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THE CO-OPERATION OF ESA AND EU AND THE RELATIONSHIP OF THEIR LEGAL REGIMES

by

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ABSTRACT

This paper analyses the consequences of possibly conflicting obligations of member States arising out of provisions of the Convention establishing the European Space Agency (ESA) and the Treaty establishing the European Community (EC). Especially in the field of industrial policy, this issue gains practical relevance, as ESA's rules on geographical return might conflict with EC rules e.g. on state aid and the market freedoms.

If ESA-Convention and EC-Treaty impose obligations which the member States cannot fulfil simultaneously, a conflict of norms occurs. In this case, the member States that are party to only one of the treaties can expect the obligations resulting from this treaty to be implemented. With respect to States which are members of both organisations, there is an obligation under international law to apply the treaty which prevails according to the rules on conflicts between treaties.

If member States apply a treaty which is inapplicable, they violate public international law. The authors submit that the ESA-Convention is *lex specialis* to the EC-Treaty. By applying the ESA-Convention, the member States therefore act in conformity with public international law. The possibly ensuing violation of the EC-Treaty, however, entails all the consequences of a breach of treaty.

INTRODUCTION

As ESA and EC/EU seek to deepen their co-operation in the field of space activities, the interrelation between their respective legal regimes becomes more relevant. It therefore must be analysed whether activities of ESA and the EC/EU or their respective member States could infringe the founding treaties of these international organisations or other rules of public international law. The application of the ESA provisions on industrial policy may serve as an example to show the practical relevance of this question.[1]

If ESA-Convention and EC-Treaty impose divergent obligations which the member States cannot fulfil simultaneously, a conflict of norms occurs. In this case, the member States that are party to only one of the founding treaties can expect the obligations of the treaty to which they are a party to be implemented by the other member States and possibly also by ESA and the EC respectively. For States which

are members of both organisations, the question arises which of the treaties prevails over the other treaty and thus has to be applied.

In praxi, the members of both organisations apply the ESA-Convention to the full extent. Thus, if a conflict between treaty obligations occurs, they cannot fulfil their obligations towards the States which are members only of the EC and towards the organs of the EC. This paper will only shortly address the compatibility of treaty obligations. We will not undertake to analyse this issue in detail, as it is subject to further research in the framework of an ongoing project supervised by Prof. Stephan Hobe at the Institute of Air and Space Law at the University of Cologne. This research project, which is sponsored by the German Federal Government and the German Aerospace Center DLR, is entitled "Legal framework for a coherent future structure of European space activities". Though this project formally is not part of the Project 2001 Plus, the results will also be presented at the final symposium of the Project 2001 Plus, which will take place in June 2005 in Cologne.[2]

The main focus of this paper therefore is to examine whether the members of both organisations comply with the rules of public international law on conflicts between treaties and the principle of *pacta sunt servanda* by applying the ESA-Convention. It shall be analysed which of the two treaties, the EC-Treaty or the ESA-Convention, prevails.

THE TREATIES IN QUESTION

ESA and EC are two different and independent subjects of public international law without direct institutional interrelations, ESA as an international organisation, the EC as a more integrated supranational organisation.[3] Both organisations largely have different objectives, tasks and competences and are based on different international treaties.

ESA is the legal successor of the international organisations ELDO and ESRO.[4] The founding treaty of ESA is the ESA-Convention of 1980.[5] The activities of ESA are limited to intergovernmental cooperation in the field of space research and space applications.[6] Decisions directly depend on the interests and activities of member States. There is no judicial review of the member States' fulfilment of their obligations arising out of the Convention or of the implementation by the organs. Any dispute concerning the interpretation or application of the ESA-Convention is to be submitted to arbitration, according to Art. XVII of the ESA-Convention. If a member State does not fulfil its obligations the Council may exclude it from membership of ESA by a two-thirds majority of all member States, Art. XVIII ESA-Convention.

The EC, on the other hand, was founded in 1958 as the European Economic Community (EEC). The founding treaties were amended several times and the organisation was renamed into European Community.[7] The Single European Act (SEA) in 1987 introduced provisions on the completion of the internal market and an R&D competence of the EC.[8] In 1993, the European Union was founded by the EU-Treaty, but the EU is not an international organisation and has no legal capacity.[9] In the future, the Draft Treaty Establishing a Constitution for Europe is meant to replace the EC-Treaty and the EU-Treaty and to consolidate all tasks within the European Union as an international organisation.[10] The EC pursues the goal of a comprehensive integration of its member States in numerous political areas. While the cooperation within the European Economic Community was limited to the economical context, the Draft Constitution even extends the competences of the EU explicitly to space policy.[11] As a

supranational organisation, the EC can create legal obligations and rights which apply directly to individuals and companies in the member States.[12] The EC's European Court of Justice (ECJ) ensures the observance of EC law by issuing binding interpretations for the application of the treaties and their implementing rules. The Court judges on the acts and omissions of the institutions and the member States in accordance with Community law.[13]

The ECJ can exercise this control also with respect to ESA-law in case the application of ESA rules violates EC law. This possibility, however, has existed in theory since the entry into force of the ELDO- and ESRO-Conventions in 1964. Nevertheless, it became more realistic with the entry into force of the SEA in 1987.[14]

COMPATIBILITY OF THE TREATIES

The question whether a conflict between the treaties exists is subject to the interpretation of the treaties in question.

A conflict between treaty provisions in this case is most likely to occur with respect to the industrial policies of both organisations, especially the so-called principle of geographical return applied by ESA and its implementation by the award of contracts. This principle results in a geographic distribution of contracts between the member States to their industry corresponding in value to the amount of the respective member State's contributions to the Agency's programmes. The ratio between a member State's percentage share of the total value of contracts awarded among all member States and its total percentage contributions shall not fall below 0.8, or higher if the ESA Council so decides. ESA's industrial policy is prescribed in Art. VII and Annex V to the Convention.

Furthermore, the conclusion of the ESA-Convention itself, which might contain provisions which are in conflict with EC law, could have violated the member States' obligations arising out of the EC-Treaty.

Finally, the other activities of member States within the ESA framework could infringe EC law, e.g. the participation in ESA Council decisions regarding the increase of the minimum return coefficient, the participation of a member State in ESA's optional programmes or activities within the framework of optional programmes like the agreement on contributions exceeding the national income or the acceptance of a higher individual minimum return coefficient.[15]

Norms of the EC-Treaty that are potentially infringed by such activities include the secondary law rules of public procurement as laid down in Directive 2004/18[16], the rules on competition in Art. 81 *et seq.*, especially those on state aid in Art. 87-89 EC, the free movement of goods and services, Art. 28-31 and 49-55 EC and the principle of non-discrimination as guaranteed in Art. 12 EC.

The question of compatibility of both treaties must be clarified by a detailed interpretation of the relevant treaty provisions. Therefore, this issue is one of the central research interests of an ongoing research project conducted by the Institute of Air and Space Law in Cologne. For the purpose of this paper, we will assume that the treaties are in conflict, without prejudice to the final results of the research project.

CONSEQUENCES OF COLLISIONS OF TREATY OBLIGATIONS

If two treaties are in conflict, their parties are obliged under international law *vis-à-vis* the other States party to both treaties to apply the treaty which prevails according to the rules on conflicts between treaties. Before the rules on conflicts between treaties will be analysed in some detail, the consequences of the application of the "wrong" treaty towards other member States

and the international organisations shall be studied. The issue is further complicated by the fact that not all EC-member States are members of ESA, and *vice versa*, but at present 13 States are members of both organisations. It is therefore necessary to look at the consequences of the application of the two treaties by States which are members of both organisations, for States which are members of only the EC and by those States which are only member of ESA.

Breach of the respective other Treaty by an International Organisation

It does not seem possible that ESA or the EC as international organisations themselves breach the founding treaty of the other organisation. ESA itself is neither directly affected by the transfer of competences from member States to the EC in the field of R&D, nor by the explicit inclusion of a competence for space activities in the Draft Constitution. ESA is not a party to the founding treaties of the EC and, as an international organisation, it is not subject to the exercise of sovereign powers by the EC.[17] Similarly, the EC is not bound by decisions of ESA. The founding treaties of ESA and EC are independent of each other and enjoy an equivalent legal status.[18] There are no other rules of public international law which one organisation might breach *vis-à-vis* the other in this case.

Breach of Material Norms by Double-Members towards Members of only one Organisation and the Organisation itself

The question therefore is whether the member States that are members of both organisations in applying one of the treaties – in practice the ESA-Convention – infringe their obligations arising out of the other, the EC-Treaty, towards the EC and towards the States which are only member of the EC.

Infringement of the EC-Treaty

The *pacta sunt servanda* rule obliges States to accept a treaty in force as binding and to perform it in good faith.[19] As a general principle of customary international law,[20] it is also contained in Art. 26 of the Vienna Convention on the Law of Treaties. Art. 10 of the EC-Treaty explicitly repeats this rule for the EC.[21] Member States could violate the principle *pacta sunt servanda* or Art. 10 EC in this case by joining a second organisation and assuming new obligations which are incompatible with the obligations accepted as a member of the first organisation.[22]

Such a violation entails all the consequences of a breach of obligations under international law.[23] This is confirmed by the principle *pacta tertiis nec nocent nec prosunt*. These consequences apply irrespective of the question which treaty prevails.[24] Consequently, the rules of international law on conflicts between treaties are not relevant here and can only gain importance regarding the relationship between States that are members of both organisations, as will be discussed below.

International responsibility as well as the violation of the specific rule of Art. 10 EC[25] result in an obligation to provide reparation.[26] If the internationally wrongful act is the conclusion of a treaty which jeopardizes the execution of an earlier treaty, the termination or the amendment of this treaty would be the adequate form of restitution.[27] Until such a declaration of termination or an amendment would become effective, however, the ESA-Convention would be applicable.

Furthermore, the EC-Treaty in Art. 226, 227 contains a specific procedure applicable in case of infringements of the Treaty.

Infringement of the ESA-Convention

Another, though more hypothetical, possibility would be that the ECJ prohibits EC member States to apply the provisions of the ESA-Convention and the member States follow such a ruling. As a consequence of the full application of the EC-Treaty, member States would infringe the ESA-Convention and thus the principle *pacta sunt servanda* with the mentioned consequences. Member States which are members of both organisations would be internationally responsible[28] *vis-à-vis* the States which are only member of ESA, and possibly *vis-à-vis* the organisation itself.

The application of the *pacta sunt servanda* principle, however, depends on the results of an interpretation of the treaties, as it presupposes a collision of treaty obligations. As stated above, we will leave this interpretation to the research project and assume for the purposes of this paper that a collision occurs.

Breach of Public International Law by Double-Members towards Members of both Organisations

If we look at the relationship between States which are members of both organisations, we can observe that the *pacta sunt servanda* rule requires States to apply the prevailing treaty if the obligations resulting from the two treaties are conflicting. The States party to both treaties can claim the fulfilment of the obligations arising out of the applicable treaty, i.e. the treaty prevailing according to the rules on conflicts between treaties. Therefore, it is of high practical relevance to determine whether the provisions of the ESA-Convention or the EC-Treaty prevail.

If the application of the ESA-Convention was not in compliance with the principles of public international law, those States members of both organisations would not only possibly be internationally responsible towards the States which are only members of the EC and towards the organs of the EC but as well towards the other States which are members of both organisations. Thus, one of those "double-members" could also invoke a breach of the material provisions of the EC-Treaty and of the rule of *pacta sunt servanda* and could claim within the ESA Council that all norms of the EC-Treaty have to be observed. These States could claim that an obligation exists to amend or terminate the ESA-Convention or to adjust its application accordingly.

On the other hand, if the application of the ESA-Convention was in conformity with the rules on conflicts between treaties, the members of both organisations could reject the claim of another member of both organisations that EC law should be applied on the basis that the ESA-Convention would derogate the norms of the EC-Treaty. Only the EC member States which are not members of ESA as well as EC organs, however, could still claim a violation of the *pacta sunt servanda* principle and of EC law with the mentioned consequences. However, they could not invoke it within the ESA Council.

Consequently, the question whether the EC-Treaty or the ESA-Convention prevails in case of conflict could be of high practical importance, as the legal consequences may differ significantly.

RESOLUTION OF CONFLICTS BETWEEN TREATIES

As shown in the previous part, member States that apply a treaty which according to the rules on conflicts of treaties is inapplicable violate rules of public international law *vis-à-vis* each other and *vis-à-vis* the international organisation founded by the treaty that prevails but is not applied.

If the conflict between the treaties concerned cannot be resolved by applying, first, a

special treaty clause which gives precedence to one treaty, second, the hierarchical principle could apply. Third, a special provision could prevail over a general provision, and finally later legislation could supersede earlier legislation.

Special Treaty Clause

Special treaty clauses may solve the conflict between successive treaties relating to the same subject matter. Art. 30 (2) of the Vienna Convention provides: "When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of the other treaty prevail."

The ESA-Convention does not contain a clause specifying the precedence of other treaties. The EC-Treaty, on the other hand, contains such a clause. Art. 307 provides that "the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty." However, member States are obliged to "take all appropriate steps to eliminate the incompatibilities" with EC law.

The ESA-Convention entered into force in 1980, replacing the ESRO- and ELDO-Conventions.[29] Their founding treaties entered into force in 1964, after the EEC was founded in 1958. Art. 307 EC therefore does not generally give precedence to the ESA-Convention, except for those States which first joined ESA, namely Sweden, Spain and Austria.[30] Most States, however, joined the EEC/EC before they joined ESA.

Yet the EEC Treaty was amended several times after the entry into force of the ESA-Convention. In 1987, the SEA introduced an R&D competence for the Community. Art. 307 EC also applies to cases where the EC-Treaty had been in force, but the EC received the competence in question only later and unpredictably.[31] As the EEC had been involved in R&D activities already since 1974,[32] its new competence was not unexpected and not unpredictable at the time of ratification of the ESA-Convention. Furthermore, the ECJ interprets Art. 307 EC rather narrowly.[33] Therefore, it can be assumed that Art. 307 EC does not give precedence to the ESA-Convention in the field of R&D for other States than Spain, Sweden, Austria and possibly Finland which joined both organisations on January 1, 1995.

Art. 305 EC is a special clause which only applies in relation to provisions of the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community. Art. 306 EC only applies to the Benelux States. For treaties concluded after accession to the EC, the EC-Treaty does not contain specific provisions.

Consequently, as both the EC-Treaty and the ESA-Convention do not contain specific clauses resolving possible conflicts between these treaties, other principles of international law must be applied.

Hierarchical principle

A treaty of higher rank prevails over a treaty with lower rank irrespective of its time of conclusion.[34] Art. 103 of the Charter of the United Nations and Art. 30 (1) of the Vienna Convention provide that the Charter shall prevail in the event of a conflict. Some authors argue that other treaties may also prevail and thus have an effect similar to that of Art. 103 of the UN-Charter if they contain a clause establishing their higher rank.[35] According to this view, the constitutions of important international organisations have a function which is comparable to the UN-Charter and serve the international community in an outstanding way. Their higher rank is therefore

considered to be justified. A similar reasoning applies to treaties which apply *erga omnes*, for example treaties for the protection of human rights.[36]
The EC-Treaty and the ESA-Convention might be such constitutions of important international organisations. As the EC enjoys a higher level of integration and exercises functions in a number of policy sectors, it is the organisation with more comprehensive functions. It is nonetheless doubtful whether the EC-Treaty can be said to exercise such a specific function in the interest of the international community which would outweigh the importance of ESA to the effect that the EC-Treaty prevails. The regional scope of both organisations militates against such a conclusion. Furthermore, there is no international organisation comparable to the UN in terms of universality, purposes and powers. It would not be possible to adopt a clause as extensive in effect as Art. 103 of the UN-Charter for so long as the UN exists.[37] Moreover, the EC-Treaty does not contain a clause which would establish its higher rank *vis-à-vis* the founding treaties of other organisations.
Therefore, the hierarchical principle cannot justify the precedence of either EC-Treaty or ESA-Convention.

Lex specialis

In case of a conflict between a general and a special provision, the special provision prevails according to the customary rule of public international law *lex specialis derogat legi generali*.[38]
The EC-Treaty pursues the goal of a comprehensive integration of its member States in numerous political areas. It applies to economic activities of all kind.
By contrast, the activities of ESA are limited to intergovernmental cooperation in the field of space research and space applications.[39]
The ESA-Convention and its annexes specifically contain provisions on the elaboration and implementation of activities, programmes and on an appropriate industrial policy in the space field, on the contents of possible space programmes, their execution, financial participation etc. The ESA-Convention is more specific, e.g. with respect to the provisions on the industrial policy, than the possibly conflicting provisions of the EC-Treaty. In this respect, the ESA-Convention can be compared to the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, which similarly applied[40]/applies to specific goods and sectors of industry while the EC-Treaty is general in nature with a comprehensive scope of applicability.[41] Especially with regard to the European Atomic Energy Community Art. 305 EC confirms the prevalence of the *lex specialis*.
If and to the extent that the provisions of the ESA-Convention and the EC-Treaty are incompatible, the ESA-Convention prevails as the *lex specialis*.

Lex posterior

When two successive treaties relate to the same subject-matter, and the treaties do not determine which treaty shall take precedence, Art. 30 (3) of the Vienna Convention determines that the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. If not all States parties to the earlier treaty are party to the later treaty, the treaty to which both States are parties governs their mutual rights and obligations, Art. 30 (4) lit. b of the Vienna Convention. Between those States parties to both treaties, para. 4 lit. a refers to the principle *lex posterior derogat priori* contained in the abovementioned para. 3.
It can be difficult to determine which treaty is the treaty earlier in time.[42] The first treaty

concluded was the EEC-Treaty in 1957, in force on 1 January 1958. Signed in 1962, the Conventions establishing ESRO and ELDO entered into force in 1964. Then, in 1975, the ESA-Convention was agreed upon and entered into force in 1980. The EEC-Treaty was amended several times after that date. As mentioned above, the SEA of 1987 is of special importance here, as it extended the EC's scope of competences to R&D activities. As a consequence of the Maastricht Treaty[43], the EEC changed its name into EC and the EU was founded. The Amsterdam Treaty of 1997[44] renumbered the EC-Treaty's articles, while the Nice Treaty of 2001[45] was confined to merely institutional amendments. Therefore, one could consider the EC-Treaty in its latest form as being a later treaty than the ESA-Convention. In other cases, the ECJ followed this reasoning with respect to other agreements in the sense of Art. 307 EC.[46] However, the ECJ only bases its decisions upon European law, and examines the compatibility with the EC-Treaty. The answer according to public international law thus might be different.

All of the amending treaties confirmed the continuity of the legal personality of the EC and of the original treaty. They were only amendments of an existing treaty, not substantially new treaties. In such a case, the date of the original instrument remains the same after the revision.[47] The provisions of Art. 307 and 305 also remained unchanged and did not, for example, take the entry into force of the amending treaty as a new reference date. Thus, only some specific amendments, like the introduction of the R&D competence, can be considered to be later agreements than the ESA-Convention. Likewise, the ESA-Convention has been amended twice,[48] but these amendments were confined to questions which are unlikely to conflict with EC law. Thus, to the larger extent the EC-Treaty seems to be the *lex prior*, and the ESA-Convention the prevailing *lex posterior*.

Once the envisaged European Constitution enters into force, however, this "Treaty establishing a Constitution for Europe" might be considered as the *lex posterior vis-à-vis* the ESA-Convention, as Art. IV-2 of the Draft Constitution provides that the earlier EC/EU-Treaties shall be repealed as from the date of entry into force of the Treaty establishing the Constitution. In this case, a conflict between the ESA-Convention as the earlier, but more specific treaty – a *lex prior et specialis* – and a later, general European Constitution, the *lex posterior et generalis*, might occur.

However, Art. 30 (3) of the Vienna Convention, containing the *lex posterior* rule, according to Art. 30 (1) only applies to the extent that the provisions relate to the same subject-matter. This is the case only if the provisions are of a comparable degree of generality.[49] Otherwise, Art. 30 of the Vienna Convention does not apply.

Thus, in case the provisions of an earlier treaty are more specific than the provisions of a later, more general treaty, Art. 30 (4) of the Vienna Convention, referring to para. 3, is not applicable.[50] The more specific treaty provisions apply. As a consequence, in general the more specific provisions of the ESA-Convention prevail over the EC-Treaty and even over the envisaged European Constitution.

It might be possible that some provisions of the EC-Treaty or the European Constitution are more specific. In this case, these provisions would prevail as *leges speciales*. However, the provisions of the ESA-Convention which are of particular relevance for the industrial policy like the geographical return principle are generally more specific and therefore prevail.

According to another approach, the *lex specialis* rule is no conflict norm but merely a rule of interpretation in order to determine

which treaty shall apply.[51] Then, the *lex posterior* rule only applies as a last resort in case the application of the *lex specialis* principle does not lead to a result. This approach also postulates a comparable degree of generality and therefore leads to identical conclusions based on the interpretation of the "same subject-matter". The result is in both cases the general prevalence of the ESA-Convention, except for those cases where the EC-Treaty exceptionally might contain the more specific provision.

CONCLUSION

The current State practice of applying the ESA-Convention without accepting restrictions possibly resulting from the EC-Treaty is in conformity with the rules of public international law, as the ESA-Convention is the prevailing treaty according to these rules. The ESA-Convention generally is *lex specialis* to the EC-Treaty.

Hence, the States member of ESA and the EC do not infringe their obligations *vis-à-vis* the other members of both organisations in case the interpretation of the relevant provisions of the treaties should lead to the conclusion that the obligations resulting from both treaties are not compatible.

However, this conclusion does not imply that the application of the ESA-Convention does not violate the *pacta sunt servanda* rule *vis-à-vis* the States members of only one founding treaty or towards the organisations themselves. The member States remain responsible under international law for any breach and might be obliged to amend one or both treaties or their application as a form of restitution.[52] In EC law, there exists a specific legal procedure before the ECJ for the infringement of obligations under the EC-Treaty, cf. Art. 226 and 227 EC.

Further results, for example regarding the question whether a conflict of norms actually occurs, will be presented in the research report of the project "Legal framework of a coherent future structure of European space activities" on the occasion of the Final Symposium of Project 2001 Plus in June 2005 in Cologne.

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[24] Art. 30 (5) Vienna Convention.

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[30] Austria (ESA: 1986, EC: 1995); Sweden (ESA: 1976/1980, EC: 1995); Spain (ESA: 1979/1980, EC: 1986). Finland joined both organisations on 1 January 1995.

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[32] T. Oppermann, *op. cit.* in n. 17, marginal note 1943.

[33] Cf. eg. ECJ, Judgments of 5 November 2002, Case 475/98, Rep. 2002, I-9797, para. 49; Case 466/98, Rep. 2002, I-9427, para. 28; Case 476/98, Rep. 2002, I-9855, para. 64 et seq. – Open Skies.

[34] G. Dahm/J. Delbrück/R. Wolfrum, Völkerrecht, Vol. I/3, 2nd ed., Berlin 2002, § 156, p. 687; W. Karl, *op. cit.* in n. 23, p. 936.

[35] G. Dahm/J. Delbrück/R. Wolfrum, *op. cit.* in n. 34, § 156, p. 691.

[36] *Ibid*, § 156, p. 692.

[37] A. Aust, Modern Treaty Law and Practice, Cambridge 2000, p. 175.

[38] N. Quoc Dinh/P. Daillier/A. Pellet, Droit international public, 7th ed., Paris 2002, § 173, p. 271.

[39] Art. II of the ESA-Convention.

[40] The ECSC-Treaty terminated on 23 July 2002.

[41] Re. the relationship of ECSCT, EACT and ECT cf. K. Schmalenbach, in: C. Calliess/M. Ruffert, *op. cit.* in n. 21, Art. 305 EGV, marginal note 3.

[42] J. B. Mus, Conflicts between Treaties in International Law, in: 45 NILR (1998), p. 208, 220.

[43] Entry into force on 1 November 1993.

[44] Entry into force on 1 May 1999.

[45] Signed on of 26 February 2001, entry into force on 1 February 2003

[46] ECJ, Judgments of 5 November 2002, Case 475/98, Rep. 2002, I-9797, para. 49; Case 466/98, Rep. 2002, I-9427, para. 28; Case 476/98, Rep. 2002, I-9855, para. 64 et seq. – Open Skies.

[47] E. W. Vierdag, The Time of the "Conclusion" of a Multilateral Treaty, in: 59 BYIL (1988), p. 75, at 101.

[48] By Council Resolutions ESA/C-M/CXXII/Res. 1 (Final), chapter IV, adopted on 20 October 1995 and ESA/C-M/CLIV/Res. 2 (Final), chapter III, adopted on 15 November 2001.

[49] See answer of Special Rapporteur H. Waldock, as published in: Conférence des Nations Unies sur le Droit des Traités, 2ième session, Documents Officiels, New York 1970, p. 270, para. 41. A. Aust, *op. cit.* in n. 37, p. 183 with further references; N. Quoc Dinh/ P. Daillier/ A. Pellet, *op. cit.* in n. 38, § 173, p. 271; P. Reuter, *op. cit.* in n. 27, para. 201.

[50] *Ibid.* Differentiating E. W. Vierdag, *op. cit.* in n. 47, p. 75, at 100.

[51] J. B. Mus, *op. cit.* in n. 42, p. 218.

[52] S. Hobe/O. Kimminich, *op. cit.* in n. 19, p. 219; W. Karl, *op. cit.* in n. 23, p. 938.