragraph 4.2.7.4. of Annex 6 (Operations).

(6) Development and Implementation of regulatory material on Facilitation

The development of regulatory material on facilitation is achieved through means similar to those used in the development of regulatory technical material. Periodic meetings on facilitation put forward recommendations for standards and recommended practices which, after review by states and the Air Transport Committee of the Council, are adopted by the Council as amendments to Annex 9 to the Chicago Convention.

The process of implementation, predictably enough, consists in assistance given by ICAO to states in implementing the facilitation programme. The means used include co-operation with other international organizations and appropriate regional meetings of other bodies dealing with facilitation matters, participation in regional studies when these have facilitation aspects and arranging of visits to states by facilitation experts of the Secretariat.

Here, too, the Assembly adopts resolutions exhorting states to implement Annex 9, to report differences from the provisions of Annex 9, to continue in their efforts to eliminate those differences and to liberalize the formalities imposed on international tourist traffic carried by commercial and non-commercial aviation.<sup>72</sup>

In 1958, the Council issued a document stating ICAO's aim in the field of facilitation. In the view of the Council this document set forth the needs of international civil aviation in such a way as to provide a guide to contracting states for future planning in this field and to inform and assist other organizations interested in the promotion of facilitation. A second edition was issued in 1965. This publication contains a lengthy section devoted to the means of attaining the aims of ICAO in the field of facilitation.

Many of the contracting states have established national facilitation committees, including representatives from the aviation, customs, immigration, public health and tourist departments as well as airline operators to take all the necessary steps for the application of the provisions of Annex 9 in their respective territories. In a number of cases, close co-operation has been achieved between states, either by way of regional meetings or otherwise, resulting in a considerable simplification of border-crossing formalities on flights between their territories.

4. Implementation of Regional Plans

(1) General

Regional Plans provide for the supply of thousands of items of services and facilities and involve substantial expenditures for personnel and equipment. Therefore, their implementation poses special problems. Financial and technical resources vary widely between states in a region and this poses a problem in implementation of Regional Plans.

(2) Special Implementation Panel (1956-1959)

The problems involved in the implementation of Regional Plans and the solutions therefor were stated in detail in a report of the special Implementation Panel <sup>recommended</sup> by the Assembly in 1956, <sup>73</sup> and appointed by the Council almost immediately after the Assembly. <sup>74</sup> This Panel was composed of the President of the ICAO Council and six high aviation officials respectively from Brazil, France, Netherlands, Spain, United Kingdom and United States of America. In view of the high-level calibre of the members of the Panel and the exhaustive nature of its lengthy world-wide study, its statement of the above-mentioned problems and solutions is of permanent interest. A summary of this statement follows. In reading this summary, it should be noted that the Panel, by implication, assumes the existence of a civil aviation organizational structure in each country and also of a national aviation legislation. That these may not exist on anything

like an adequate scale is obvious from the difficulties described earlier in connexion with the implementation of SARPS and PANS. The Panel Report contains, so to speak, an inventory of problems on the operating level where services, equipment and skilled technical personnel are required.

Problems

The problems covered by the Panel's report<sup>75</sup> include the following:

(a) There is a limit to what can be asked from, or recommended to, a sovereign state in terms of taking exceptional measures to remedy a deficiency. (II-4)

(b) The time required to obtain implementation is relatively longer than desirable. (II-4)

(c) In some cases (e.g., air traffic services) operational, rather than political considerations should govern implementation so that it should take place in the territory of more than one state (e.g., Flight Information Regions) or on a regional basis (air traffic control services). (II-10.3.1 and 10.3.3)

(d) The need for highly skilled personnel. (II-10.3.3)

(e) The need for fewer and larger centres (air traffic control).

(Idem)

(f) The need for states to develop and improve techniques and practices to meet new requirements and to train personnel to carry out these techniques and practices. (II-10.4.2)

(g) The need for fixed and expendable equipment, new organizations, operating and maintenance personnel educated in new techniques

and for communications to be provided or improved to permit rapid and reliable exchange of data. (Idem.)

- (h) The pattern of operations may not be an ideal or efficient one. (II-10.5.3)
- (i) The regional plan must reflect valid requirements. Best results will be obtained if entire area can be brought to an adequate level of performance. (II-10.5.3)
- (j) The financial difficulties of the government as a whole. (II-10.5.7)
- (k) The structure of civil aviation machinery, or its position in the overall government organization, is such that its effectiveness is diminished. (II-10.5.8)
- (l) International political complications, (II-10.5.9)
- (m) The ever-present prospect of changes in regional plans is detrimental to implementation. (II-10.5.10)

The Panel noted a number of special difficulties which it encountered in its own work in the implementation process: The poor response to correspondence with states, subsequent to a visit, containing questions or suggestions for remedial action; the reluctance of some states to use foreign personnel at least as a remedial measure, even when funds are available; the unwillingness of states to ask for loans, or to explore how loans might be obtained using the good offices of the Panel, even when the Panel had suggested such a step; the disappointment on the part of some states that the Panel had not been able to offer or give assurances of more concrete help, such as gifts of money, equipment or personnel, or immediate joint financing or technical assistance; and, lastly, the reluctance of airlines to

participate in schemes which might assist to solve some of the major deficiencies but where charges for improved services would result. (Part III-2)

Solutions

The Implementation Panel suggested the following solutions for the above-mentioned problems:

- (a) Visits to states by experts (e.g., in case of communications). (II-10.2.2)
- (b) Cooperative measures among states (e.g., in the flight checking of navigational aids). (II-10.2.6)
- (c) Remedy the lack of spare parts (e.g., in case of communications equipment). (II-10.2.7)
- (d) Better salaries and working conditions for personnel so as to retain them in Government service. (II-16)
- (e) Insistence on the importance of international civil aviation to the state's economy. (II-17)
- (f) Technical solutions
  - (i) ICAO Technical Assistance Programme
    - technical assistance
    - Better share of / funds required for civil aviation (II-20.1.4)
    - in regard to technical assistance
    - Difficulties/include time required to build up a complete technical organization; poor salaries for personnel who are given training. (II-20.1.5)
  - (ii) Bilateral technical assistance
    - Need to avoid duplication of effort or conflicting technical assistance advice among those states furnishing / on a bilateral basis.
  - (iii) Assistance by ICAO Secretariat. (II-20.3)



- (g) Financial solutions (II-21)
- (i) Government themselves/supply funds, although there are needs other than those of aviation to be met. (II-21.1)
  - (ii) Loans from international lending institutions. (II-21.4)
  - (iii) Purchase of equipment by instalments. (II-21.5)
  - (iv) Bilateral financial assistance between states. (II-21.6)
  - (v) Joint financing under/Convention. (II-21.7)
  - (vi) User charges. (II-21.8)

(h) Operating agencies which act as operating agencies of the Government and have the advantage of being autonomous and better prospects for recruiting personnel. (II-22)

Desirable characteristics of an instrument of ICAO to assist in implementation

- (a) Implementation problems should be tackled on a state-wide or system (i.e. COM, MET, ATS etc.) basis. (II-6)
- (b) Consideration of the economic aspects of non-implementation of facilities and services, as well as the purely technical aspects. (III-7)
- (c) High level consultation with states which may be more productive of results in procuring implementation. (III-8)
- (d) Freedom of discussion with states by those authorized to encourage implementation. (III-9)
- (e) Briefing for visits to states. The political, social and economic situation of state visited should be known by those authorized to encourage implementation. (III-10)
- (f) Requests for Council action on problems hindering implementation should be dealt with expeditiously. (III-11)

(3) Standing Group of Implementation of the Council

The Implementation Panel (1956-1959) is not to be confused with the Standing Group of Implementation of the Council. In 1959, the Assembly called for an effort to ascertain major deficiencies in air navigation services on the main international air routes.<sup>76</sup>

Secretariat surveys were made of three regions.

On considering these reports the Council decided that the machinery for promoting the implementation of regional plans should take the form of a standing group with a permanent membership of five (the President of the Council - Chairman, the President of the Air Navigation Commission and the Chairmen of the Air Transport, Joint Support and Finance Committees) and a "floating" membership to be selected by the President of the Council on an ad hoc basis and to be made up of Representatives on Council and members of the Commission, Air Transport Committee and Joint Support Committee familiar with a particular problem or geographical area, and of such persons outside the Organization as the President might wish to call upon.<sup>77</sup> The Group is still in existence and meets regularly to consider problems of implementation.

(4) Assembly policy statement on implementation of Regional Plans

As in the case of SARPS and PANS, the Assembly adopts policy statements concerning the implementation of Regional Plans. The preoccupation with implementation is evident even in the Resolution concerned with the formulation of Regional Plans and SUPPS. Thus, in 1965, the Assembly instructed the Council to

"ensure that implementation dates in Regional Plans involving the procurement of new types of equipment be realistically related to the ready availability of suitable

equipment, preferably from more than one source." <sup>78</sup>

The detailed Resolution <sup>79</sup> on the implementation of Regional Plans and SUPPS provides for prompt information to each contracting state of the recommendation applicable to it for the provision of air navigation facilities and services under an approved Regional Plan and of the associated implementation dates approved by the Council; the preparation by contracting states and the keeping up-to-date of suitable manning plans for the orderly implementation of Regional Plans; the giving of priority by contracting states to these items which are of such a nature that lack of implementation is likely to result in serious deficiencies; periodical progress reports on implementation; criteria for the reporting of deficiencies (by users to states and by states to ICAO where there has been no remedial action by the state concerned); improvement of effectiveness of methods by which deficiencies are isolated and eliminated, and reduction to a minimum of the time taken for investigation of reported deficiencies and action on them by the Organization.

The same Resolution also contemplates various ways and means of fostering and assisting in the implementation of Regional Plans, thus: request of a state for assistance from ICAO after exploring all methods and means for implementation of Regional Plans with which that state is concerned; the holding of informal meetings of states where initiated by states or convened by the Secretary General; assistance by Council to states; assistance through the Expanded Programme of Technical Assistance, technical advice and assistance from the Secretariat and the training resources of the Secretariat; assistance of states by ICAO Regional Offices, and co-ordination, in

particular at the regional level, of all activities of ICAO that can contribute to the implementation of Regional Plans.

As to the economic and financial aspects of the implementation of Regional Plans, the Assembly, in 1965, indicated that before applying to ICAO for joint financing under Chapter XV of the Convention, states would be expected to obtain implementation by means of loans for capital expenditures, operating agencies, technical assistance or other means compatible with the Convention. The Assembly also insisted on the need for user and provider states to give serious consideration, in particular at regional meetings, to the economic justification of projected air navigation facilities and services; requested the Council to assist states, as far as feasible, in their consideration and evaluation of the economic and financial aspects of the Regional Plans; directed the Council to follow closely and analyse pertinent developments in the areas of operational research, systems analysis, and cost/benefit methodology for the information of and possible application by contracting states to planning in connection with air navigation facilities and services, and, lastly, invited states to examine with other states in the region whether the implementation of the particular Regional Plan could be implemented through bilateral or multilateral arrangements. 80

(5) Proposal for the establishment of an Aviation Development Fund

It may be noted that the establishment of an Aviation Development Fund was proposed at the Fifteenth Session of the Assembly (1965). The proposal "envisaged a fund to finance projects or activities designed to implement or assist in the implementation of

regional and national programmes related to overall plans of ICAO for the development of civil aviation. The Fund would primarily provide capital and goods (e.g., telecommunications and navigational aid equipment), but would also cover recurring expenses for maintenance and operation on a diminishing basis. It would be administered by an ICAO Executive Committee which would approve individual projects of up to five years' duration. The proposed fund would not compete with or replace existing sources of air programmes but would be regarded as supplementary to them.<sup>81</sup> The Council and its Standing Group on Implementation having examined this proposal, had doubts as to its practicability, effectiveness and feasibility, but at the same time pointed out alternative methods<sup>82</sup> of financing (e.g., bilateral aid, loans from lending institutions).

### III. Topics and Questions

#### 1. The Choice of techniques to carry out an agreed course of action

##### (1) Undertakings of member states in presumably binding form (Desirability)

The extent to which it will be possible to have member states of an international organization undertake in binding form to carry out a policy or action will depend on many factors. A prime factor will be any provisions of the constituent instrument of the organization which may contain an agreement of the member states to be bound by certain decisions of the organization. In the absence of such provisions, the decisions of the organization will, for the most part, be implemented to the extent that compliance with them is to the mutual advantage of the member states. This is particularly true of functional organizations where compliance with

technical regulatory material adopted or approved by them gives member states the advantage of an ordered participation in a technical activity. For example, in the Convention on International Civil Aviation, compliance with technical regulatory material prepared by ICAO will promote, as contemplated by the Chicago Convention, the "safety, efficiency and regularity" of international civil aviation.

(2) Varying degrees of legal obligation implied by various forms of expressing approval by member states

(a) Ratification of the terms of a treaty

A state that ratifies a protocol of amendment to the Chicago Convention,<sup>83</sup> ratifies or adheres to a convention on air law adopted by the ICAO Assembly<sup>84</sup> or a diplomatic conference convened under the auspices of ICAO,<sup>85</sup> ratifies or adheres to an agreement adopted by the European Civil Aviation Conference for which ICAO supplies Secretariat services,<sup>86</sup> accepts or accedes to an agreement on the joint financing of air navigation facilities and services adopted by a conference held under the auspices of ICAO<sup>87</sup> is legally bound to implement the protocol, convention or agreement as the case may be. The joint financing agreements provide for certain modifications subject to the consent of the contracting states and once this consent is given, the states are legally bound to honour their commitments.<sup>88</sup>

(b) Failure to make timely objection

If the majority of the ICAO contracting states do not, within a specified time, register their disapproval with the Council, of an Annex (or amendment thereto) to the Chicago Convention,<sup>89</sup> the Annex and amendment thereto become effective.

As has been seen from the description of the process of making Annexes applicable, the Annex is not absolutely binding on states even at the date of coming into effect (except in the case of Annex 2 - Rules of the Air in so far as it applies over the high seas). But at least at this date, the Annex has a certain form for the purposes of the next phase of its life.<sup>90</sup>

It is recalled that Article 38 of the Convention provides for the obligatory notification of differences to Standards, Annexes and amendments thereto. If, by the date on which the Annex becomes applicable, a state has notified ICAO of differences between the standards in the Annex material and its national practice, there is a presumption that it has complied with the standards in all respects and it is therefore bound to comply with them, for so long thereafter as it does not notify differences. But, as has been seen in the discussion on implementation, ICAO experience shows that a state which has notified no differences is not necessarily complying in all respects with standards and Annexes. Non-notification in many instances may imply quite the contrary position.

The President of the Council has delegated authority to approve SUPPS. Proposals for amendments are requested by a state or group of states and are circulated by the Secretary General to all states considered to be affected. If there is no objection, the Secretary General circulates the proposal to members of the Air Navigation Commission and the representatives on the Council with a request that he be notified within a certain delay (seven days to three weeks) whether formal discussion is desired. If there is no request for formal discussion, the proposal is approved by the President of the Council. If, on the basis of the original

inquiry of the Secretary General, a state objects, and consultation does not remove the objection, the matter will be considered by the Air Navigation Commission and, if amendment is necessary, by the Council. There is a similar procedure for consequential amendments drafted by the Secretary General, although the Air Navigation Commission can ultimately approve such amendments under delegated authority. While the failure to make the above-mentioned objections will not make the SUPPS binding, the technique of absence-of-objection has an important role to play in the process of consultation which leads to the establishment of a text that raises community expectations. Again, as in the case of the PANS, while the notification of differences to SUPPS is not obligatory, it is encouraged if there are differences to notify.

(c) Modification of treaty by qualified majority

The amendments to the Chicago Convention bind only those states that have ratified the protocol of amendment come into force only in respect of states which have ratified them when ratified by the number of states specified by the Assembly.

(Art. 94(a)) In practice, states have acted so as to comply with constitutional and housekeeping amendments even though they have not ratified them.<sup>91</sup> Thus, no states have objected to the convening of the Assembly less often than annually, to the holding of elections to a 27-member Council instead of a 21-member Council. This does not mean that the non-ratifying states are not free to object.

On the other hand, if an issue were to arise under the amendment which introduced Article 93 bis into the Convention, this amendment being concerned with a political matter (cessation of membership, etc.) difficulties might conceivably be raised by those states which have not ratified it.

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The Danish-Icelandic agreements on joint financing provide for their amendment in regard to finances, equipment and services provided the consent of states responsible for 90% of the contributions is obtained;<sup>93</sup> and some very substantial amendments have been made to the agreements in this regard. States not consenting are not bound to contribute to the new equipment and services. A striking example

of international legislation is that of the adoption by a two-thirds majority (18 out of 27 members) of the ICAO Council of the rules of the air which are applicable without deviation over the high seas.<sup>94</sup> The affirmative vote of 18 ICAO member states can thus bind the remainder of the 114 member states.<sup>95</sup>

(d) Voting for a decision

There are certain decisions which bind a state whether or not it votes for them. For example, when the Assembly adopts the scale of assessments by a majority vote, states in the minority, or not voting at all, are bound to pay their contributions to the ICAO budget.

Obviously, in the case of the adoption of the rules of the air applicable over the high seas, only the maximum number of 27, i.e. the Council member states, out of the 114 ICAO member states would have an opportunity to vote.<sup>96</sup> Nevertheless all 114 states are bound by the decision of the Council.

(e) Voting for a recommendation

It is very doubtful that a state which votes for an ICAO recommendation has a strict legal obligation to comply with it. Much would depend on the nature and content of the recommendation and each case would have to be examined in the light of the

surrounding circumstances. An affirmative vote of a state for a recommendation could raise an expectation of compliance by that state with the recommendation.

In the somewhat special case of a Recommended Practice included in an Annex, in respect of which Recommended Practice only a Council member state is entitled to vote, heightened expectation of compliance could arise also vis-à-vis a non-Council state that had no opportunity to vote. This expectation would arise from the fact that the Council, <sup>in</sup> adopting a Recommended Practice included in an Annex, acts on behalf of all ICAO member states and that, in practice, states are encouraged to comply with Recommended Practices and to notify ICAO if they do not comply with them. A similar situation exists in the case of the approval of PANS and SUPPS. Their approval by ICAO raises expectations of compliance in the absence of notification of differences by the states.

(f) Other expressions of consensus

Sometimes a consensus will become manifest through a decision taken in the absence of objection. Thus, at the 14th session of the Assembly in 1962, it was agreed, in the Executive Committee and the Plenary Meeting of the Assembly itself, that, in the absence of objection, states that had not ratified the amendment to the Chicago Convention increasing the number of Council seats from 21 to 27 could both vote in the election for all 27 Council members and stand for election.<sup>97</sup>

An important decision was taken at the 15th session of the Assembly in 1965 when the Delegation of Roumania was seated in the absence of objection. Roumania had previously deposited an instrument of adherence to the Convention with the

Government of the United States of America under Article 92  
98  
of the Convention,

2. Legal effects of member states' approval of decisions

(1) The practical significance and the assumed legal effect of a state's support and formal vote for a recommendation, resolution, interpretation and formal decision through its representative in an international organization

(a) Practical significance: A case has not arisen in clear terms, except in the case of housekeeping decisions (e.g., assessments for the budget). It is quite possible for a state to vote for a recommendation and not implement it, although, on the basis of its support and affirmative vote, there might be an expectation that it might implement. In the case of a consensus, representatives may make it clear that they participate in the consensus formation without binding their governments. This happened in the Subcommittee on Article 77 of the Chicago Convention which reached a consensus on the possibility of the registration of aircraft of international operating agencies on other than a national basis.<sup>99</sup> At the same time, within the organ concerned, there may be a strong feeling of loyalty to the consensus on the part of the members once it has been achieved.<sup>100</sup>

(b) Assumed legal obligation: In many cases, a state's support and vote for a decision does lead to the assumption that it is legally bound by the decision. Other decisions are binding and any state, irrespective of whether it votes at the meeting at which the relevant decision is taken, is bound, for example, to pay assessments once the scale therefor is adopted by the Assembly;<sup>101</sup> to recognize election of the Council once it has taken place;<sup>102</sup> to recognize the

election of the President of the Council once he has been elected by the Council<sup>103</sup> and to acknowledge a Council decision under Article 87 of the Convention as binding.<sup>104</sup> The contracting-out principle would not apply to such decisions. States will, on occasion, act as though bound by decisions that they have not ratified. For example, they so act in relation to amendments to the Convention concerning the holding of sessions of the Assembly less often than annually<sup>105</sup> and the election of a Council of twenty-seven members instead of twenty-one.

- (2) Instances in which national authorities have acted to carry out decisions of an international organization even though their representatives have not voted for them, or have actively opposed them in the international organization

The International Conference on Private Air Law, held in 1952, adopted and opened for signature the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface.<sup>106</sup> One of the most debated questions at that Conference was whether the Convention should provide that suits could be brought only in the courts of the state where the damage was caused or that they could be brought in a number of courts. Australia and Canada both voted for the second solution; but the Convention, as adopted, included the first.<sup>107</sup> Nevertheless, both Australia and Canada later ratified the Convention.

A state whose representatives at a session of the Assembly are opposed to certain budget estimates which are nevertheless adopted will pay the whole of its assessed contribution, presumably because it considers itself to be bound by the relevant Assembly resolution.

It sometimes happens that, in the ICAO Council, there is a split vote as to the agenda or the site of a meeting. States on the minority side of the vote do not for that reason refuse to be represented at the meeting.

- (3) Whether concepts of legal obligation are invoked in such instances

In the case of assessments for the regular budget of ICAC a concept of legal obligation could be invoked and ultimately non-payment could lead to the imposition of the suspension of voting power and services. <sup>108</sup>

- (4) The obligation, if any, to carry out, through national measures, decisions of an international organization voted for by the representative of a state

Normally, the legal obligation to implement a decision through national measures would flow not from the casting of an affirmative vote, but from the provisions of the <sup>Organization's</sup> constitution. Thus, irrespective of whether a state's representative on the ICAC Council has voted for or against the decision or abstained from voting, the state is bound to comply with the Rules of the Air adopted by the Council for inclusion in Annex 2 to the <sup>Chicago</sup> Convention and declared by it as being applicable over the high seas. This is an exceptional case since the ICAC Standards included in an Annex are normally based on a "contracting-out" concept. According to this concept, a state voting for a Standard in the Council can later file differences to it. But, by way of exception, Article 12 of the Convention provides that the rules of the air in force over the high seas are those established from time to time under the Convention and states are bound to insure their observance. <sup>109</sup>

- (5) Use made of approval ad referendum

Due to the relatively few cases of binding decisions in ICAC, approval of decisions ad referendum (the expression being here used in a flexible and non-technical sense) would be the rule. In this sense it

would apply to Assembly resolutions and decisions except those concerned with such items as the establishment of the scale of assessments, the budget, the suspension of voting power of states in arrears in their contributions and the election of the Council. In the non-technical sense the expression ad referendum could also apply to most Council decisions except those dealing with the adoption of rules of the air for application over the high seas, the power delegated to the Council to make assessments applicable to new states joining ICAG (this exercise of the Council's delegated authority being subject to approval by the Assembly,<sup>110</sup> but not by the new state concerned) and a decision of the Council under Article 67 of the Convention.

A special case is that of the Final Act of the North Atlantic Ocean Stations Conference of 1960 which included amendments that modified extensively the financial arrangements contained in the Agreement on North Atlantic Ocean Stations of 1954. The Conference contemplated the preparation of a Protocol of amendment only if the Council considered this to be necessary. The Council later decided that the recommendations of the Conference could be implemented without modification of the 1954 Agreement and therefore did not prepare a protocol of amendment.<sup>111</sup> This line of action was not surprising since so many of the arrangements in the field of joint financing of air navigation services are subject to modification with the consent. Flexibility of amendment of the arrangements makes it easier to keep the subject-matter of the arrangements up to date with technological requirements. In addition, the co-ordinating role played by the ICAG Council and Secretariat ensure that the consents of states will be elicited in regard to financial changes in the agreements and thus the requirements for more formal procedures of ratification and acceptance of changes are obviated.

The ad referendum concept taken in the technical concept applies to conventions adopted by the assembly or conventions and agreements adopted by ICAO-sponsored meetings. These documents provide variously for states to become parties to them by actions which include the deposit of an instrument of ratification or acceptance following the signature of the representative of the state concerned.

3. Internal legal effects of decisions of international organizations

- (1) Extent to which the various modes described in 1 and 2 above are regarded as being obligations upon governments to adopt consistent policies, legislation and administrative regulations

There are certain provisions of the Chicago Convention which require that legal effect be given, on the national level, to certain decisions of ICAO:

-Rules of the air: Each contracting state undertakes to keep its own regulations in respect of the rules of the air uniform, to the greatest possible extent, with those established from time to time under the Convention. (See Article 12, second sentence)<sup>112</sup>

-Recognition of certificates and licenses: "Certificates of airworthiness and certificates of competency and licenses issued or rendered valid by the contracting state in which the aircraft is registered, shall be recognized as valid by the other contracting states, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention." (Article 33)

The effect of Article 33 is that the policy, legislation or administrative regulations, as the case may be, of a particular state, in so far as concerns the issuance or validation of certificates or airworthiness or personnel licenses, must be equal to or better than minimum adopted by a Council decision.

Similarly, it is provided that "radio transmitting apparatus may be used only by members of the flight crew who

are provided with a special license for the purpose, issued by the appropriate authorities of the state in which the aircraft is registered." (Article 30)

- (2) Extent to which the various modes described in 1 and 2 above are regarded as directly creating rights and obligations in the nationals of governments giving their approval

Provided states comply with the internationally accepted minima for personnel licensing and airworthiness certification, there is a reciprocal recognition of certificates of airworthiness and personnel licenses. The beneficiaries of this recognition are the individuals (whether or not nationals of the state that has issued or validated the certificates or licenses) who hold the licenses or the individuals or airlines whose aircraft have the certificates of airworthiness. Other things being equal (i.e., subject to the obtaining of permits for commercial services) these individuals, who hold proper papers, have the right to participate in international air navigation.

In the case of the Convention on the International Recognition of Rights in Aircraft (Geneva, 1948)<sup>113</sup> which was adopted by the ICAO Assembly, property rights of individuals in aircraft are affected provided the rights have been constituted in accordance with the law of the contracting state in which the aircraft was registered at the time of their constitution and are regularly recorded in a public record of the contracting state in which the aircraft is registered as to nationality. The individual's nationality would be irrelevant provided the property rights were registered and recorded as stipulated by the Convention.

The contract of carriage by air, which is entered into by private persons and airlines, is affected when a state becomes a party to certain documents adopted by ICAO-sponsored conferences. The two documents concerned are



the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 (The Hague, 1955)<sup>114</sup> and the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier (Guadalajara, 1961).<sup>115</sup>

The Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963)<sup>116</sup>, which was also adopted by an ICAO-sponsored conference, will, when it has come into force, affect individuals engaged in flights specified in the Convention.

- (3) Illustrative examples of variations in law and practice among member states of particular organizations in giving effect to treaties or decisions of international organizations as directly applicable municipal law, and of the legal reasoning invoked to support such applications

The question of differences filed in respect of ICAO regulatory material has been discussed earlier in this paper. The basic reasons for the filing of differences are (i) inability of the state concerned to comply with the minima specified in the material or (ii) the ability of the state to do better than those minima. This is not so much legal reasoning as technical reasoning based on the lack of equipment or trained personnel in the case of (i), or superior technology in terms of equipment and personnel in the case of (ii), it being borne in mind that a standard in an ICAO Annex is an international minimum (except in Annex 9 - Facilitation-where minima and maxima are specified). More details concerning this question of differences need not be given here. It may, however, be stated that the legal foundation for the filing of differences in the case of ICAO standards in Annexes is the contracting-out concept found in Article 38 of the Chicago Convention.

- (4) The extent to which the growth of international organization activity has an impact on the traditional theories of incorporation of treaty obligations, and now of international organization decisions, into municipal law

In the technological field where financial outlay and trained personnel are required in order to implement regulatory technical material, the contracting-out principle, which permits of flexibility in implementation, is favoured over the requirement of paper compliance which may be valueless.

The technical material adopted by ICAO is implemented on the national level party by provisions in statutes, but, for the most part, in subsidiary legislation (decrees, orders-in-council, notices to airmen, aeronautical information publications(AIPS)) and even in operating manuals.

Similar flexibility is found in the Danish/Icelandic Joint Financing Agreements (1956) under which certain air navigation services are provided in the North Atlantic Area.<sup>117</sup> The agreements are couched in terms that enable changes to be made in services, equipment, capital, expenditures and operating costs without the necessity of using protocols of amendment. The consent of states to changes is transmitted to ICAO and the agreements are under constant adjustment with the ICAO Council and Secretariat playing an important coordinating role. The Danish/Icelandic Agreements prior to 1956 did not contain the same flexibility and were subject to a more formal process of amendment.

- (5) Illustrations of practical problems that have arisen in the experience of international organizations

These illustrations are given under the heading entitled "II. Techniques available to encourage compliance with decisions".

- (6) Examples of conflicts between "organization law" and municipal law of member states

National boundaries and air traffic services areas:  
Strict adherence to national boundaries could hinder meeting the operational needs of international air traffic. Therefore ICAO encourages states not to insist on observance of

sovereignty and to review their air traffic service areas on the basis of technical and operational considerations rather than on the basis of national boundaries. States are also encouraged, when justified, to negotiate with other states concerned toward the delineation of flight information regions (FIRs), control areas (CTs) and control zones (CTRs), extending across national boundaries when so required to meet the above-mentioned operational needs.<sup>118</sup>

In addition, while the ICAO Rules of the Air over the high seas are to be applied without deviation, states which furnish Air Traffic Control services over the high seas falling within their control areas are allowed to apply their national Air Traffic Control services over the high seas with the differences filed by them pursuant to Article 38 of the Convention.<sup>119</sup>

Regional Plans-Equipment for Prague Airport: In 1956 the Czech Government complained to the ICAO Assembly that it was unable to procure certain equipment required in order to implement an ICAO Regional Plan at Prague Airport. It could not get the equipment since export permits were refused by supplier countries.<sup>120</sup> The matter was referred to the ICAO Council which found no solution for it.<sup>121</sup>

Double taxation: The danger of a conflict between "organization law" and municipal law of a member state arose when ICAO wished to introduce a staff assessment plan applicable to all staff at a time when there was no provision in the Federal Income Tax Act (Canada) which would permit ICAO employees, who were Canadian nationals, a set-off for an internal levy paid by them to ICAO on their ICAO salary and emoluments. The Canadian Government solved this difficulty by making an appropriate amendment to the Income Tax Act which, in effect, has resulted in an ICAO Canadian employee who pays an assessment to ICAO having to pay little, if any, tax under the Income Tax Act.<sup>122</sup>

*There is no concept as such in Canada was just copying*

When the Province of Quebec, the political subdivision of Canada in which ICAO has its headquarters, introduced income tax in 1954, no similar provisions was included in its Act. An arrangement was, however, made with the Province whereby non-Canadians would not have to file tax returns. The Canadian staff members have to pay income tax to the Province, but are reimbursed by ICAO mostly through funds received from the Federal Government.<sup>123</sup>

4. Compliance: Measures to help assure that member states' commitments or obligations are carried out

(1) Reporting procedures

States are obliged under the Chicago Convention to notify differences between their national regulations and the ICAO standards contained in Annexes and are encouraged to notify differences in respect of recommended practices, Procedures for Air Navigation Services (PANS) and Regional Supplementary Procedures (SUPPS). These differences are published by ICAO. The implementation process in regard to this regulatory material as well as the implementation procedures followed for Regional Plans is discussed above.

Assembly resolutions remind states of the importance of ratifying or adhering to ICAO-sponsored conventions on air law.<sup>124</sup>

That an amendment to the Chicago Convention can be quickly brought into force was demonstrated when the amendment increasing the size of the ICAO Council entered into force in July 1962 only thirteen months after its adoption at an extraordinary session of the Assembly as a result of an intensive campaign for ratification.<sup>125</sup>

(2) Formal inspections

There is no provision under the Chicago Convention for formal inspections concerning compliance with ICAO decisions. But, as seen earlier in this paper, inspections are made by Regional Office staffs which are sometimes given temporary help in order to follow up difficult questions of implementation.

(3) Judicial proceedings

If any disagreement arises between two or more contracting states of ICAO relating to the interpretation or application of the Chicago Convention and its Annexes and cannot be settled by negotiation, it must, on application of any state concerned in the disagreement, be decided by the ICAO Council. The disagreements contemplated could include questions of implementation of ICAO decisions and the Council's role under the Convention is a judicial one. Provision is made for appeals from the Council decisions on disagreements to the International Court of Justice or, under appropriate circumstances, to an ad hoc arbitral tribunal.<sup>126</sup> Penalties for non-conformity a final and binding decision in regard to a disagreement are very severe including suspension of the operations of airlines of a defaulting state in the territory of other contracting states<sup>127</sup> and the suspension of voting power in the Assembly and Council of a defaulting state.<sup>128</sup>

5. Special problems of federated states

ICAO has encountered this problems to some extent in connexion with privileges and immunities to be granted by Canadian and Quebec authorities to the organization, national representatives and the staff located at the headquarters in Montreal.<sup>129</sup>

At the International Conference on Private Air Law, held under ICAO auspices at Rome, in 1952, Australia and Canada intimated that they would have difficulty in accepting a clause, in the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface.<sup>130</sup> This clause provided for the bringing of suits under the Convention in a single forum. Nevertheless these two states were among the first to ratify the Convention.

6. Amendment of constituent instruments through methods other than explicit approval by all members

(1) Provision concerning amendments

Amendments to the Chicago Convention come into force when ratified by the number of states specified by the Assembly. The number so specified must be not less

than two-thirds of the total number of contracting states.<sup>131</sup>  
In practice, the Assembly specifies the number as being two-thirds of the membership at the time it adopts the amendment.<sup>132</sup> The amendment comes into force only in respect of states which have ratified it.<sup>133</sup>

(2) ICAC experience with specific amendments

In practice, states that have not ratified certain amendments have not objected to their application to them. For example, states comply with the amendments to Articles 48(a), 49(e) and 60 which permit the convening of the Assembly once every three years instead of annually as required in the original text of the Chicago Convention.<sup>134</sup> Indeed, states have enjoyed quite important privileges under an amendment which they did not ratify. In 1961, the Assembly adopted an amendment which was to have the effect of increasing the number of Council seats from 21 to 27.<sup>135</sup> The amendment entered into force on 17 July 1962. At the 14th session of the Assembly, held in August-September 1962, it was agreed that states that had not yet ratified the amendment could both stand for election to the augmented Council and could vote in the election.<sup>136</sup>

(3) Avoidance of an amendment

In 1956, at the 10th session of the Assembly, it was decided not to amend the Chicago Convention (as had been proposed) so as to delete item (e) of Article 29 (Requirement that an aircraft carry a journey log book) and Article 34 (Journey log book). Instead, the Assembly adopted Resolution A10-36 (Journey log book) which, for those states that chose to follow it constituted, in effect, an amendment to the Chicago Convention. The operative part of the resolution read as follows:

"THE ASSEMBLY RESOLVES that the General Declaration, when prepared so as to contain all the information required by Article 34 with respect to the journey log book, may be considered by contracting States to be an acceptable form of journey log book; and the carriage and maintenance of the General Declaration under such circumstances may be considered to fulfill the purposes of Articles 29 and 34 with respect to the journey log book."

Curiously enough, the Council later failed to adopt a United Kingdom proposal to delete from Annex 6 to the Chicago Convention the provisions concerning the journey log book. The affirmative vote of 13 was one short of the two-thirds majority of 14 required by the Convention for the adoption of an amendment to an Annex.<sup>137</sup>

#### IV. Conclusion

It is seen from the foregoing that ICAO decisions are of a wide variety and that the problems of implementation are closely related to the types and subject-matter of the decisions. The bulk of ICAO's substantive decisions is concerned with technical regulatory material and most of this is adopted on a "contracting-out" basis. Implementation of these decisions depends not so much on legal rules as on the good-will of contracting states and their need to comply with the technological laws of air navigation if they are to participate in it effectively. In this respect, ICAO is hardly different from any other functional international organization engaged in normative activities. Nor does the fact that much of the ICAO activity in the technical field is of a para-legal nature deprive it of significance in discussing the implementation of ICAO decisions. Whether compliance with an ICAO-adopted norm is induced by a legal requirement or a natural requirement inherent in a technological activity will not make much difference provided compliance is achieved.

The problems of implementation of the technical normative material are, to a great extent, evidence of the technological gap between the developed and developing countries. A basic factor hindering implementation is the lack of men, matériel and the money to pay for the training and retention of men and the acquisition and maintenance of matériel. This is what might be called the "3-M" gap.

Possibly radical solutions are needed. A recently suggested solution for some of the difficulties of implementation in respect of the supply of facilities and services for air navigation might, if it proved to be practicable, simplify difficulties or even eliminate them in advance. It has been

suggested that systems planning be applied to the introduction of new aircraft types. In future, steps would be taken to harmonize the aircraft and infrastructure. The implications of these measures for both providers of facilities and services, on the one hand, and the operators, on the other, would have to be determined and analyzed before the characteristics of the aircraft were frozen and before the airlines were committed to its operation. The hope is that this approach would narrow the gap between infrastructure and aircraft with a consequent saving in money and men.<sup>138</sup> Only future discussions will tell whether and to what extent such a radical solution can be adopted.

The pragmatic activities of ICAO as a functional international organization are not productive of much "law", if the expression is used in terms of a rule the non-observance of which involves the application of a sanction by the law-giver. Nevertheless the ICAO decisions in the normative field may often contain within them severe natural sanctions which deprive those who do not comply with these decisions of the benefit of safe and fruitful participation in international civil aviation. On the other hand, decisions of a constitutional and housekeeping nature involve sanctions which tend to be legal since they are based expressly, or by necessary implication, on the provisions of ICAO's constituent instrument, the Chicago Convention.

The law of international organization is at a very primitive stage and legal sanctions tend to be the exception rather than the rule. Mankind must needs work with the tools at hand and, at least in the case of functional international organizations, must learn to appreciate the value of natural sanctions as an aid in securing compliance with certain decisions. At the same time, he will seek, to the extent possible, to strengthen the structure of the world community so that legal sanctions will become the exception and not the rule. ★

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Notes

- \* This paper was written in a private capacity; responsibility for the opinions expressed is the author's. Unless otherwise indicated, references to documents are to those of ICAO.
- 1 For a discussion of the different kinds of resolutions of the United Nations General Assembly, see Skubiszewski, "The General Assembly of the United Nations and Its Power to Influence National Action," (1964) Proceedings of the A.S.I.L., 153-162; also in Falk and Mendlovitz, The Strategy of World Order, Vol. 3, The United Nations (hereinafter cited as "FM-3"), 238-247.
  - 2 Lande (1964) "The Changing Effectiveness of General Assembly Resolutions," Proceedings of the A.S.I.L. 167-173; also in FM-3, 230-236.
  - 3 Falk, "On the Quasi-legislative Competence of the General Assembly," (1966) 60 A.J.I.L. 784.
  - 4 Skubiszewski, op. cit., note 1 supra, 158; also FM-3, 243.
  - 5 Vallat, "The Competence of the United Nations General Assembly," (1959) 97 Recueil des Cours 211.
  - 6 Skubiszewski, op. cit., note 1 supra, 154; also in FM-3, 239.
  - 7 FM-3, 248, referring to the views of Professor Myres McDougal.
  - 8 Doc 8528 A15-P/6.
  - 9 For a reference to various operative words used in resolutions of the United Nations General Assembly, see Sloan, "The Binding Force of a Recommendation of the General Assembly of the United Nations," (1948) 25 B.Y.I.L. 3.
  - 10 Doc 7188-C/828 Proceedings of the Council, 11th Session (1950), 36-38.
  - 11 Doc 7346-C/855 Proceedings of the Council, 12th Session (1951), 33-39.  
Doc 7241-C/838 Action of the Council, 14th Session (1951), 47-48.  
Doc 8665-C/970 Action of the Council, 59th Session (1966), 17-18; C-WP/4457.
  - 12 Doc 8662-1 C/969-1 13/3/67.
  - 13 Mrs. Higgins has pointed out that "the particular 'sanction system' built into international law is simply the sanction of reciprocity. It is not, by and large, sanctions in the sense of physical compulsion or physical punishment." She then goes on to point out the lack of "a centralizing process" and indicates that "international law as it applies to a multitude

of questions...is widely heeded because its breach would incur a reciprocal response". See Higgins, The Development of International Law through the Political Organs of the United Nations (London, 1963), 8; also FM-3, 46.

This statement could apply to a sanction system involving normative activities of functional international organizations.

- 14 For an example, see Friedmann, "National <sup>Sovereignty</sup>/International Cooperation, and the Reality of International Law," (1963) 10 UCLA Law Review 748-750; also FM-3, 517-519.
- 15 Idem. See also FM-3, 507 for a commentary on Friedmann's view.
- 16 Fawcett, "The International Monetary Fund and International Law," (1964) 40 B.Y.I.L. 34.
- 17 Lande, op. cit., note 2 supra, 164; also in FM-3. See also Fisher, "Bringing Law to Bear on Governments," (1961) 74 Harv.L.R. 1134-1135; also in Falk and Mendlovitz, The Strategy of World Order, Vol. 2, International Law 79-80.
- 18 Extracts from an address of the Hon. Ernest A. Gross taken from the Verbatim Record of the Public Sitting of the ICJ in the South West Africa Cases, May 19, 1965, reproduced in FM-3, 82.
- 19 FM-3, 88.
- 20 See note 13 supra.
- 21 For convenience, the word "regulatory" will be used in this paper as referring, in particular, to ICAO standards, practices and procedures and, by extension, to regional plans for equipment and services. These items, normative in character, are adopted with varying degrees of formality and create community expectations of compliance which also vary in degree. They all require implementation action on the national level, the exception being the case of the rules of the air applicable over the high seas (See note 42 infra).
- 22 Chicago Convention, Article 62. In the earlier sessions of the Assembly there was a tendency to suspend the voting power of defaulting states. Thus, at various times, the voting power of the following states was suspended: Bolivia, Czechoslovakia, El Salvador, Guatemala, Jordan, Nicaragua, Paraguay, Peru and Poland. But the Assembly later adopted a more flexible policy in regard to arrears of payments and the sanction of suspension of voting power has not been applied for many years.

- 23 Chicago Convention, Article 33.
- 24 Ibid., Art. 39.
- 25 Ibid., Art. 40.
- 26 Ibid., Arts. 84-85.
- 27 Ibid., Art. 87.
- 28 Ibid., Art. 88.
- 29 The only convention adopted by the Assembly to date has been the Convention on the International Recognition of Rights in Aircraft (Geneva, 1948); Doc 7620, 310 U.N.T.S. 151 (1958).
- 30 For example, the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 1952); Doc 7364, 310 U.N.T.S. 181 (1958)
- 31 Doc 8080-JS/579. Acts on the Joint Financing of the North Atlantic Ocean Stations Agreement. Contains the Agreement on North Atlantic Ocean Stations, signed at Paris on 25 February 1954; 215 U.N.T.S. 249 (1955).
- 32 This is the "consensus of the whole" as distinct from the "majority consensus". For a discussion of the latter, see Lande, op. cit., note 2 supra, 165; also FM-3, 230.
- 33 For example, in the United Nations Committee on the Peaceful Uses of Outer Space and the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. One writer has sounded the wise warning that "consensus" without state practice is not productive of a rule of law. See Gross, "The United Nations and the Role of Law," (1965) 19 International Organization 557. See also, on this point, notes 99 and 100 infra.
- 34 Resolution A15-8. A lengthy resolution on this subject is adopted at the triennial sessions of the Assembly and lays down the policy for the future development and implementation of technical norms in the field of international air navigation.
- 34 There are fifteen Annexes to the Chicago Convention. Annex 9 is concerned with the facilitation of international air transport. The remaining fourteen Annexes, which are concerned with technical matters, are as follows: 1-Personnel Licensing; 2-Rules of the Air; 3-Meteorology; 4-Aeronautical Charts; 5-Units of Measurement to be used in Air-Ground Communications; 6-Operation of Aircraft-International Commercial Air Transport; 7-Aircraft

Nationality and Registration Marks; 8-Airworthiness of Aircraft; 10-Aeronautical Telecommunications; 11-Air Traffic Services; 12-Search and Rescue; 13-Aircraft Accident Inquiry; 14-Aerodromes, and 15-Aeronautical Information Services.

A number of Annex provisions would be meaningless unless supplemented by appropriate provisions in national laws and regulations. In other cases, the wording of Annex provisions has to be adapted before the substance can be included in national provisions.

- 36 See, for example, Article 28 of the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (1952) which provides that: "If legislative measures are necessary in any Contracting State to give effect to this Convention, the Secretary-General of the International Civil Aviation Organization shall be informed forthwith of the measures so taken."
- 37 See, for example, the text of the Rome Convention (note 30 supra) which is set forth in a schedule to the Foreign Aircraft Third Party Damage Act, 3 & 4 Eliz. II (Can. 1955), c. 15.
- 38 This is the case for the Convention for the Unification of Certain Rules relating to International Carriage by Air, Warsaw, 12 October 1929 in respect of which the United States of America deposited an instrument of adherence on 31 May 1934.
- 39 Doc 7283-C/842 Action of the Council, 15th Session (1952), 14; Doc 7278-C/841.
- 40 For reports on the extent to which states were able to implement this definition by early 1954, see AT-WP/356, 361 and 362.
- 41 See Foreword to Annex 2 (Rules of the Air), 5th edition, March 1966, 6.
- 42 For further information concerning Article 12 and the application over the high seas of rules of the air adopted by the Council, see Carroz, "International Legislation in Air Navigation over the High Seas," (1959) 26 J.A.L.C. 158-172; for the German version of this note, see (1959) 8 Zeitschrift für Luftrecht 3-24.
- 43 Chapter XVIII, Articles 84-88.

- 44 In 1952, the Council decided that the approved minutes of the relevant meetings of the Council would be an adequate record on which the Secretary General would make and retain an adequate copy of each Annex or amendment thereto. See Doc 7283-C/842 Action of the Council, 15th Session (1952), 9; C-WP/1060. But while certified true copies of conventions adopted at meetings held under ICAO auspices are sent to states, certified true copies of Annexes or amendments thereto are not. Nevertheless after adoption by the Council, the so-called "green" edition of the Annex or amendment is sent to states and they are invited to take with respect to that copy the actions indicated in the resolution of adoption.
- 45 Chicago Convention, Articles 37, 54(1) and 90.
- 46 Ibid., Art. 28.
- 47 By a simple majority and not a qualified majority of two-thirds as required by Article 90(a) of the Chicago Convention for the adoption of the Annexes.
- 48 These regions do not cover the polar areas and large portions of Canada and the United States of America. See C-WP/4594 3/5/67 which contains a proposal for revising the structure of the regions so as to include the polar areas and possibly to increase their number from eight to nine.
- 49 Doc 8143-AN/873 Rules of Procedure for the Conduct of Air Navigation Meetings and Directives to Divisional-type Air Navigation Meetings, 27 March 1961.
- 50 Chicago Convention, Art. 90.
- 51 Ibid., Art. 38.
- 52 Ibid., Art. 52 which provides in part that: "Decisions of the Council shall require approval by a majority of its members."
- 53 Doc 8144-AN/874 Rules of Procedure for the Conduct of Air Navigation Meetings and Directives to Regional Air Navigation Meetings, 27 March 1961.
- 54 For a more detailed description of the aims of ICAO in the field of facilitation, see Doc 7891-C/906/2 Aims of ICAO in the Field of Facilitation, 2nd ed., 1965. The IMCO has paid ICAO the compliment of modelling a Convention and an Annex thereto on Annex 9 to the Chicago Convention and relevant provisions of the Chicago Convention. See Erler, "The New Convention on

Facilitation of International Maritime Traffic," (1967)  
13 McGill L.J. 323-328 and Alexandrowicz, "The Convention  
on Facilitation of International Maritime Traffic and Inter-  
national Technical Regulations: A Comparative Study," (1966)  
15 I.C.L.Q. 621-659. For the text of the Convention, see  
IMCO publication entitled "International Conference on Fac-  
ilitation of Maritime Travel and Transport, 1965" (London,  
1965).

- 55 Doc 8144-AN/874, note 53 supra, 2-6.
- 56 Chicago Convention, Art. 90.
- 57 For examples, see A15-WP/28 TE/5 31/5/65 and A15-WP/40 TE/9  
22/4/65.
- 58 Resolution A15-8: Consolidated statement of continuing ICAO  
policies related specifically to air navigation.
- 59 Resolution A10-7: ICAO Policy and Programme for the Provision  
of Air Navigation Facilities and Services.
- 60 Doc 8097-C/926 Action of the Council, 40th Session (1960), 26-27.
- 61 Material contained in the ensuing discussion is taken from  
statements presented to the 15th Session of the Assembly. See  
A15-WP/28<sup>TE/5</sup> 31/3/65 and A15-WP/40 TE/9 22/4/65.
- 62 For a discussion of the question of flexibility, see Doc 8542  
A15-TE/52 Report of the Technical Commission, 15th Session of  
the Assembly (1965), 36-37.
- 63 Resolution A15-12: Measures to facilitate implementation of  
SARPS and PANS.
- 64 See also AN-WP/3309 15/5/67 which is a Secretariat note con-  
cerning the publication of differences in Aeronautical Inform-  
ation Publications.
- 65 Resolution A15-8, Appendix E.
- 66 The Council also establishes a common date of applicability for  
all amendments to SARPS and PANS. For example, for the year 1967,  
the date chosen was 24 August. See Doc 8665-C/970 Action of the  
Council, 59th Session (1966), 10.
- 67 This would now come under the United Nations Development Programme  
with which ICAO is associated.
- 68 Resolution A15-8, Appendix G.
- 69 Idem.
- 70 Resolution A15-12.

- 71 The SARPS on Facilitation inevitably take two forms: (1) A negative form, e.g., that states shall not impose more than certain maximum requirements in the way of paper work, restrictions of freedom of movement, etc. (2) A positive form, e.g., that states shall provide certain minimum facilities for passenger convenience for traffic which is merely passing through, etc. Whenever a question arises under a negative provision, it is assumed that states will, wherever possible, relax their requirements below the maximum set forth in the SARPS. Whenever there is a positive provision, it is assumed that states will, wherever possible, furnish more than the minimum set forth in the SARPS.
- 72 Resolution A15-23.
- 73 Resolution A10-7.
- 74 Doc 7763-C/896 Action of the Council, 29th Session (1956), 37-42.
- 75 Doc 7966 A12-EX/1. For convenience, references to the source of the material given below will be incorporated in the text of this paper in parentheses. The Roman numerals will refer to Parts of the Panel's report and Arabic figures to paragraphs of the report.
- 76 Resolution A12-5.
- 77 Op. cit., note 60 supra, 26-27.
- 78 Resolution A15-8, Appendix F, clause 4.
- 79 Resolution A15-8, Appendix H. At the same time, in Resolution A15-10, the Assembly directed the Council "to revise and improve the guidance provided for regional air navigation meetings in respect of: a) the relationship between planning and implementation; and b) the establishment of an order of priority for implementation of air navigation facilities and services required by regional plans; and c) the importance of adequate maintenance and efficient operation of facilities and services that have been or will be provided."
- 80 Resolution A15-5: Economic and Financial Aspects of the Implementation of Regional Plans.
- 81 Doc 8522 A15-EX/43, 21-22.
- 82 Doc 8665-C/970, Action of the Council, 59th Session (1966), 27.

- 83 As at July 1st, 1967 five protocols of amendment to the Chicago Convention had been drawn up as a result of Assembly action. Such amendments come into force when ratified by the number of contracting states specified by the Assembly. The number so specified must be not less than two-thirds of the total number of contracting states. (Art. 94 (a)) The Chicago Convention provides that the Assembly, in its resolution recommending adoption of an amendment, may provide that any state which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of ICAO and a party to the Convention. The Assembly has not yet made such a recommendation. On the other hand, the IMCO Assembly, when adopting, in 1964, the amendment which increased the membership of the Maritime Safety Committee, invoked Article 52 of the constituent instrument of the IMCO and provided for loss of membership of a state which did not ratify the amendment within a specified period. See IMCO Resolution A.70(IV) in IMCO Assembly, 2nd Extraordinary Session (1964), Resolutions and Other Decisions, 6.
- 84 See note 29 supra.
- 85 See note 30 supra.
- 86 Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe. Doc 7695; 310 U.N.T.S. 229 (1958).
- 87 For example, the Agreement on the Joint Financing of Certain Air Navigation Services in Iceland (Geneva, 1956). Doc 7725-JS/562; 334 U.N.T.S. 13 (1959).
- 88 Ibid., Arts. V and VI.
- 89 Art. 90(a). It has not yet happened that the majority of states have registered their disapproval of an Annex or of an amendment thereto.
- 90 A few months after the Annex (or the amendment thereto) becomes effective, it becomes applicable, the date of applicability being specified by the Council in the resolution of adoption.



- 91 None of the amendments to the Chicago Convention has yet been ratified by the total membership of ICAO. In fact, only four of the five protocols of amendment which exist have come into force.
- 92 This article is concerned with the cessation of membership in ICAO of a state whose government the United Nations General Assembly has recommended be debarred from membership in international agencies established by or brought into relationship with the United Nations.
- 93 Note 88 supra.
- 94 This flows from the provisions of Article 12 of the Chicago Convention. See also Note 42 supra.
- 95 As at July 1st, 1967.
- 96 Article 90(a) of the Chicago Convention provides that Annexes require for their adoption the vote of two-thirds of the Council (i.e., 14 out of 27 Council member states) at a meeting called for that purpose.
- 97 Doc 8270 A14-EX/31, para. 8.
- 98 A15-WP/112 EX/18; Doc 8522 A15-EX/43, 2-3.
- 99 The consensus process is, of course, well established in the United Nations as witness the use of it in such bodies as the Committee on the Peaceful Uses of Outer Space and the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States.
- 100 This was particularly evident in the session of the ICAO Subcommittee on Nationality and Registration of Aircraft Operated by International Operating Agencies (known as the "Subcommittee on Article 77") held in January 1967 (LC/SC Article/Report 7/2/67). Once the consensus had been reached on the main topic under discussion, there was strong opposition within the Subcommittee to any attempt to break it, although the members of the Subcommittee at the same time reserved the positions of their governments.
- 101 If it does not, it may have its vote in the Assembly and Council suspended in pursuance of Article 62 of the Chicago Convention. See note 22 supra.
- 102 The Council is elected at the triennial sessions of the Assembly. See Article 50 of the Chicago Convention.

- 103 Article 51 of the Chicago Convention provides for the election of the President who is an international official and represents no state.
- 104 Article 87 of the Chicago Convention provides for the imposition of a very severe penalty for non-compliance: "Each contracting State undertakes not to allow the operation of an airline of a contracting State through the airspace above its territory if the Council has decided that the airline concerned is not conforming to a final decision rendered in accordance with the previous Article."
- 105 This was in the nature of a housekeeping amendment and it has not yet come into force. As Article 48 now stands, extraordinary meetings of the Assembly may be held at any time upon the call of the Council or at the request of any ten contracting states addressed to the Secretary General. When the amendment comes into force an extraordinary session of the Assembly may be convened by the Council or "at the request of not less than one-fifth of the contracting States".
- 106 Note 30 supra.
- 107 Rome Convention, Article 20.
- 108 Chicago Convention, Article 62.
- 109 Ibid., Art. 12; note 42 supra.
- 110 For a typical resolution, see A15-32: Confirmation of Council action with respect to the assessments of Trinidad and Tobago, Jamaica, Algeria, Rwanda, Somalia, Yemen, Kenya, Malawi, Zambia, Mali and Togo.
- 111 Doc 8080-JS/579 Acts on the Joint Financing of the North Atlantic Ocean Stations Agreement.
- 112 Note 42 supra.
- 113 Note 29 supra.

- 114 Doc 7632; 478 U.N.T.S. 371 (1963).
- 115 Doc 8181; 500 U.N.T.S. 31 (1964).
- 116 Doc 8364.
- 117 For Icelandic Agreement, see Note 87 *supra*; for Danish Agreement, see Doc 7726-JS/563; 334 U.N.T.S. 89 (1959).
- 118 Resolution A15-8, Appendix T.
- 119 Foreword to Annex 11, 5th ed., March 1966, 5-6.
- 120 Resolution A10-12: Elimination of Deficiencies at Prague Airport.
- 121 Doc 7763-C/896 Action of the Council, 29th Session (1956), 15.
- 122 Income Tax Act, R.S.C. 1952, c. 148, s. 41(4). See, on arrangements with Canadian Government concerning privileges and immunities, Dai, "The Headquarters Agreement between Canada and the International Civil Aviation Organization," (1964) 2 The Canadian Yearbook of International Law 205-214.
- 123 Doc 7763-C/896 Action of the Council, 29th Session (1956), 6.
- 124 E.g., Resolutions A10-39 and A12-23.
- 125 The year 1962 was an election year for the Council which is elected for a three-year term. There was a successful attempt to have the amendment come into force before the 1962 session of the Assembly at which the election was to take place.
- 126 Chicago Convention, Articles 84 and 85.
- 127 Ibid., Art. 87.
- 128 Ibid., Art. 88.
- 129 Dai, op. cit., note 121 supra, 205-214.
- 130 Note 30 supra.
- 131 Chicago Convention, Article 94.
- 132 Resolutions A1-4, A8-1, A8-4, A13-1 and A14-5.
- 133 Chicago Convention, Article 94.
- 134 Resolution A8-1.
- 135 Resolution A13-1.
- 136 Doc 8270 A14-EX/31, para. 8.
- 137 Doc 7763-C/896 Action of the Council, 29th Session (1956), 17.
- 138 C-WP/4595.

Appendix "A"

Principles Governing the Reporting of "Differences"  
from ICAO Standards, Practices and Procedures

At its 12th Session (1950), the Council adopted a set of principles to govern the reporting of differences from International Standards contained in Annexes to the Convention, Recommended Practices, Specifications, Procedures and Supplementary Procedures. These principles are set forth below.

Subject No. 14.14: Effect of Deviations by Contracting States from International Standards and Reservations to Regional Air Navigation Plans

Principles Governing the Reporting of "Differences" from ICAO Standards, Practices and Procedures

At its meetings on 29 September, 3 and 10 October and 12 November, the Council considered the 79th Report of the Air Navigation Commission (C-WP/650), containing the Commission's recommendations concerning the notification by States and the dissemination by ICAO of "differences" from ICAO Standards, Practices and Procedures, and related papers by the Representative of Canada (C-WP/720), the Representative of the United Kingdom (C-WP/722) and the Secretary General (C-WP/749). At the last of these meetings it approved the following principles to govern the reporting of differences:

"1) Differences from International Standards contained in Annexes to the Convention

A) That Contracting States, when notifying ICAO of the differences between their national regulations and practices and the international Standards contained in Annexes in compliance with Article 38 of the Convention, be requested to give particular attention to those differences knowledge of which is essential to the safety or regularity of international air navigation;

B) That the following criteria, or such of them as are appropriate to a particular Annex, be brought to the attention of Contracting States to be used as a guide in determining reportable differences:

i) When the national regulations of a Contracting State affect the operation of aircraft of other Contracting States in and above its territory

- a) by imposing an obligation within the scope of an Annex which is not covered by an ICAO Standard;
- b) by imposing an obligation different in character\* from that of the corresponding ICAO Standard;
- c) by being more exacting than the corresponding ICAO Standard;
- d) by being less protective than the corresponding ICAO Standard.

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\* The expression "different in character" in (i)(b) and (ii)(a) would be applied to a national regulation which achieves by other means the same objective as that of the corresponding ICAO Standard and so cannot be classified under (i)(c) or (d) and (ii)(b).

ii) When the national regulations of a Contracting State applicable to its aircraft and their maintenance, as well as to aircrew personnel, engaged in international air operations over the territory of another Contracting State

a) are different in character\* from that of the corresponding ICAO Standard;

b) are less protective than the corresponding ICAO Standard.

iii) When the facilities or services provided by a Contracting State for international air navigation

a) impose an obligation or requirement for safety additional to any that may be imposed by the corresponding ICAO Standard;

b) while not imposing an additional obligation differ in principle, type or system from the corresponding ICAO Standard;

c) are less protective than the corresponding ICAO Standard.

## 2) Differences from Recommended Practices

A) That, although differences from Recommended Practices are not notifiable under Article 38 of the Convention, Contracting States be invited to notify the Organization of the differences between their national regulations and practices and any corresponding Recommended Practices contained in an Annex when the knowledge of such differences is important for the safety of air navigation;

B) That, as a guide to determining the differences to be notified, States be invited to use the criteria in (1)(B) above, in so far as they are applicable.

## 3) Differences from Specifications, Procedures and Supplementary Procedures

A) That Contracting States be invited also to notify the Organization of the differences between their national regulations and practices and any corresponding procedures contained in Procedures for Air Navigation Services (PANS), Supplementary Procedures (SUPPS) and Specifications\*\* approved by the Council for application by Contracting States on a world-wide or regional basis, when the knowledge of such differences is important for the safety of air navigation;

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\* The expression "different in character" in (i)(b) and (ii)(a) would be applied to a national regulation which achieves by other means the same objective as that of the corresponding ICAO Standard and so cannot be classified under (i)(c) or (d) and (ii)(b).

\*\* To date the only "Specifications" issued by ICAO are the Specifications for Meteorological Services to International Air Navigation (Doc 5714-MET/511), which were approved by the Council for world-wide use on 17 September 1948 and came into force on 1 January 1949.

B) That, in inviting Contracting States to notify differences from Procedures for Air Navigation Services, it be pointed out that a difference arising from compliance with a Supplementary Procedure would not be regarded as a reportable difference;

C) That, in determining the differences to be reported, States be invited to use the criteria in (1)(B) above, in so far as they are applicable."

The Council also approved the recommendation of the Air Navigation Commission that -

"The final edition of an Annex issued by the Organization should include a loose-leaf Supplement, indicating in an index table, by States, the notification of significant differences in respect of the various paragraphs of the Annex, the table to be followed by a list, by paragraphs of the Annex, of the actual differences reported."

- and the revised draft resolution for the adoption of an Annex set out in Appendix B to C-WP/749. The determination of the form of State Letter on the adoption of an Annex and of the machinery for notifying differences from PANS, SUPPS and Specifications was left to the Secretariat.

The Secretariat was asked to prepare, for separate consideration at an appropriate time, an interpretation of the word "procedures" as used in Article 38, and recommendations as to the principles which should govern the reporting of differences from Annexes not relating to air navigation, such as Annex 9 (Facilitation of International Air Transport).

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American Society of International Law

LEGAL ADVISERS AND INTERNATIONAL ORGANIZATIONS

Meeting, August 26-31, 1967

DECISIONS OF INTERNATIONAL ORGANIZATIONS:  
EFFECTIVENESS IN MEMBER STATES

THE EUROPEAN COMMUNITIES

by Michel Gaudet  
Director-General, Legal Service of the  
Commission of the European Communities

I. The choice of techniques to carry out an agreed course of action.

To do its work the EEC has at its disposal a number of very diversified legal instruments, from the classical techniques used by international meetings to the specific instruments provided by the E.E.C. Treaty.

A. Specific measures

The Community institutions may issue a variety of specific measures of the types defined in Article 189 of the EEC Treaty, which vary in their binding force both as regards their components (objectives and means) and their addressees.

1. "Regulations shall have a general application. They shall be binding in every respect and directly applicable in each Member State". The three characteristics of regulations are then their general field of application, their binding force and the directness of their applicability.

(i) "... the regulation, being of an essentially normative character, is applied not to a limited, designated, or identifiable group of persons, but to essentially abstract categories envisaged as a whole" (1).

It is an act applicable to objectively determined situations.

(ii) Regulations are binding in every respect. They are complete legal acts with all that is required for them to take effect without further normative intervention (2).

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(1) Court of Justice of the European Communities, Cases 16 and 17/62 Recueil, Vol. VIII, p.918

(2) Regulations may, however, specify precise and limited action by the States

(iii) They are immediately applicable in all Member States. They have force of law throughout the Community without requiring any national formula of incorporation or execution. "The regulations shall be published in the official gazette of the European Communities. They shall enter into force on the date fixed in them or, failing this, on the twentieth day following their publication" (Article 191, first paragraph).

Regulations confer rights or impose obligations on individuals, and these rights or obligations can be invoked in the courts.

2. "Directives shall be binding, as to the result to be achieved, on each Member State to which they are addressed, while leaving to national authorities the choice of form and means".

(i) Unlike regulations, directives are binding only on the Member State or States to which they are addressed.

(ii) Their effectiveness depends on the action taken by the State, which is left with a margin of discretion as to methods of implementation. Directives are binding only as to the result to be achieved (1)

(iii) As directives can concern one or more Member States, they must be "notified to those to whom they are addressed" (Article 191, second paragraph).

3. "Decisions shall be binding in every respect on those to whom they are addressed".

(i) Like directives, decisions concern addressees who are referred to by name.

"Directives and decisions shall be notified to their addressees and shall take effect upon such notification" (Article 191, second paragraph). This characteristic distinguishes them from regulations which are of universal application.

(ii) Directives and decisions differ, however, as to the status of addressee and the margin of discretion allowed.

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(1) It must be noted however that in practice the content of directives tends to be more and more precise and detailed.

Decisions may be addressed to individuals as well as to Member States.

- (a) Decisions addressed to individuals, which are binding in every respect, are directly applicable to the addressee after notification.

In this respect, their effects are similar to those of regulations.

- (b) Decisions addressed to Member States bind those Member States, without leaving them, as do directives, a choice as to form and means.

4. "Recommendations and opinions shall have no binding force". These acts are akin to <sup>traditional</sup> instruments.

5. Lastly, reference can be made to the various measures which are not mentioned in Article 189, but which are taken by the Community institutions in the course of their duties; these include decisions on budgetary matters and the general programmes for the removal of restrictions on freedom of establishment and freedom to supply services. It must also be pointed out that the Community is authorized to conclude agreements with non-member countries and international organizations (Articles 111, 113, 114, 228-231, 238).

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The four kinds of measure described in Article 189 are adopted by the Council and Commission "in the discharge of their duties and in accordance with the provisions of this Treaty", that is, as part of the responsibilities falling upon them, according to the ways and means laid down in, and in the circumstances specified by the Treaty

Their originality consists in the process by which they take shape in common institutions, i.e. by a vote subject to certain conditions and not by diplomatic commitment.

These decisions are taken by the institution as a body; they can bind States and even individuals. The binding character of the measure depends on its nature and not on the form of approval, which has no influence on its binding power.

The choice between these different types of measure may be laid down in the Treaty or it may be left to the initiative of the institutions, either by means of an alternative expressly offered by the Treaty or because of the very general terms used therein.

If the institutions are given the choice of form for an act, they take various considerations into account, in particular the objective aimed at by the Treaty and the legal means of protection conferred upon individuals.

These considerations derive from the points raised in the above examination of the various types of measure. Regulations are more suitable than directives when the steps to be taken must be uniform, precise and detailed, with no latitude as regards method of execution. Directives allow the States greater scope for adjustment to their legal systems and make it easier to take into account different national situations.

When common organizations had to be set up for the different agricultural markets (cereals<sup>(1)</sup>, pigmeat<sup>(2)</sup>, pigs<sup>(3)</sup>, poultry<sup>(4)</sup>, fruit and vegetables<sup>(5)</sup>, milk and milk products<sup>(6)</sup>; beef and

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(1) Regulation No. 19, official gazette of the European Communities 20 April 1962, p. 933

(2) Regulation No. 20, ibid., p.945

(3) Regulation No. 21, ibid., p.953

(4) Regulation No. 22, ibid., p.959

(5) Regulation No. 23, ibid., p.965

(6) Regulation No. 13/64, ibid., 27 February 1964, p.549

veal<sup>(1)</sup>, and rice<sup>(2)</sup>, the regulation was the form adopted for the basic and for certain implementing measures, as it was indispensable to set up a uniform body of rules, providing a complete and detailed machinery, to be equally effective everywhere and giving individuals the right of appeal. On the other hand, when it was necessary to provide measures to facilitate the transition from the national market systems to the common organization, a directive was drawn up allowing Member States considerable freedom of choice<sup>(3)</sup>.

Likewise Regulation No. 17<sup>(4)</sup> was adopted to implement the principles set out in Articles 85 and 86. The choice was dictated by the result to be attained: rules which create identical conditions of competition, which can be applied to individuals and which are accompanied by sanctions. Article 85, moreover, had already been found to be directly applicable<sup>(5)</sup>.

A further example of making the form selected fit the aim is provided in the agricultural sphere by the shift from a transitional system involving execution through the Member States to a system which is applied directly. In the first stage of progressively organizing the markets, the Commission fixed the free-at-frontier prices of cereals between the Member States and the cif prices of cereals from non-member countries. It addressed a decision to each Member State, to which the task was left of calculating the levies and imposing them by a domestic measure<sup>(6)</sup>.

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- (1) Regulation No. 14/64, official gazette of the European Communities, 27 February 1964, p.562
  - (2) Regulation No. 16/64, *ibid.*, p.574
  - (3) Commission Directive on certain transitional arrangements in the cereals sector, *ibid.*, 9 June 1962, p.1367.
  - (4) Regulation no. 17, *ibid.*, 21 February 1962, p.204.
  - (5) Court of Justice of the European Communities, Case 13/61, Recueil, Vol.VIII, p.89
  - (6) Regulation No.19, Official Gazette of the European Communities, 20 April 1962, p.933

At the single market stage for cereals, which came into force, on 1 July 1967, the Commission establishes itself by regulation the uniform levy on imports from third countries, which is directly applicable in the Member States <sup>(1)</sup>.

B. The classical methods

1. Resolutions and records in the minutes express agreement reached at a meeting.

(a) A resolution is a declaration of intent, political in character but without <sup>locally</sup> binding force, which states formally that it has been decided to act in a specified manner.

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binding*

The Community institutions have adopted several resolutions on agriculture, among which may be quoted the resolutions <sup>(2)</sup> in which the Council agreed to take the decisions enabling market organization for milk products, beef and veal, and sugar to be implemented on given dates and also invited the Commission to submit the requisite proposals by given dates.

(b) Inclusion of an item in the minutes is also political in its import. If requested unanimously, it forms an interpretative statement of the agreement reached. If asked for by one or more States and not opposed by the others, it implies a reservation.

2. The international convention of classical type is also used. It may be provided for in the Treaty, as in the case of Article 20, which deals with determination of the duties on the products in List G annexed to the Treaty, and of Article 220,

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Official Gazette of the European Commu-  
(1) Regulation No. 120/67/CEE, titles, 13 June 1967, p. 2269  
(2) Official Gazette of the European Communities, 20 April 1962, p. 1006

which has been the basis for various drafts or preliminary drafts of Conventions, such as the draft conventions concerning jurisdiction and the execution of judgments in civil and commercial matters and concerning the reciprocal recognition of companies and legal persons, the preliminary draft of a convention on bankruptcy and related procedures.

Such conventions have a supplementary character in the case of the draft European patent convention and the draft articles of a European-type company.

3. A class of decision midway between the traditional and specific instruments has made its appearance in the practice of the European Communities. The decisions of the Representatives of the Governments of the Member States meeting in the Council cover an area exceeding the competence expressly attributed to the Community institutions, but the purpose they serve is indistinguishable from the aims specified in the Treaty. These decisions<sup>(1)</sup> deal with a variety of subjects. The most characteristic example is that of the decisions of 12 May 1960 and 15 May 1962<sup>(2)</sup> on speeding up achievement of the aims of the E.E.C. Treaty.

The nature of the decisions of the Representatives of the Governments meeting in the Council is difficult to define.

- (i) They have the character of international commitments and also certain Community aspects, the importance of the latter varying from one case to another. As a rule they have been looked upon as simplified agreements which are not submitted to national parliaments for approval. These decisions generally contain a final provision worded as follows : "The Governments of the Member States shall within one month notify the Secretary-General of the Council whether under their domestic law any action is required to implement the present decision; if so, they shall immediately notify the Secretary-General when this action has been completed".

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(1) They number about 60 so far - Professor Schermers, *Besluiten van de Vertegenwoordigers der Lid-Staten; Gemeenschapsrecht* (Sociaal Economische Wetgeving - October/November 1966, No 10/11).

(2) Official gazette of the European Communities, 12 September 1960, p.1217, and 28 May 1962, p.1284



(ii) The decisions of the Representatives of the Governments meeting in the Council also have certain features which distinguish them from traditional international agreements, because the Member States use the institutional framework provided by the Treaties, in particular the procedures and certain forms. The Commission, for instance, submitted to the Council its proposals for the speed-up in the form of recommendations and the Representatives of the Governments adopted, with some amendments, the recommendations in the form of a decision taken in the Council.

The decisions were signed by the President of the Council and published in the official gazette of the European Communities.

They provided a basis for certain acts of the Community institutions and national authorities. The E.E.C. Commission took several further decisions on the strength of these acceleration decisions.

The internal implementing conventions accompanying the Association Conventions of the Community and which are also concluded by the Representatives of the governments meeting in the Council, rather belong to the group of traditional international commitments. Indeed they are signed by the plenipotentiaries of the Member States and contain a formula according to which they shall be approved by each Member State in accordance with its constitutional rules.<sup>(1)</sup>

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(1) Two conventions accompanying the Association Convention with Greece, Official Gazette of the European Communities, 18 February 1962, p.350 and 352; two conventions accompanying the Association Convention with Turkey, *ibid.*, 29 December 1964, p.3703 and 3705; and two conventions accompanying the Association Convention with the African and Malagasy States associated with the Community, *ibid.*, 11 June 1964, p.1490 and 1493.

## II. Legal effects of Member States' approval of decisions

Because of the structure of the Communities and the particular ways in which their decisions are reached (these are described in Section I above) this point does not call for many remarks.

In the case of measures adopted by the Commission (regulations, directives, decisions), the question of how the Member States vote does not arise; they are bound by the measures taken by the Commission, an independent body which acts on the principle of joint responsibility and on which the States as such are not represented.

In the case of measures taken by the Council, to which each Government delegates one of its members, it must be recalled that a favourable or unfavourable vote by a State in no way affects the binding force of the collective decision. All that must be considered is whether the substantive and procedural rules have been observed - a matter over which the Court of Justice of the European Communities exercises control; any State which considers that a decision is not in accordance with these rules may appeal against it.

The EEC Treaty provides for the following types of vote :  
by simple majority, by qualified majority, and unanimous.

Voting by simple majority is the general rule (Article 148(1)): "Except where otherwise provided in this Treaty, the conclusions of the Council shall be reached by a majority vote of its members". However, a large number of particular measures require either unanimity or a qualified majority, so that in practice this general rule is rather the exception.

The EEC Treaty also provides for a gradual change-over from unanimity to a qualified majority as the transitional period advances.

The method of calculating the qualified majority is set out in Article 148(2), which establishes a weighting system :  
"Where the conclusions of the Council require a qualified majority, the votes of its members shall be weighted as follows :

Belgium	..	..	..	2
Germany	..	..	..	4
France	..	..	..	4
Italy	..	..	..	4
Luxembourg		..	..	1
Netherlands		..	..	2

Majorities shall be required for the adoption of any conclusions as follows :

Twelve votes in favour where this Treaty requires that they be reached on a proposal of the Commission, or

Twelve votes including a favourable vote by at least four members in all other cases."

Article 149 says moreover that, "When by virtue of this Treaty the Council is acting on a proposal of the Commission, it may amend the proposal only if it is unanimous."

Here the purpose of unanimity is to strengthen the role of the Commission in preparing decisions.

On unanimity, Article 148(3) states : "Abstentions by members either present or represented shall not prevent the adoption of Council conclusions requiring unanimity." It could be deduced that a qualified majority is sometimes more difficult to achieve

than unanimity in case of abstention. In reality, the practical interest of Article 148(3) is to allow a member of the Council to express displeasure (which may seem called for on the national plane) without however blocking the decision.

There are several examples where decisions have been adopted by a majority vote, for instance in the budgets and in tariff quotas. These decisions have been simply accepted and implemented by the States in the minority. That States have on occasion voted against the budget, has not prevented them from making their contribution towards the expenditure decided upon.

Furthermore, a State which had voted against the adoption of a regulation<sup>(1)</sup> and had expressed legal reservations, attacked the regulation<sup>(2)</sup> before the Court of Justice, thereby showing that it did not intend to refrain unilaterally from implementing the decision and that it contested its legality by process of law.

Insistence on unanimity, even when only a simple or qualified majority is required, may prove desirable without the Community character of the decision being jeopardized. For example, for the adoption of the first regulation on restrictive agreements, although since the end of 1960 the Treaty no longer required more than a qualified majority, the Council and the Commission deemed it preferable that this regulation, giving the Commission very wide powers, especially to carry out its investigations, should be adopted unanimously.

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(1) Regulation No. 19/65 conferring on the Commission the power to grant exemptions, by regulation, under Article 85(3) to certain classes of agreement, Official gazette of the European Communities, dated March 6, 1965, page. 533/65.

(2) Court of Justice of the European Communities, case 32/65 (Italian Republic v. EEC Council and Commission) Recueil, Vol. XII - 4, p.564.

Lastly decisions may be adopted unanimously without a particular effort having been made to achieve this.

The Luxembourg agreements brought about certain adjustments of an interpretative nature to the strict application of the majority principle. The right to decide by majority vote does not mean that unanimity must not be sought, especially when it is a matter of vital interest to one of the Member States. Any divergence of views, however, cannot block the working of the Community :

" I. Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community, in accordance with Article 2 of the Treaty.

II? With regard to the preceding paragraph, the French delegation considers that where very important interests are at stake the discussion must be continued until unanimous agreement is reached.

III. The six delegations note that there is a divergence of views on what should be done in the event of a failure to reach complete agreement.

IV. The six delegations nevertheless consider that this divergence does not prevent the Community's work being resumed in accordance with the normal procedure."<sup>(1)</sup>

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(1) Extract from the minutes of the Council meeting of 29 January 1966.

### III. Internal legal effects of decisions of international organizations

A. The measures (as defined in Article 189 of the Treaty) that can be taken by the Community Institutions fall into two classes which vary in the effect they have in the Member States : there are measures which are binding only on the States themselves and require action by them, and there are those which affect individuals directly, conferring rights or imposing obligations (cf. Section I). This raises the problem of the direct applicability of acts of the Community, a problem which also arises in connection with the provisions of the Treaty itself.

1. The domestic courts and the Court of Justice of the European Communities have had to pronounce on the point whether certain rules established by the European treaties could be invoked directly by individuals, and they have evolved interpretative criteria based mainly on the nature and subject of the measure in question.

Article 31 of the E.E.C. Treaty has been recognized as directly applicable by the Italian Council of State <sup>(1)</sup> and Article 70 of the E.C.S.C. Treaty by the French Council of State <sup>(2)</sup>. Numerous decisions of the Tariefcommissie in the Netherlands have dealt with the legality of charges in the light of Articles 12 and 16 of the Treaty. The direct applicability of Article 85 has been very much contested by judges in various countries. While certain courts in Germany and the Netherlands have accepted that it was directly applicable <sup>(3)</sup>, others have not <sup>(4)</sup>.

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(1) 7 November 1962, Foro Padano 1963, V, p. 34

(2) 22 December 1961, S.N.C.F., Gazette du Palais, 25 May 1962.

(3) Landgericht Düsseldorf, 6 December 1960, Wirtschaft und Wettbewerb 1960, p. 805 ; Oberlandgericht Frankfurt, 19 January 1962, Der Betriebsberater 1962, p. 735 ; Court of Appeal of Arnhem, 28 June 1961, Nederlandse Jurisprudentie 1962, p. 438.

(4) Zutphen Court, 11 July 1958, Revue du Marché Commun 1959, p. 46 ; Hague Court, 3 March 1960, Wirtschaft und Wettbewerb 1960, p. 773

The Court of Justice of the European Communities, whose task (cf. below) is to give a uniform interpretation of the Treaty, has established certain criteria enabling the self-executing character of its provisions to be recognized, for example in the well-known Van Gend and Loos judgment : "To know whether the provisions of an international treaty have such an effect it is necessary to look at its spirit, its content and the terms used.

... Community law, therefore, apart from legislation by the Member States, not only imposes obligations on individuals but also confers on them legal rights... The latter arise not only when an explicit grant is made by the Treaty, but also through obligations imposed, in a clearly defined manner, by the Treaty on individuals as well as on Member States and the Community Institutions "(1).

The Court has thus recognized direct applicability of articles 12 (1), 37 (2) (2) and 53 (2) of the E.E.C. Treaty, which clearly impose a prohibition in binding terms. It also recognized direct applicability of article 95 which imposes a precisely defined obligation (3).

Besides the provisions of the Treaty recognized as self-executing, Community regulations and decisions addressed to private individuals are measures that are directly applicable.

(a) Regulations

Besides its general field of application, the essential characteristic of a regulation lies in its direct applicability

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(1) Court of Justice of the European Communities (C.J.E.C.), case 26/62, Recueil, Vol. IX, p. 6

(2) C.J.E.C., case 6/64, Recueil, Vol. X, p. 1141

(3) C.J.E.C., case 57/65, Recueil, Vol. XII, p. 293

(cf. Sec. I). For the Community a regulation is the normative act par excellence. "... the Community legislates directly and exclusively in all matters that need to be regulated uniformly and in detail in pursuit of the objectives laid down in the Treaty" (1).

The direct applicability of regulations does not raise problems for the national courts ; it is a principle which they have accepted on many occasions. Divergences arise only through the interpretation of these regulations in the national or the Community context. These divergences are of particular value in bringing out the importance of the role played by the Court of Justice of the Communities in obtaining a uniform interpretation of Community acts (cf. B 3 below).

(b) Decisions addressed to individuals belong to the directly applicable acts of the Community.

According to article 192 of the E.E.C. Treaty, "decisions of the Council or of the Commission which include a pecuniary obligation on persons other than States shall be enforceable (forment titre exécutoire)". This enforceability gives them a character and value similar to decisions taken in individual countries by their own authorities.

An example that can be quoted is that of fines inflicted by the decisions of the E.C.S.C. High Authority (under article 92 of the E.C.S.C. Treaty, which is analogous to E.E.C. article 192), which have been enforced by domestic courts (2).

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(1) Hallstein, "The European Community : a new legal order", address given on 19 November 1964 at the Faculty of Law and Economics in Paris.

(2) All these cases have arisen in Italy :  
Pretura di Roma, 11 March 1964, Foro Italiano 1964, I, p. 866  
Tribunale di Napoli, 22 April 1964, Foro Italiano 1964, I, p. 1253  
Tribunale di Mondovi, 24 July 1964, Foro Padano 1965, IV, p. 17  
Tribunale di Roma, 22 September 1964, Common Market Law Reports 1966, p. 20  
Tribunale di Milano, 24 June 1964, Common Market Law Reports 1965, p. 1

It was on the occasion of an enforcement case that the Italian Constitutional Court affirmed the constitutionality of the ECSC Treaty

(27 December, 1965, Acciaierie San Michele, Common Market Law Review, 1966, p.81.)



2. The other measures available to the Community Institutions, i.e. directives, decisions addressed to the Member States, opinions and recommendations, are generally considered not to be directly applicable, for the Treaty does not attribute this characteristic to them. It must be noted, however, that for directives, and even more for decisions, this distinction is tending to become blurred.

(a) As regards decisions addressed to the Member States, while certain courts have affirmed that they bind only the Member State addressed and do not have a binding effect on nationals of a Member State <sup>(1)</sup>, the Finanzgericht of Hamburg <sup>(2)</sup> has recognized that "customs authorities are not authorized to disregard the decision, which is for them of a binding nature".

As decisions are binding in every respect and do not allow a discretionary margin of implementation, they therefore have, in practice, effects comparable to those of regulations.

In giving a verdict on the admissibility of an appeal, the Court of Justice of the Communities recognized that a Commission decision amending or abolishing national safeguard measures is directly applicable and concerns the individuals affected as directly as the measures it replaces <sup>(3)</sup>.

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(1) Finanzgericht Rheinland Pfalz, 27 March 1963, Entscheidungen der Finanzgerichte 1963, p. 444 and 25 March 1965, not published ; Finanzgericht Bremen, 3 September 1963, Common Market Law Reports 1964, p. 295.

(2) 19 November 1964, Common Market Law Reports 1965, p. 268

(3) C.J.E.C., cases 106 and 107/63, Recueil, Vol. XI, p. 533

(b) Directives often concern matters calling for very elaborate rules. They also often are the result of a compromise worked out in great detail. So their provisions tend to become more and more precise and detailed, leaving very little freedom to the States in the means to use for implementing them.

In any case, directives constitute one of the elements for judging objective legality, for the national authorities find that they have to be taken into account when national rules are being implemented or interpreted <sup>(1)</sup>.

It also may in certain cases seem arbitrary to deny the direct effect of certain provisions of a directive which, in their content, do not differ from treaty provisions recognized by the Court of Justice as having a direct effect, particularly when the directives impose an unconditional obligation to abolish a national measure or to refrain from doing something.

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B. The growing activity of international organizations and specifically of the European Communities has had a very distinct influence on traditional concepts regarding the incorporation in domestic law of obligations deriving from treaties and acts of international organizations. This influence has shown itself in the constitutional, legislative and judicial approach to problems raised by the international organizations, and specifically the European Communities.

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(1) This is what the Berlin Administrative Court did in its judgment of 26 October 1962 (Common Market Law Reports 1964, p. 5)

1. The constitutions of most Member States now contain provisions authorizing transfer of responsibilities to international organizations : for example, article 24 <sup>(1)</sup> of the German Basic Law ; article 11 <sup>(2)</sup> of the Italian Constitution ; the preamble to the present French Constitution, in the form of a reference to the 1946 Constitution <sup>(3)</sup> ; article 67 (1)<sup>+</sup><sup>(4)</sup>, article 49 (bis)<sup>(5)</sup> of the Luxemburg Constitution.

<sup>+</sup>of the Netherlands Constitution as revised in 1953 and 1956

For the Netherlands and Luxemburg, it is their participation in the European Institutions which has entailed these changes in their constitutions ; draft amendments are being studied in Belgium for the same reason, but these have not yet been completed.

Moreover, certain constitutions clearly state the primacy of international law over domestic law as, for example, does the French Constitution of 1958 in its article 55 <sup>(6)</sup>.

The Netherlands Constitution, which in this respect is the most advanced, has systematically regulated relations between domestic law and international law by confirming the supremacy,

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- (1) "The Federation may, by legislation, transfer sovereign powers to international institutions".
  - (2) "Italy..., on conditions of equality with the other states, agrees to the limitations of her sovereignty necessary to an organization which will assure peace and justice among nations, and promotes and encourages international organizations constituted for this purpose".
  - (3) "On condition of reciprocity, France accepts the limitations of sovereignty necessary to the organization and defence of peace".
  - (4) "Subject where necessary to the provisions of article 63 (procedure for approving derogations from the Constitution), powers in the fields of legislation, administration and jurisdiction may be delegated by a convention or by virtue of a convention to organizations founded upon the law of nations".
  - (5) "The exercise of powers reserved by the Constitution to the legislature, the executive or the judiciary may be temporarily delegated by treaty to institutions founded upon the law of nations".
  - (6) "Treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party".

not only of the provisions of treaties, but also of the decisions taken by international organizations <sup>(1)</sup>.

In the countries where this possibility exists, the constitutionality of the European Treaties has been referred to the courts.

The Italian Constitutional Court, twice called on to make a pronouncement, has in the Costa/Enel <sup>(2)</sup> and Acciaierie San Michele <sup>(3)</sup> judgments recognized that the Treaties are in conformity with the Constitution.

In Germany the Finanzgericht of the Rhineland-Palatinate has questioned the constitutionality of the E.E.C. Treaty and of an agricultural regulation, and has referred the matter to the Bundesverfassungsgericht <sup>(4)</sup> (the Federal Constitutional Court),

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- (1) Articles 66 and 67 (2), as revised in 1953 and 1956 :
- (a) Article 66 : "Legislative provisions in force within the Kingdom shall not be applied in cases in which such an application would be incompatible with clauses by which everyone is bound, contained in agreements which have been concluded either before or after the entry into force of such provisions".
  - (b) Article 67 (2) : "Articles 65 and 66 shall apply by analogy to the acts of organizations founded upon the law of nations".
- (2) 7 March 1964, Foro Italiano 1964, I, p. 465. The Court affirmed the regularity of the procedure adopted to conclude the Treaty : "This rule (Article 11 of the Italian Constitution) means that when certain conditions are complied with, it is possible to conclude treaties involving limitations of sovereignty and to make them enforceable by an ordinary law".
- (3) 27 December 1965, Common Market Law Review 1966, p. 81. The Court recognized the compatibility of the E.C.S.C. Treaty with certain provisions of the Constitution concerning the judicial protection of individuals (articles 102 and 113).
- (4) 14 November 1963, Common Market Law Reports 1964, p. 130. The Court deems contrary to the principles contained in articles 20, 79 (3) and 80 of the Basic Law the power attributed by the E.E.C. Treaty to the Council of Ministers to issue regulations in matters reserved to the legislature.

which has not yet made a pronouncement. But various courts (1) have admitted that the transfer of responsibilities to the E.E.C. institutions was in conformity with the Basic Law by virtue of its Article 24 and did not conflict with the principle of separation of powers. So the Bundesfinanzhof refused to submit the matter of the constitutionality of the agricultural regulations to the Bundesverfassungsgericht or to await its decision in the case submitted to it by the Finanzgericht of the Rhineland-Palatinate, considering that there were no legitimate grounds for doubt (2).

2. The increase in the normative activities of the European institutions has led in the Member States to a tendency to modify the traditional division of powers between legislature and executive. The reasons underlying this development are as follows (3):

- (i) Parliamentary procedure is slow and complex ;
- (ii) The sovereign character of the legislature seems incompatible with the function of executing Community law;
- (iii) Legislative procedure re-opens political debate on the substance of Community measures already adopted ;
- (iv) There is no adequate sanction when Parliament refuses to comply with the Community measures ;
- (v) Executive procedure, on the contrary, is far better adapted to the function of implementing Community law in the domestic context and here its use is not disturbing because it does not deprive the parliaments of a substantive power.

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(1) Verwaltungsgericht Frankfurt am Main, 17 December 1963, AWD des BB 1964, p. 60, and 7 July 1965, id 1965, p. 299 ; Finanzgericht Bremen, 3 September 1963, Common Market Law Reports 1964, p. 296.

(2) 25 April 1967, not published.

(3) Sohler-Mégret report on "Le rôle de l'exécutif national et du législateur national dans la mise en oeuvre du droit communautaire", Bruges Week 1965.

The use of executive procedure to implement the Treaty is illustrated by the following examples.

Sometimes governments use the power they have to make orders implementing domestic laws to implement provisions of the Treaties and of Community acts, considering those as part of their domestic law <sup>(1)</sup>. Furthermore power is delegated by the legislature to the executive, even in countries like Germany, where such transfer of power is subject under article 80 of the Basic Law to very strict conditions.

The German law ratifying the E.E.C. Treaty <sup>(2)</sup> had already conferred on the Government power to implement by order (Rechtsverordnung) certain articles of the Treaty in customs matters. Article 77 of the law of 14 June 1961 widened the powers given to the Government and replaced the need for the Bundestag's prior agreement by approval subsequent to publication of the order, which is deemed to have been given if the order is not annulled within three months <sup>(3)</sup>.

In Italy the ratification law, in its article 4 <sup>(4)</sup>, and subsequent laws <sup>(5)</sup> have delegated considerable power to the Government in the conditions stipulated by article 76 of the

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- (1) Measures necessary to implement article 13 of E.E.C. Regulation n° 17 were taken by the Italian Government in the form of a presidential decree of 22 September 1963 (Gazzetta Ufficiale, 11 January 1964) as if a national law were being implemented. Since 1964, E.E.C. decisions on customs matters have been executed in France by presidential decree as if they were domestic laws.
  - (2) Law of 27 July 1957, Bundesgesetzblatt II p. 753.
  - (3) Bundesgesetzblatt 1961, I, p. 758. Article 77 of this law has been amended by the laws of 18 August 1962, 4 September 1962, 25 March 1964 and 9 September 1964 which grant the Government further powers in customs matters.
  - (4) Law of 14 October 1957 (Gazzetta Ufficiale, Supplemento ordinario, 23 December 1957).
  - (5) See e.g. Law of 20 December 1960 (Gazzetta Ufficiale 22 December 1960), Law of 26 January 1962 (ibid. 5 February 1962) and Law of 1 February 1965 (ibid. 15 February 1965) .

Constitution. The executive has also used the special procedure provided by article 77 of the Constitution (decree-laws made without delegation, to be converted into ordinary law by a given date, failing which their validity lapses), e.g. to implement the common agricultural policy <sup>(1)</sup>.

In France the Government already has since the passing of the 1958 Constitution autonomous power under article 34 to issue rules and regulations in all matters not expressly reserved to the legislature. Furthermore Parliament empowered the Government, on the basis of article 38 of the Constitution, to issue orders to implement the E.E.C. common agricultural policy <sup>(2)</sup> and the E.E.C. directives on freedom of establishment and freedom to supply services <sup>(3)</sup>

3. Lastly, the domestic courts have felt the need for closer collaboration with the Court of Justice of the European Communities because of the innumerable problems arising from the application of Community law.

Numerous divergences have indeed been observed within one and the same State or between one State and another in decisions made by courts called on to pronounce on the application of Community measures.

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(1) See e.g. Decree-Law of 30 July 1962 (Gazzetta Ufficiale 30 July 1962) which became the Law of 28 September 1962 (ibid. 12 October 1962) ; Decree-Law of 11 September 1963 (ibid. 12 September 1963) which became the Law of 3 November 1963 (ibid. 11 November 1963).

(2) Law of 8 August 1962, Journal officiel de la République française, 10 August 1962.

(3) Law of 14 December 1964 (Journal officiel de la République française, 15 December 1964) renewed by the Law of 6 July 1966 (ibid. 7 July 1966).

In Germany, for instance, the Bremen Financial Court <sup>(1)</sup> considered that the countervailing charge placed on imports of agricultural products from non-member countries in addition to the Community levy was incompatible with article 20 of Regulation n° 19 on the gradual establishment of a common organization of the market in cereals, because it constituted in fact a charge having equivalent effect to a customs duty, while the Nuremberg Financial Court, in two judgments <sup>(2)</sup>, attributed to it the character of a fiscal charge compatible with Community rules.

The Berlin Administrative Court in a judgment of 26 October 1962 <sup>(3)</sup> held that any national of a Member State is entitled to a residence permit if he complies with the conditions of Regulation n° 15 concerning the free movement of workers in the E.E.C., while for the Munster Oberverwaltungsgericht <sup>(4)</sup> Regulation n° 15 does not conflict with the maintenance in force, in conformity with articles 48 <sup>(3)</sup> and 56 <sup>(1)</sup> of the E.E.C. Treaty, of rules governing the residence of foreigners which are justified by reasons of public policy (ordre public) and public security.

In similar cases the Munich Court of Appeal <sup>(5)</sup> held that vertical agreements prohibiting exports, if notified to the Commission, were provisionally valid according to article 4 <sup>(2)</sup> of Regulation n° 17, as the Amiens Court of Appeal <sup>(6)</sup> held that, as long as the Commission had not embarked upon the necessary procedure, the national authorities remained competent to judge those agreements which, applying only to the home territory, do not fall under article 85 <sup>(1)</sup> of the E.E.C. Treaty and cannot be exempted by notification from the prohibition provided by this article ; it refused to apply to the Court of Justice for an interpretation of the Community provision in question.

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(1) 9 April 1963, Common Market Law Reports 1964, p. 304

(2) 23 April 1963, ibid., p. 96 and 23 March 1964, ibid., p. 310

(3) Ibid. 1964, p. 5

(4) 10 September 1963, ibid. 1965, p. 53

(5) Oberlandesgericht München, 30 May 1963, ibid. 1964, p. 87

(6) 9 May 1963, JCP 1963, n° 13222, confirmed by the Cour de Cassation, 23 October 1964, Dalloz 1964, p. 753



These examples illustrate clearly the difficulties that may arise from differences in interpretation of Community law by domestic Courts. Consequently these courts are using more and more frequently the machinery provided by article 177 of the E.E.C. Treaty.

Article 177 states that : "The Court of Justice shall be competent to give preliminary rulings concerning :

- (a) The interpretation of this Treaty ;
- (b) The validity and interpretation of acts of institutions of the Community ;
- (c) The interpretation of the statutes of any bodies set up by an act of the Council, where the said statutes so provide.

Where such a question is raised before any court of one of the Member States, the said court may, if it considers that a decision on the question is essential to enable it to render judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a domestic court of a Member State, from whose decisions there is no possibility of appeal under domestic law, the said court is bound to refer the matter to the Court of Justice."

The Court of Justice is thus called upon to assume a supervisory role which ensures unity of case law in the Community and prevents the disequilibrium which could result from divergent interpretations.

The procedure under article 177 having made it possible (see part A of this Section) to define a common notion of direct applicability, it also contributes considerably to the juridical protection afforded individuals by the Treaty.

A widespread readiness to apply for interpretations will furthermore make it possible to settle the conflicts that inevitably arise between Community and domestic law, the Member States not yet having uniform rules for dealing with such conflicts.

While there are certain countries where the constitution (France, Netherlands) or case law (Luxemburg) recognize the primacy of international law over domestic law, there are others where a dualist conception of the manner in which international law is received (Germany and Italy) leads, by the principle of assimilation, to a subsequent law being given preference over a Community act (*lex posterior derogat priori*).

Often case law has attempted to ensure the primacy of international law by a conciliatory interpretation or by denying that a conflict exists <sup>(1)</sup>. But the clearly expressed intention of the legislator may make such attempt impossible.

The Costa/Enel case brought up the problem in acute form in Italy. The Italian Constitutional Court recognized the primacy of the subsequently enacted law, treating the conflict between the Treaty and domestic law as a conflict between norms of equal rank <sup>(2)</sup>.

The Court of Justice of the European Communities has affirmed the primacy of Community law. This primacy is an evident corollary of the Community law being law common to six Member States and the indispensable condition of its effectiveness which depends essentially on its consistent and uniform application :

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- (1) Invoked mainly in Italy (Corte di Cassazione 12 July 1957, Foro Italiano 1958, I, p. 1294).
- (2) 7 March 1964, Foro Italiano 1964, I, P. 465. The German Constitutional Court, in a noted judgment (concordat case) came to the same conclusion, refusing to recognize the primacy of a treaty over domestic law (26 March 1957, BVerfGE Vol. 6, p. 362).

"Whereas the reception into the law of each member country of provisions which are of Community origin and, more generally, the letter and spirit of the Treaty are such that it is impossible for the States to assert the supremacy over a legal system accepted by them on a basis of reciprocity of a subsequent unilateral measure : such a measure therefore cannot be invoked against the common legal system ;

"Whereas the executive force of Community law cannot vary from one State to another in favour of subsequent domestic law without jeopardizing the achievement of the aims of the Treaty referred to in article 5 (2), nor cause discrimination, forbidden by article 7 ;"

"Flowing as it does from an autonomous source, law born of the Treaty cannot therefore, given its original specific nature, be opposed in the courts by a national law, whatever it may be, without losing its Community character and without the legal basis of the Community being jeopardized ; " (1)

Article 177 offers, therefore, the means of ensuring, in any case, the primacy of Community law thanks to the authority of the interpretation of the Community provision given by the Court of Justice.

The preceding may have illustrated the importance of the machinery provided by article 177 ; it is the requests for preliminary rulings that allow the problem submitted to the domestic court to be placed in its true Community context, and assure in this way a uniform application of the Community law in all member countries.

Experience shows that the domestic courts are becoming more and more aware of the significance of this provision. More and more applications for interpretation are being made to the Court of Justice by Courts and Tribunals of different nature of all the member States (2). Close and enlightened co-operation is developing between the Court of Justice and the domestic courts.

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(1) C.J.E.C., case 6/64, Recueil, Vol. X, p. 1159

(2) From the beginning of this year, 18 applications have been made.

IV. Compliance - measures to help ensure that Member States' commitments or obligations are carried out

The EEC Treaty, subsequent measures and the practices adopted have established a body of institutions and measures which make it possible to ensure that the Community's decisions are carried out by Member States.

Here again we find the traditional techniques used in the classical international organizations and judicial procedures peculiar to the European institutions.

Article 155 of the EEC Treaty instructs the Commission to "ensure that the provisions of this Treaty and the measures pursuant to it taken by the institutions are carried out".

Article 5 lays down a general line of conduct for Member States : "Member States shall take all appropriate measures, whether general or particular, to ensure the carrying out of the obligations arising out of this Treaty or resulting from measures taken by the institutions of the Community. They shall facilitate the execution of the Community's tasks".

A. Traditional techniques

The Member States and Community institutions co-operate constantly by exchanging information, by consultation, by regular reviews and by confrontation.

1. The Commission has extensive means of obtaining information :
  - (i) Its staff systematically scrutinizes the official publications of the Member States to ensure that the measures being taken

conform to the Treaty. They are in close contact with government departments in the various countries which, in accordance with Article 5, must facilitate the tasks of the Community and make available all necessary information and facilities.

- (ii) Article 213 of the EEC Treaty endows the Commission with very wide powers defined in general terms : "For the execution of the tasks entrusted to it the Commission may, within the limits and under the conditions laid down by the Council in accordance with the provisions of this Treaty, collect any information and carry out <sup>any</sup> checks that may be needed."

Community acts, such as Regulation No. 17 on restrictive agreements (Article 14)<sup>(1)</sup> have given the Commission vast powers of supervision and inquiry. By other acts surveys of wages and investment have been organized.<sup>(2)</sup>

- (iii) Other Treaty provisions require the Member States to inform or consult the Commission in certain specific cases. For instance, Article 93 on aids says : "1. The Commission shall in conjunction with Member States keep all systems of aids existing in those States under constant review. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market. ..."

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aids."

Article 102 (approximation of laws) reads : "1. When there is reason to fear that the introduction or amendment of a provision imposed by law, regulation or administrative action may cause distortion

(1) Official Gazette of the European Communities dated Feb. 21, 1962, p. 204

(2) For wages : Regulation n° 10, Official Gazette of the European Communities, Aug. 31, 1960, p. 1199/60

Regulation n° 14, *ibid.* Aug. 16, 1961, p. 1054/61

" 28, *ibid.* May 28, 1962, p. 1277/62

" 151, *ibid.* Dec. 13, 1962, p. 2841/62

" 188/64 " Dec. 24, 1964, p. 3634/64

within the meaning of Article 101 above, the Member State desiring to introduce or amend such provision shall consult the Commission. After consulting the Member States the Commission shall recommend to the States concerned such measures as may be appropriate to avoid the distortion in question."

Co-operation and reciprocal provision of information between the Commission and Member States are, moreover, called for again and again in the Treaty (Articles 43, 49 54 (3 b), 103, 105, 118, etc.).

Also Community acts specify expressly that the Member States must inform the Commission of the measures taken to implement them.

2. Advisory bodies have been set up in accordance with the Treaty or with subsequent decisions with the aim of working out, under the auspices of the Commission, a common line of action.

Various advisory committees undertake studies at regular intervals and render opinions with a view to promoting co-ordination of the Member States' policies.

For example, the Monetary Committee's task according to Article 105 is :

- (i) To keep under review the monetary and financial situation of Member States and of the Community and also the general system of payments in Member States, and to report regularly thereon to the Council and to the Commission;
- (ii) To deliver opinions at the request of the Council or of the Commission or on its own initiative, for submission to these institutions.

The Short-term Economic Policy Committee, set up by a Council decision of 9 March 1960<sup>(1)</sup> "co-operates in the process of consultation

between Member States and the Commission provided for in Article 103 of the Treaty".

The task of the Medium-term Economic Policy Committee, set up by a Council decision of 15 April 1964<sup>(1)</sup>, is to use "all available information and especially the studies of economic prospects made by a group of experts attached to the Commission, to draft a medium-term Economic programme...".

The Budget Policy Committee<sup>(2)</sup> has to "study and collate the main lines of the budgetary policies of the Member States".

The Committee of Governors of Central Banks in the EEC<sup>(3)</sup> is responsible "for conducting consultations relating to the general rules and the main lines of policy of the central banks, in particular as regards credit, the money market and the exchange market".

The system of "Management Committees", provided for by all the basic agricultural regulations<sup>(4)</sup>, provides a characteristic example of the permanent contacts between the representatives of the Member States and of the Community.

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- (1) Official Gazette of the European Communities, Apr. 22, 1964 p. 1031  
(2) Council decision, *ibid.* May 21, 1964 p. 1205  
(3) " " , *ibid.* May 21, 1964 p. 1206  
(4) Regulation No. 19, *ibid.* Apr. 20, 1962 p. 933 replaced by  
" No. 120, *ibid.* June 19, 1967 p. 2269 (cereals)  
" No. 20, *ibid.* Apr. 20, 1962 p. 945 replaced by  
" No. 121, *ibid.* June 19, 1967 p. 2283 (pigmeat)  
" No. 21, *ibid.* Apr. 20, 1962 p. 953 replaced by  
" No. 122, *ibid.* June 19, 1967 p. 2293 (eggs)  
" No. 22, *ibid.* Apr. 20, 1962 p. 959 replaced by  
" No. 123, *ibid.* June 19, 1967 p. 2301 (poultry)  
" No. 23, *ibid.* Apr. 20, 1962 p. 965 ~~replaced by~~  
" No. 13/64 " Feb. 27, 1964 p. 549 milk and milk prod.  
" No. 14/64 " Feb. 27, 1964 p. 562 beef and veal  
" No. 16/64 " Feb. 27, 1964 p. 574 rice

Each Management Committee is responsible for a group of agricultural products and is composed of representatives of the Member States and the Commission. The Committees have to assist the Commission in the task of adopting the necessary measures to implement the basic regulations. This leads in practice to regular exchanges of views and common studies.

In general there is constant co-operation at all levels between the Member States and the Community institutions through official bodies, some of which have been described, as well as at meetings of experts and working parties.

The extent of this co-operation is shown by the variety of possibilities and methods of action provided by innumerable Community acts. The Commission may act :

- (i) In contact with the government departments in the Member States;
- (ii) In collaboration with the Member States or their government departments;
- (iii) After reference to the Member States (outside the Committees);
- (iv) After compulsory reference to a Committee or to the Member States through a Committee or on the proposal of a Committee;
- (v) After reference to the Council
- (vi) After reference to a Management Committee and subject to a decision by the Council if the Committee has disagreed;
- (vii) After reference to the Member States through a Management Committee and subject to amendment by the Council (agricultural safeguard clause formula);
- (viii) In agreement with the Member States.



## B. Judicial procedures

The EEC Treaty provides judicial procedures to ensure that the States respect their obligations. For this purpose cases can be brought before the Court of Justice of the European Communities either by the Commission (Article 169) or by a Member State (Article 170).

Application of Article 169 in one means the Commission has of carrying out its task as defined in Article 155.

The conditions and pattern of the procedure are very similar in the two cases.

The aim is not so much to penalize past action as to induce an offending State to adopt a certain line of behaviour<sup>(1)</sup>. This explains the division of the procedure into two stages : pre-trial proceedings, when conciliation is attempted, and the proceedings proper, which are opened only if the former fail.

### 1. Procedure under Article 169

- (a) The stage prior to reference to the Court consists mainly in a warning taking the form of a reasoned opinion.

The Commission has exclusive power of initiative : "If the Commission considers that a Member State has failed to fulfil any of its obligations under this Treaty, it shall issue a reasoned opinion on the matter after giving the State concerned the opportunity to submit its comments."<sup>(2)</sup>

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(1) Submissions Roemer, Court of Justice of the European Community (CJEC), Case 20/59, Recueil, Vol. VI, p. 709

(2) In certain urgent cases covered by Articles 93 (2) and 225 of the EEC Treaty the Commission may bring the matter directly before the Court of Justice without issuing an opinion.

So far three-quarters of the cases have been concluded at the first stage of the proceedings, generally with the State in question taking measures to put matters right.

Otherwise the Commission issues a reasoned opinion setting out the Commission's position on the alleged non-compliance and inviting the State to take measures to put an end to it. According to the Court "the opinion must be considered sufficiently reasoned for legal purposes when it contains a coherent account of the reasons which convinced the Commission that the State in question has failed to comply with one of its obligations<sup>(1)</sup>."

A lack or insufficiency of reasons would render the procedure irregular and the suit, consequently, would not be admissible; for the reasons submitted form a substantive element in this preliminary stage. The Member State requested to conform<sup>to</sup> the opinion within the time-limit allowed must be clearly informed of the reasons why the Commission deems its conduct contrary to the Treaty.

(b) The proceedings proper

"If the State concerned does not comply with the terms of such opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice" (Article 169, second paragraph). The expiry of the period is followed by the proceedings proper which are governed by stricter rules.

To date, the Commission has used its power, under Article 169, second paragraph, to file a suit in only ten cases.

Admissibility of a suit is subject to the condition that the State has not conformed to the reasoned opinion in the period allowed, that is to say that it has not taken the measures recommended.

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(1) CJEC, Case 7/61, Recueil, Vol. VII, P. 654

Even if the State conforms to the opinion after the expiry of the period, the suit is admissible, the Commission still having "an interest in having the question decided at law whether there has been non-compliance".<sup>(1)</sup>

The States cannot block the application of Article 169 by submitting to the Commission requests for exemption or safeguard measures. The procedures for derogating from the general rules of the Treaty, "distinct by their nature and their effects from the comminatory procedure at the disposal of the Commission by virtue of Article 169, can in no way render the latter ineffective"<sup>(2)</sup>.

Furthermore, the failure of a State or the Community to carry out its obligations cannot dispense the other Member States from fulfilling their obligations for, "apart from the cases expressly provided for, the terms of the Treaty forbid the Member States to take the law into their own hands."<sup>(3)</sup>

No time-limit is fixed for the Commission to bring the case before the Court. In practice it endeavours to file the suit within two months of the expiry of the period allowed by the reasoned opinion.

The proceedings before the Court of Justice follow the rules established by the Statute of the Court and its rules of procedure. The Court has, in particular, the power to order an investigation (rules of procedure, Article 45). The other Member States may intervene, but only to make submissions tending to support or oppose the case of one of the original parties to the suit (Statute, Article 37 and rules of procedure, Article 93). The Court of Justice may, in any cases before it, prescribe any necessary interim measures (EEC Treaty, Article 186).

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(1) CJEC, Case 7/61, Recueil, Vol. VII, p. 655

(2) CJEC, Cases 2 and 3/62, Vol. VIII, p. 825

(3) CJEC, cases 90 and 91/63, Recueil, Vol. X, p. 1232

The Court has the widest powers of investigation in seeking out and judging the facts. It must consider as a whole the actual behaviour of the State, without being bound by the account given in the reasoned opinion.

## 2. Procedure under Article 170

This procedure, by which a Member State seeks a finding against another Member State for failure to fulfil its obligations, is very similar. "Any Member State which considers that another Member State has failed to fulfil any of its obligations under this Treaty may bring the matter before the Court of Justice".

### (a) Pre-trial proceedings

Article 170, however, calls for the prior intervention of the Commission, which has to act as referee : "Before a Member State institutes, against another Member State, proceedings relating to an alleged infringement of its obligations under this Treaty, it shall bring the matter before the Commission" (Article 170, second paragraph)<sup>(1)</sup>. Once the matter has been referred to the Commission by the State, which must indicate clearly its intention to call for an investigation into the non-compliance, the Commission instigates a written and oral discussion through which it endeavours to eliminate the differences between the States concerned : "The Commission shall deliver a reasoned opinion after the States concerned have been given the opportunity both to submit their own cases and to reply to each other's case both orally and in writing" (Article 170, third paragraph). A three-sided debate begins in which not only the alleged offending State and the Commission take part, as in the case of Article 169, but also the State that has raised the matter.

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(1) Articles 93(2) and 225 of the EEC Treaty dispense the State from this condition.

The role and scope of the reasoned opinion are different in the two procedures. The main purpose of the opinion, which can be negative (inconceivable where Article 169 is concerned), is to give information to the States and the Court. The reasoning must be detailed, but any irregularity in the reasoned opinion will not have the same effect on the admissibility of the suit as in the case of Article 169. It will simply have the effect of invalidating the reasoned opinion, but will not deprive the requesting State of its right to institute proceedings. That State will be in the same situation as if the Commission had not issued an opinion within three months, for "if the Commission has not given an opinion within a period of three months from the date on which the matter was brought before it, the absence of such opinion shall not preclude the bringing of the matter before the Court of Justice" (Article 170, fourth paragraph).

(b) Proceedings

At the proceedings stage the suit goes ahead quite independently of the results of the reasoned opinion.

In the circumstances referred to in Article 170, fourth paragraph, that is if the Commission has not given an opinion, it is not the Commission's silence but the alleged non-compliance of the State which is attacked. If the reasoned opinion does not recognize the failure to fulfil an obligation, this does not prevent the requesting State from filing a suit immediately.

If the Commission does recognize such failure, the requesting State will probably wait for the other State to conform to the reasoned opinion, but nothing in the text of Article 170, as against that of Article 169, obliges it to do so.

Subject to these observations, the procedure under Article 170 follows the same rules as that under Article 169. So far the procedure has not been applied in practice as no suit has been filed under Article 170.

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The Court decision closing the proceedings proper instituted under Article 169 or 170 may either reject the suit as inadmissible or dismiss the case or recognize the failure to fulfill the obligation.

The judgment is of a declaratory nature, as the Court does not have the power to quash the legislative or administrative acts of Member States. It confines itself to recognizing the failure, without indicating how it is to be remedied.

Article 171 states : "If the Court of Justice finds that a Member State has failed to fulfil any of its obligations under this Treaty, such State is bound to take the measures required to comply with the judgment of the Court". While the judgment is not enforceable of itself in the Member State, it has all the authority that attaches to court decisions, and experience has shown that this has always been sufficient. Would it be otherwise, or would the measures taken not prove to be sufficient; the Commission or the other Member States would ~~have~~ to institute further proceedings that would lead to a finding of failure to comply with <sup>a</sup> Article 171. The case has never arisen and in practice there are no examples of States refusing to comply with the Court's judgment.

As has been seen, moreover, these procedures are not often carried through to the end of the proceedings in Court. No proceedings have been instituted on the basis of Article 170. Out of ten suits filed by the Commission under Article 169, only seven have resulted in judgments. The other three cases (18/61, 22/63 and 38/65) were concluded without the Court having to make a pronouncement.

## V. The special problems of federated States

Of the six Member States, the German Federal Republic alone is a true federal State.

In Italy the existence of regions with a special statute raises problems analogous to those that can occur in a truly federal State.

A. In Germany the execution of the obligations deriving from the E.E.C. Treaty has not so far led to controversy, the powers of the Länder being fairly limited in those fields which concern the E.E.C., but problems could arise in connection with the execution of directives on the right of establishment or on vocational training, since cultural matters come under the Länder authorities.

1. Certain arrangements have been made to safeguard the rights of the Länder, which are represented in the Bundesrat or Federal Council.

The question was raised during the debates which preceded ratification of the Treaties, and article 2 of the Ratification Law provides an answer. "The Federal Government shall keep the Bundestag and the Bundesrat constantly informed on developments in the Council of the European Economic Community and the Council of the European Atomic Energy Community. Where a Council decision will require German domestic legislation or when it creates law that will be directly applicable in the Federal Republic of Germany, the Bundestag and the Bundesrat shall be informed before the decision is taken".

In practice the Federal Government keeps the Bundesrat regularly and rapidly informed of all Community measures, in particular of all the proposals which the Commission submits to the Council. This gives the relevant Bundesrat committees an opportunity to examine the texts and to submit to the Government views which often influence the latter's attitude when the subject is being discussed in the Council of the Communities.

2. Like the Federal authorities, the Community Institutions consider that care should be taken to ensure that Community decisions do not upset, even unintentionally, the constitutional division of powers between Federal authorities and Länder, as could happen if, for instance, power to take certain actions were given to specific bodies or if the Länder were required to set up new organs for the implementation of Community law.

3. The essential problem is that of ensuring that commitments undertaken by the Federal Government are executed by the Länder. So far there have been no actual cases which have led to a dispute, and the question of principle has been avoided. If it should be raised, there are two theories which could be advanced in order ensure the execution of the commitments accepted by the Federal Government.

(i) If as most writers agree, and as has apparently been confirmed by actual experience, it is up to the Länder to execute the Community measures in fields where the Länder are competent, they are responsible to the Federal Government for taking the necessary action. The Federal Government can demand that any necessary measures be adopted by virtue of the principle of "Bundestreue", or federal loyalty ; there have been many cases where the Constitutional Court has been called upon to ensure that the principle of "Bundestreue" is observed.

(ii) The second theory (defended by von Mangoldt and Klein) is that article 24 of the Basic Law, which authorizes the transfer of powers to international organizations, can be said to involve a change in the division of powers between the Federal Government and the Länder as far as the application of Community measures is concerned.

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B. In Italy the regions are required to exercise their powers with due respect for the international commitments undertaken by the State. This principle is implicit in article 117 of the Constitution <sup>(1)</sup>, which delimits the powers of the regional bodies, and it has been accepted by the Constitutional Court <sup>(2)</sup>.

When the Constitutional Court was called upon to deal with a concrete case, it annulled a law for aid to shipbuilding which had been passed by the regional Parliament in Sicily without the Italian Republic having had the possibility to respect the requirement, contained in articles 92 and 93 of the E.E.C. Treaty, that there should be prior consultation within the Commission. The Court pointed out that it would be wrong to attach importance to the fact that the Regional Statute for Sicily does not expressly include "respect for international commitments" among the limitations on the legislative powers of the region, as has been done in other statutes which were approved subsequently (article 3 of the Special Statute for Sardinia ; article 2 of the Special Statute for the Val d'Aosta ; article 4 of the Special Statute for the Trentino-Alto Adige). Even when there is no specific stipulation, it cannot be supposed that autonomous regions have been given sovereign powers <sup>(3)</sup>.

It appears then that if any measure taken by the regional authorities conflicts with the commitments of the State under the European Treaties, that measure will be unconstitutional.

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(1) Art. 117 runs : "Subject to the limits imposed by the fundamental principles laid down by State legislation, and provided there is no conflict with the national interest and the interest of other regions, regions shall enact legislation in the following fields..."

(2) See Perassi, *la Costituzione e l'ordinamento internazionale*, p.36.

(3) 9 April 1963, *Foro Italiano*, 1963, I, p. 861.

VI. Amendment of constitutive instruments through methods other than the explicit approval of all members

Next to procedures for amendment by agreement between Member States, requiring ratification in accordance with their respective constitutional rules, the European Treaties contain special clauses allowing the Community Institutions to make adjustments in order to deal with unforeseen situations ; these are article 95 of the E.C.S.C. Treaty, article 235 of the E.E.C. Treaty and article 203 of the Euratom Treaty.

A. The E.C.S.C. Treaty

Article 95 provides for two forms of procedure, one known as "small revision" (third and fourth paragraphs), the other to cover cases not expressly provided for (first and second paragraphs).

The procedure under the third and fourth paragraphs is examined first because it is closest to amendment proper.

1. Under the procedure for "small revision", the rules of the Treaty governing the powers of the High Authority can be adjusted where the appearance of unforeseen difficulties or a profound change in market conditions to make such adjustment necessary.

Article 95, third paragraph, says : "If, after the period of transition provided for in the Convention containing the transitional provisions, unforeseen difficulties revealed by experience in the methods of executing this Treaty, or a profound change in the economic or technical conditions directly affecting the common market for coal and steel should require an amendment of the rules for the exercise by the High Authority of the powers conferred upon it, appropriate amendments may be made provided that they do not modify the provisions of articles 2, 3 and 4, or the relationship between the powers of the High Authority and those of the other institutions of the Community".

The procedure described in the fourth paragraph involves the successive intervention of all the Community Institutions.

"These amendments shall be proposed jointly by the High Authority and the Council acting by a five-sixths majority. They shall then be submitted to the opinion of the Court. In its examination, the Court shall be fully competent to review any matters of law and fact. If the Court should find that the amendments conform to the provisions of the preceding paragraph, they shall be forwarded to the Assembly. They will come into force if they are approved by the Assembly acting by a majority of three-quarters of the votes cast representing a two-thirds majority of the total membership".

Regarding the respective roles of the various Institutions, it must be noted that the Assembly intervenes only in the last resort after approval by the Court and that it does not have the power of initiative nor the practical possibility of introducing amendments ; the Court's opinion is decisive since it cannot be disregarded ; a unanimous vote in the Council is not required, but there must be a five-sixths majority.

#### Cases of application

- (i) The small revision procedure has been used to remedy social consequences of the coal crisis due to increased competition from fuel oil and imported coal. The field of application of article 56 regarding resettlement measures has been extended to cover the possibility of "profound changes in the marketing conditions of the coalmining or of the iron and steel industry, not directly connected with the introduction of the common market<sup>6</sup>..."

The Court recognized that there had been a profound change in the marketing conditions of the coalmining industry and that the widening of the conditions in which article 56 could be applied did not exceed the limits fixed in the third paragraph of article 95 <sup>(1)</sup>.

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(1) Court of Justice of the European Communities, Opinion 1-60 of 4 March 1960, Recueil, Vol VI, p. 93. See also : Opinion of 17 December 1959, Recueil, Vol V, p. 533.

- (ii) The second attempt at a small revision concerned article 65 regarding agreements between enterprises. This attempt failed because it was rejected by the Court <sup>(1)</sup>. The Court admitted the possibility of amending article 65 (2) of the Treaty in order to enable the High Authority to authorize types of agreement other than those specified in the text. But it deemed too vague a "proposal that would merely provide for the authorization" of agreements concerning adjustment to new marketing conditions and above all considered that it was impossible to set aside the limits placed by article 65 (2) c) on the size of cartels without infringing the stipulations of article 95, third paragraph.
- (iii) In these cases the Court which, according to Article 95, fourth paragraph, is "fully competent to review any matters of law and fact" showed great prudence in the judgments which this provision enables it to make. It did consider that "the introduction of new conditions permitting the exercise by the High Authority of a power in circumstances other than those specified by the Treaty does not constitute introduction of a new power". The Court therefore accepts that a small revision may lead to the widening of the powers of the High Authority but within the fields transferred to the Community. But it has in fact been cautious on how far-reaching the small revision may go ; in its view the possibility of authorizing restrictive agreements exceeding the size fixed by article 65 (2) c) ran counter to article 4 d) of the Treaty and the transformation of a prior examination system into a review of the facts and later direct intervention amounted to the attribution of a new power.

The Court pointed out furthermore that there could be no derogation from the normal procedure of review except in cases where neither the general structure of the Treaty

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(1) C.J.E.C. Opinion 1-61 of 13 December 1961, Recueil, Vol. VII, p. 483

nor the relations between the Community and the Member States will suffer. That is why the Court, faced with a proposal that would not just have extended the benefits provided by social provisions but would have modified the essential elements of competition, showed great prudence, which may be explained by the fact that article 95, fourth paragraph, allows the Treaty to be revised against the will or without the co-operation of one of the Member States.

2. Procedure under article 95, first and second paragraphs

This procedure has, according to the Court, the sole object "of instituting a system of derogation peculiar to the Treaty in order to enable the High Authority to face an unforeseen situation." (1)

Article 95, first paragraph, stipulates : "In all cases not expressly provided for in this Treaty in which a decision or a recommendation of the High Authority appears necessary to fulfil, in the operation of the common market for coal and steel and in accordance with the provisions of article 5 above, one of the objectives of the Community as defined in articles 2, 3 and 4, such a decision or recommendation may be taken with the unanimous agreement of the Council and after consulting the Consultative Committee."

Unlike the small revision, article 95, first and second paragraphs, can be applied from the beginning of the transitional period. The procedure applicable, which requires the unanimous agreement of the Council of Ministers, is to be found in other articles of the Treaty (53 b), 54, 81), while article 95, fourth paragraph, discussed above, provides for a most unusual procedure involving all the Institutions of the Community.

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(1) C.J.E.C., case 9/61, Recueil, Vol. VIII, p. 449.

Application of article 95, first paragraph, is subject to the presence of two essential elements, the existence of a case "not expressly provided for" and the need to attain one of the objectives defined in articles 2, 3 and 4.

#### Cases of application

Decisions on what constitutes a case "not expressly provided for" has not failed to raise difficulties, as the application of the clause shows. Are these only cases omitted unintentionally by the authors of the Treaty but similar to those that have been provided for, or on the contrary are they situations justifying the use of methods which are totally different or even run counter to those laid down in the Treaty ?

The High Authority has taken the middle road, considering that it is possible on the basis of article 95, first paragraph to use the funds from levies for needs other than those stipulated in article 50 but rejecting recourse to this provision, to settle the problem of Ruhr coal sales agencies, though it accepted this as a basis for authorizing the establishment of a Community system of aid to the coalmining industry<sup>(1)</sup>.

In certain respects, then, it seems that the first and second paragraphs of article 95 go beyond the "small revision", for the latter concerns modification of the rules for the exercise of the powers of the High Authority and must necessarily be based closely on the text of the Treaty, while the main purpose of article 95, first and second paragraphs, is to fill the gaps in the High Authority's means of action while complying with the stipulations of article 5 (i.e. ways and means of intervention and relations between the institutions and enterprises).

Lastly it must be noted that article 95, first and second paragraphs, may serve as a basis only for a decision whose scope and duration must be adapted to the situation justifying its adoption.

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(1) Official gazette of the European Communities, 25 February 1965,

B. The E.E.C. Treaty

Article 235 of the E.E.C. Treaty specifies how the Community institutions may take decisions in cases not provided for by the Treaty but falling within the terms of reference of the Community.

"If it becomes apparent that action by the Community is necessary to achieve, within the framework of the common market, one of the aims of the Community, and this Treaty has not provided the powers needed for such action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the requisite provisions".<sup>(1)</sup>

As results from its terms, the situation referred to in this provision is quite similar to the one referred to in article 95, first and second paragraphs of the E.C.S.C. Treaty.

The meaning and scope of article 235 have been defined in the Commission's reply to written question n° 20 submitted by M. Vredeling:

"Article 235 covers the case where the Treaty, while assigning to the Community a specific aim, has not provided the means of action to achieve this aim. In such a case the Council, acting on a proposal of the Commission and after consulting the European Parliament, is called upon in its capacity as a Community Institution to take the necessary steps in the forms set out in article 189 of the Treaty. Article 235, therefore, does not provide for the conclusion of supplementary agreements between the Member States but the adoption of a Community act".

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(1) Article 203 of the Euratom Treaty is identical in its terms to article 235 of the E.E.C. Treaty. To date it has not yet been applied.

Article 235 has been used in the first place to provide special rules for processed agricultural products not listed in Annexe II to the Treaty. As the rules of the Treaty and subsequent Community acts concerning abolition of national protection measures are quite different for agricultural products and the other ones, difficult problems arose for processed products, to which legally the less strict rules for agricultural products could not be applied. Therefore a system has been created on the basis of article 235 tending to harmonize the rules to be applied to those products with the rules applicable to agricultural products (1).

Article 235 also constitutes the legal basis for the third acceleration of the time-table for setting up the custom union. As has been discussed in Section I, the first two accelerations had been decided by the Representatives of the Governments of the Member States, meeting in the Council. For the definite implementing of the custom unions it has been considered preferable to adopt an act of the Council based on the Treaty. As the Treaty does not provide for all the necessary powers to that effect, article 235 has been referred to (2).

Finally, in the social field, article 235 served as the basis for the Decision of 22 December 1966 on a Community grant to Italy for the purpose of aid to redundant sulphur-mine workers and scholarships for their children (3).

These precedents may indicate that article 235 will probably play an important role in the further development of the E.E.C., as more occasions may occur which the authors of the Treaty have not foreseen. To date none of the acts, taken on the basis of article 235, has been challenged before the Court of Justice.

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(1) See e.g. Official gazette of the European Communities, 20 April 1962, p. 999, and 28 October 1966, p. 3361

(2) Ibid. 21 September 1966, p. 2971

(3) Ibid. 31 December 1966, p. 4168