

WORLD LAW

CONTINUITY IN THE LAW OF INTERNATIONAL ORGANIZATION

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"De fine non est consilium, sed solum de his, quae sunt ad finem." S. THOMAS
AQUINAS, SUMMA THEOLOGICA I, II, 14, 2 (Editio Leonina tom. VI, p. 106).

PART TWO:

CONTINUITY FROM OEEC TO OECD†

BEFORE discussing the legal nature of the transition from the Organisation for European Economic Co-operation (OEEC) to the Organisation for Economic Co-operation and Development (OECD), a brief examination of the history of the OEEC seems appropriate, since that institution has during its lifetime made, practically without interruption, successful efforts to cope with the problem of continuity by way of constitutional and administrative adaptation.

I

THE OEEC IN RETROSPECT

The history of the OEEC consists of a series of reforms which transformed that body from a post-war distributor of American aid

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† This is Part Two of an article appearing in successive issues of the DUKE LAW JOURNAL. Part one dealt with continuity in the law of international organisation. Since the writing of this article was terminated in the fall of 1961, the propositions set forth were tested in the practice of the OECD and its organs. The experience gained since September 30, 1961, when the OECD Convention came into force, has been traced by the present writer in *Die Organisation Für Wirtschaftliche Zusammenarbeit und Entwicklung (OECD)—Entstehung und Rechtsordnung*, 22 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 49-112 (1962) and in a study to be printed in volume 12 of the JAHRBUCH DES ÖFFENTLICHEN RECHTS (1963). See also, Kiss, *Quelques aspects de la substitution d'une organisation internationale à une autre*, 7 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 463 (1961); Wiebringhaus, *A propos du transfert de compétences entre organisations internationales . . .*, 7 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 537 (1961); Case Concerning the Temple of Préah Vihear (Cambodia v. Thailand), Preliminary Objections, [1961] I.C.J. Rep. 17.

into a robust multinational entity acting in pursuit of a multiple objective in the economic field. This objective was so diversified that in the second half of 1958 when the OEEC was already seized with the then insoluble controversy between the Six and the Seven, its field of activity could be described as "economic matters in a broad sense of the term."¹ The salvation of Europe from its postwar "money muddle"² was accomplished by the OEEC through three kinds of devices which were employed by the Council of OEEC or under its authority by subsidiary organs of the organisations. They were: Intra-European Payments and Compensation Agreements, the European Payments Union (EPU) and the European Monetary Agreement (EMA).³

Following the termination of the first Agreement on Multilateral Monetary Compensation of November 18, 1947,⁴ a portion of "Marshall Aid" for 1948-50 was granted in the form of "conditional aid" to certain countries on condition that they grant an equivalent amount of drawing rights to their European debtors. The beneficiaries of drawing rights were relieved from payment obligations for a corresponding amount of imports from the countries which had granted them. The granters of drawing rights, on the other hand, were compensated by an equivalent amount of dollar aid from the United States. The legal mechanics of this first attempt at dismantling bilateralism in the field of intra-European payments were provided for in the Agreements for Intra-European Payments and Compensations of October 16, 1948,⁵ and September 7, 1949,⁶ the OEEC having entered into life on April 16, 1948.⁷

¹ Elkin, 4 *EUROPEAN YEARBOOK* 100 (1958); ADAM, *L'ORGANISATION EUROPÉENNE DE COOPÉRATION ÉCONOMIQUE passim* (1949) (original function of the OEEC); cf. Mallett, 1 *EUROPEAN YEARBOOK* 62 (1955) (later history). On the legal consequences of the OEEC's role as distributor of U.S. aid and its modification to a permanent regional organization see Szuldrzunski, 2 *INT'L & COMP. L.Q.* 579 (1953).

² Triffin, *EUROPE AND THE MONEY MUDDLE* (No. 7 of Yale Studies in Economics) 143, 161 (1957).

³ See OEEC 9TH ANNUAL REPORT: *A Decade of Co-operation, Achievements and Perspectives* 75 (1958).

⁴ For a concise analysis see *Hearings Before the Senate Committee on Foreign Relations on U.S. Assistance to European Economic Recovery*, 80th Cong., 2nd Sess., pt. 1, at 510-11 (1948). Text in *Bulletin de Législation Comparée* (Ministère des Finances, Paris, 1948) at 915.

⁵ Text in *Documents on European Recovery and Defence* 111 (1949).

⁶ Text in 6 *ECONOMIC CO-OPERATION ADMINISTRATION REPORT TO CONGRESS* 81 (July-Sept. 1949).

⁷ In accordance with Art. 24(b) of the Convention for European Economic Co-

The replacement of this timely, but soon worn-out, system by the EPU was initiated by an agency of the United States Government, the Economic Co-operation Administration, in December, 1949,⁸ with the objective of substituting European co-operation for American aid as a basis for a broader and more flexible payments system.⁹ Designed to be an automatic mechanism for a multilateral, although originally limited, settlement of accounts, the EPU¹⁰ worked as a multilateral clearing house, which each month registered the payments due from one country to another in the mutual accounts of the central banks. The residual balance by each country towards each one of its partners was communicated to the Bank for International Settlements (BIS), which acted as agent for EPU. BIS then cancelled out the claims and debts accumulated during the month by each country with respect to all of its partners. Thus, only a single residual claim or debt to EPU remained, which was settled between each government and EPU. The second purpose of the EPU was to facilitate the settlement of the monthly net payments by mutual EPU credits which financed part of the settlements¹¹ while the rest was made in gold, dollars or in currency acceptable to creditor countries. The third aim of the EPU was to provide effective consultation on the problems created by extreme creditor and debtor positions in the Union.

The system had received working capital from the United States Government in the amount of 350 million dollars. Once started, its operation did not rely on additional American financial support. It was able to exist and to finance a large proportion of intra-European trade without supplementary American aid. Thus conceived, the EPU was the prime mover towards multilateralism in trade and invisible transactions. It also helped to overcome the financial crises which

operation of April 16, 1948, which provided for provisional application as from signature. Text of OEEC Convention at 1 EUROPEAN YEARBOOK 231 (1955).

⁸ On this initiative *cf.* TRIFFIN, *op. cit. supra* note 2, at 161.

⁹ For a concise summary see ECONOMIC AND POLITICAL PLANNING, EUROPEAN ORGANISATIONS 81-87 (1959).

¹⁰ Agreement for the Establishment of a European Payments Union of September 19, 1950. 2 EUROPEAN YEARBOOK 363 (1956) (text). On the legal aspects of EPU see Huet, 78 JOURNAL DU DROIT INTERNATIONAL 770 (1951); WABINITZ, DER ZWISCHENSTAATLICHE ZAHLUNGSVERKEHR AUF DER GRUNDLAGE INTERNATIONALER ZAHLUNGSABKOMMEN 16, 48 (1955); Hug, *The Law of International Payments*, 79 RECUEIL DES COURS 515, 678-712 (1951, II); Mann, *Money in Public International Law*, 96 RECUEIL DES COURS 7, 26-31 (1951, I).

¹¹ On the average sixty per cent. See OEEC 9TH ANNUAL REPORT, *op. cit. supra* note 3, at 80.

affected Europe in the early 1950's as a result of the Korean war and other political and economic incidents of a local nature but of Europe-wide dislocating effect; in addition, it contributed to the improvement and stabilization of the economies of specific countries by timely financial aid measures.¹²

Administered, under the authority of the Council of the OEEC, by a Managing Board of seven distinguished financial experts who were appointed by the Council of the OEEC in a personal capacity on the nomination of governments, the EPU had no legal personality of its own but formed part of the operational activities of the OEEC, which alone could act under international law as well as the municipal law of the contracting parties.¹³

The EPU was replaced by the EMA of August 5, 1955,¹⁴ when at the end of 1958¹⁵ OEEC members, whose contributions to the European Fund amounted in the aggregate to more than fifty per cent of the total amount of contributions provided for in the latter agreement, declared their currency convertible in different ways. Continuity was ensured by the transfer of the working capital of the EPU to the European Fund, the retention of the institutional machinery supplied by the OEEC—Council, Secretariat and BIS as agent—and the re-appointment of the members of the Managing Board of the EPU as members of the Board of Management of the EMA.¹⁶

The EMA provides essentially for the establishment of a European Fund and for a multilateral system of settlements, both operated, as was the execution of the EPU agreement, by a restricted committee, the Board of Management, under the authority of the OEEC Council. The Fund is to provide short-term credit of up to two years and to facilitate the monthly balances between the central banks of member

¹² See EUROPEAN PAYMENTS UNION, FINAL REPORT OF THE MANAGING BOARD, OEEC, 17-26 (Paris, October 1959).

¹³ Huet, *op. cit. supra* note 10, at 832-42.

¹⁴ 3 EUROPEAN YEARBOOK 213 (1957). The text published there was amended by Supplementary Protocols Nos. 2, 3 of June 27, 1958, January 15, 1960, and December 13, 1961, respectively, OEEC Council Decisions C(59)191, C(59)293(Final), C(59)294 and C(60)146(Final) and OECD Council Decision OECD/C(61)57(Final). On the legal aspects of the EMA see Huet, 1 AF 455 (1955); Wabnitz, 10 EUROPA ARCHIV 8237 (1955); Mann, *supra* note 10; Elkin, 7 EUROPEAN YEARBOOK 148 (1961).

¹⁵ Cf. THE WORK OF THE ORGANISATION FOR EUROPEAN ECONOMIC CO-OPERATION, A REPORT BY THE SECRETARY-GENERAL, 29-33 (April 1959); and FINAL REPORT OF THE EPU MANAGING BOARD, *op. cit. supra* note 12, at 53.

¹⁶ Resolution of the OEEC Council C(58)282(Final) of December 30, 1958.

states. While under the EPU Agreement credit did not require specific approval of the institutions of the OEEC operating the Union, credits now may only be granted by the OEEC Council of the organisation on the proposal of the Board of Management.

On the coming into force of the OECD Convention, the EMA continued to operate as before, but within the organisational framework of the OECD.¹⁷

No less wholesome has been the work of the OEEC in the field of trade and invisible transactions, carried out, as in the case of intra-European monetary co-operation, by restricted bodies, the Steering Board for Trade and the Committee for Invisible Transactions, organs composed of seven members, each of them chosen for his expert knowledge by the OEEC Council on the nomination of his government.

The action of the OEEC for the liberalisation of trade consisted essentially in the dismantling of quantitative restrictions which hampered the intra-European intercourse of goods. By the continuous adaptation of the trade provisions of the Code of Liberalisation¹⁸ to the improvement of the member countries' economic situation in general and their balance of payments in particular, the OEEC could reach the point where in fact nearly ninety-five per cent of members' imports on private account¹⁹ were liberalised.

In reducing restrictions on invisible transactions,²⁰ that is, on services, tourist expenditures, payments of profits and dividends, and related operations, the OEEC began in 1950 by a standstill—a

¹⁷ See Supplementary Protocol No. 4 to the EMA, the two last recitals of the preamble of the EMA as amended by that Protocol and paras. 18, 72-79 of the *Report of the Preparatory Committee of the Conference on the Reorganisation of the OEEC*, as printed in a brochure of the OEEC, Paris, December, 1960, THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 25-83 [hereinafter cited as Blue Paper]. The report [hereinafter cited as PC Report] is reprinted in Senate Comm. on Foreign Relations, *Background Documents Relating to the Organisation for Economic Co-operation and Development*, 87th Cong., 1st Sess. (1961), at 1 [hereinafter cited as Background Documents].

¹⁸ Originally adopted as CODE OF LIBERALISATION OF TRADE as a Decision of the OEEC Council C(50)258 on August 18, 1950. The trade part of this Code was not retained by the OECD; cf. PC Report paras. 58-71.

¹⁹ Cf. ANNUAL ECONOMIC REVIEW OF THE OEEC at para. 36, C(61)116, August 28, 1961.

²⁰ For an up-to-date description and analysis of the work of the OEEC in this field see LIBERALISATION OF INVISIBLE TRANSACTIONS AND CAPITAL MOVEMENTS BY THE OEEC 17-29, Paris, March 1961 (OEEC).

decision of the OEEC Council that its members should not impose new restrictions on invisible transactions. In June, 1955, it was decided to free, beginning the following November, all invisible transactions unless a member state expressly lodged a reservation against a specific item in a list of invisible transactions which would exempt that state from liberalising it. By the annual examination of these reservations and the enlargement of the list of transactions, the OEEC has achieved a large measure of freedom for intra-European intercourse in this sector and has whittled down existing restrictions which were still maintained by virtue of the reservation procedure.²¹

A start into the liberalisation of capital movements was made in December, 1959, by means of essentially the same technique by the same body, the Committee for Invisible Transactions. The Code of Liberalisation of Capital Movements of December 4, 1959,²² embodied all obligations of, and recommendations to, member countries within this field. Like the Code of Liberalisation, it consisted of a set of general undertakings and procedural rules to which was annexed a list setting out the detailed commitments with respect to which reservations could be lodged.

Another adaptation of the OEEC to the changing requirements of its members occurred in the operational fields of productivity, training and use of technical and scientific personnel, and nuclear energy. Chronologically, the first of these subjects to be dealt with was productivity through the creation of the European Productivity Agency (EPA) in 1953. That institution was devoid of legal personality, as it was an operational branch of the OEEC which alone had legal capacity. Under the authority of the OEEC Council, the Governing Body of that agency and the Secretary-General of the OEEC²³ were responsible for the operation of the EPA, which implemented its annual programs²⁴ through projects adopted by the Governing Body. These projects were of two kinds, either providing continuing services, such as productivity films, library services, exchanges of documentation and periodicals, or entailing specific action to meet non-permanent needs, such as lectures and symposia on specific aspects of productivity, missions of European experts to the United States and other tasks of a short-

²¹ Code of Liberalisation, Parts II, III, V, VI, VII, Annexes B and C.

²² Council Decision C(59)244(Final) of December 4, 1959, as amended.

²³ Cf. Amended Constitution of the EPA adopted as OEEC Council Decision C(57)170 of July 26, 1957, arts. 3-7.

²⁴ *Id.* arts. 2(d), 4(b)(c).

term nature. The work of the EPA enters into the context of continuity as it attacked the problem of economic development from the technological angle²⁵ when sizable achievements in the field of payments, trade and invisible transactions had already been accomplished and when technical adaptations were called for to increase the speed and the volume of the European recovery.²⁶

In its non-regulatory activities, the European Nuclear Energy Agency (ENEA), the operational arm of the OEEC in the field of nucleonics, has brought about one of the most important achievements in the law of international public services.²⁷ For the first time, ENEA applied the idea of joint undertakings in the field of nuclear energy.²⁸ Again, ENEA, like EPA, has no legal personality of its own, but is only an organ in a specific sphere of action of the OEEC, which alone has legal capacity under international law and the municipal law of member states. By contributing forcefully to the development of the peaceful uses of the atom in the member states of the OEEC, ENEA has contributed considerably to the maintenance of the OEEC as a useful instrument for European economic development and the adaptation of that organisation to new tasks. It was continued as part of the structure of OECD.²⁹

Constructed along basically the same organisational lines as the EPA, the Office for Scientific and Technical Personnel (OSTP) has been, since 1958,³⁰ the institutional expression of the OEEC's desire to cope with Europe's shortage of scientific and technical manpower. It is too early yet to make a complete assessment of these efforts, since the projects of the OSTP are by their very nature destined for long-term effect. Suffice it to say that the member governments consider

²⁵ *Id.* 4th recital of preamble: "the need to promote an expanding economy as the source of economic strength. . . ."

²⁶ The EPA did not survive the coming into force of the OECD Convention. PC REPORT ¶ 38-40. The text of the PC REPORT may be found in OEEC, BLUE PAPER.

²⁷ The regulatory work of the ENEA was—formally—an undistinguishable part of the acts of the OEEC, as it took the form of decisions, resolutions and recommendations adopted by the Council of the OEEC which itself created the ENEA by its Decision C(57)255 of December 17, 1957.

²⁸ For an assessment *cf.* Hahn, *International and Supranational Public Authorities*, 26 LAW & CONTEMP. PROB. 638 (1961), and the author's article on ENEA in 1 WÖRTERBUCH DES VÖLKERRECHTS 471-73 (1960).

²⁹ See PC REPORT ¶¶ 28, 95.

³⁰ The constitution of the OSTP was adopted as Council Decision C(58)130(Final) on June 19, 1958.

these activities as particularly promising, evidence being the large financial resources allocated to this office before the coming into force of the OECD Convention and the large allocations to the committees which since have continued these tasks.³¹

To cope with the problems of inland transportation, the European Conference of Ministers of Inland Transport (ECMT) was established by a Protocol of October 17, 1953.³² It is composed of all members of the OEEC and, since 1955, Yugoslavia. The United States is represented by an observer and kept informed of its proceedings. The ECMT comprises a Council of Ministers and a Committee of Deputies. The Secretariat was under the sole operational control of the Conference, but "administratively integrated" with the OEEC Secretariat. The OEEC paid the salaries and the expenses of the ECMT and provided facilities for its meetings when they were held in Paris at OEEC headquarters.³³ It had been agreed between the OEEC and the ECMT that the OEEC would be consulted on all questions of European inland transportation of general economic importance and the ECMT would be consulted on questions of inland transportation.³⁴ This relationship has been maintained since the coming into force of the OECD Convention.³⁵

Whereas the ECMT is an independent organisation, the Ministerial Committee for Agriculture and Food (MCAF) formed part of the OEEC. In addition, meetings of the OEEC Council could be attended by Ministers of Agriculture. The MCAF was serviced by the OEEC Secretariat and had no budget of its own.³⁶ Like the ECMT, the MCAF could not adopt a binding decision, but could only agree on measures to be taken by its members within their national departmental powers. It could initiate measures with binding force by submitting appropriate proposals to the OEEC. The demise of the OEEC put an end to this institutional arrangement, to be replaced by a more flexible structure.³⁷

A further development within the OEEC occurred in its relationship with the Canadian and United States Governments. Not only did

³¹ See PC REPORT ¶ 27.

³² See text at I EUROPEAN YEARBOOK 473 (1955).

³³ *Id.* 475, 477 art. 7.

³⁴ *Id.* 479 art. 11.

³⁵ See PC REPORT ¶ 131.

³⁶ Cf. Council Decision C(54)326(Final) of January 14, 1955.

³⁷ PC REPORT ¶¶ 21-23, 25, 26, 88-92.

the United States support politically, financially, and by the advice of its officials the activities, of the Organisation from the beginning, in particular in the fields of payments and productivity and in the overcoming of the shortage of scientific and technical personnel, but the two North American states also participated in the work of the OEEC as associate members after 1950.³⁸ With regard to the restricted bodies, United States participation was institutionalized by express provisions in the rules of procedure of these bodies or their terms of reference.³⁹ Nor was the legal and factual position of the United States within the framework of the OEEC affected by the termination of Marshall Plan aid in 1951-52.⁴⁰

Though without right to vote, the opinions voiced by the delegates for the two North American states carried considerable weight, much more weight than can be explained alone by their status under the Rules of Procedure of the OEEC. These rules of procedure did not go beyond permitting United States and Canadian representatives to "attend the meetings" of the organs of the organisation⁴¹ and instructing the Secretary-General of the OEEC to notify the North American delegations of the dates of such meetings, as well as to provide them with the agenda and the minutes of those meetings.⁴² It may sound over-simplified, but it is probably a correct summary of OEEC practice that the United States and Canada had, de facto, the same role as the full members of the OEEC, apart from the right to vote. Yet the lack of the veto power on the part of the United States and Canada has furnished them with an excellent occasion to prevent or support votes of the Council by sheer persuasion. This fact merits all the more

³⁸ See Rules 7 & 8 of the RULES OF PROCEDURE OF THE OEEC (December, 1958), and Resolution C/M(50)9(Final) 83(d) of 4 April 1950 and C(50)169(Final) of 23 June 1950.

³⁹ European Monetary Agreement, August 5, 1955, art. 19(d), 2 EUR. YB. 213, 233 (1957); Art. 2(a)(ii) of the Rules of Procedure of the EMA Board of Management; Code of Liberalisation, July 20, 1951, as amended July 29, 1955, arts. 35(d) (Steering Board for Trade), 39(e) (Committee for Invisible Transactions), 3 EUR. YB. 283.

⁴⁰ The Economic Co-operation Act was abolished by the Mutual Security Act of 1951, ch. 479, § 101(a)(1), 65 Stat. 373, 374, and its functions transferred to the Mutual Security Agency effective December 30, 1951, pursuant to Exec. Order No. 10300, 16 Fed. Reg. 11203 (1951). See PRICE, *THE MARSHALL PLAN AND ITS MEANING* 161 (1955).

⁴¹ OEEC RULES OF PROCEDURE, Rule 7 (December, 1958).

⁴² *Id.* Rule 8.

respect, as the OEEC legally has not pierced the "twilight of unanimity,"⁴³ but has rested by and large within its limits.

The unanimity rule itself underwent some adaptations which made it more palatable. While Article Fourteen of the OEEC Convention established the basic rule that decisions of the OEEC should be taken "by mutual agreement of all the Members," it did permit exceptions where the organisation had agreed on other methods of voting or where a member had made a declaration of non-interest.⁴⁴ The former exception has, for example, been applied by the Council when adopting certain decisions under the EPU Agreement⁴⁵ and related provisions of the EMA.⁴⁶ Projects of EPA and the OSTP could be adopted by the Governing Body and the Governing Committee, respectively, by a majority of its members present and voting though the member in whose territory the project was to be carried out could object. Furthermore, certain subsidiary committees could adopt procedural resolutions by a majority vote of the members represented on the body and present.⁴⁷

Though structurally distinguishable from the plenary bodies in which these exceptions from the unanimity rule occurred, the Managing Board of the EPU needs to be mentioned in this context also, as it could, by a majority of four of its members, adopt decisions binding on all parties to the EPU Agreement concerning the operations of the Union and its management.⁴⁸ The same rule applies to the Board of Management of the EMA.⁴⁹ Likewise, proposals by the Steering Board for Trade and the Committee for Invisible Transactions to the

⁴³ Jenks, *Some Constitutional Problems of International Organisations*, 22 BRIT. YB. INT'L L. 11, 34-36 (1945).

⁴⁴ "Unless the Organisation otherwise agrees for special cases, decisions shall be taken by mutual agreement of all the Members. The abstention of any Members declaring themselves not to be interested in the subject under discussion shall not invalidate decisions, which shall be binding for the other Members." Convention for European Economic Co-operation, April 16, 1948, art. 14, 43 AM. J. INT'L L. 94, 98 (Supp. 1949), 1 EUR. YB. 231, 237 (1955).

⁴⁵ Agreement for the Establishment of a European Payments Union, June 30, 1954, art. 19, 2 EUR. YB. 363, 387 (1956).

⁴⁶ European Monetary Agreement, August 5, 1955, art. 18, 3 EUR. YB. 213, 231 (1957).

⁴⁷ OEEC RULES OF PROCEDURE, Rule 20(b), 22(b) and 26 (December, 1958).

⁴⁸ Agreement for the Establishment of a European Payments Union, June 30, 1954, art. 20(f)-(h), 2 EUR. YB. 363, 389 (1956).

⁴⁹ European Monetary Agreement, August 5, 1955, art. 19(f)-(h), 3 EUR. YB. 213, 233 (1957).

Council could be adopted by a majority of not less than four members of the respective body.⁵⁰

Thus even the highest of norms in the hierarchy of the law of the OEEC has undergone the effect of time and been adapted to the exigencies of politics and the intra-European economy.

II

HISTORY OF THE OECD CONVENTION

One might look at the OECD Convention as a recognition that the objective of the predecessor organisation has been attained.⁵¹ Though that statement is not incorrect, it does not reflect the width and the depth of elements extraneous to the OEEC which contributed to its death and the birth of the OECD. The beginning of the end of OEEC was the hesitation of its members to settle the economic controversy between "The Six" and "The Seven," or more specifically, to come out with a concept for a general European free trade area which was acceptable to the member states of the European Economic Community⁵² as well as to those which later became the contracting parties to the Convention establishing the European Free Trade Association (EFTA).⁵³ That stage had been reached, at the latest, in the second half of December, 1958, when the hope of arriving at a mutually acceptable compromise disappeared.⁵⁴ Nevertheless, it lasted until December 21, 1959, before the reform of the OEEC became, in those

⁵⁰ Code of Liberalisation, July 20, 1951, as amended July 29, 1955, arts. 35(f), 39(g), 3 EUR. YB. 255, 283 (1957).

⁵¹ "La disparition de l'O.E.C.E. n'est pas la sanction d'un échec, mais au contraire d'une réussite." French Government, *Exposé des Motifs op. cit. infra* notes 54, at 2. Senate Comm. on Foreign Relations, *Report on Executive E*, Sen. Exec. Rep. No. 1, 87th Cong., 1st Sess. 1 (1961). For a similar view, see the oral exposé by M. Valéry Giscard d'Estaing, Secrétaire d'Etat aux Finances, before the French Assemblée Nationale, Journal Officiel of May 19, 1961, DEBATS PARLEMENTAIRES 847-50.

⁵² The treaty establishing the European Economic Community was signed on March 25, 1957.

⁵³ Signed November 20, 1959; English and French text in Cmnd. 906, 1026 (1960) Treaty Series No. 30.

⁵⁴ For a concise account of the elements which decided the outcome of the negotiations, see the Swiss *Message du Conseil fédéral sur la participation de la Suisse à l'association européenne de libre-échange of February 5, 1960* (Print No. 7957)(1-7), and the French Government's *Exposé des motifs* concerning the OECD Convention, Assemblée Nationale, 1ère Legisl., 2ème Session Ord. de 1960-61 at 5-9 (Print No. 1110). See also CAMPS, THE FREE TRADE AREA NEGOTIATIONS *passim*. The documents which played a part in the negotiations are collected in the British Command Paper, CMND. 641, published in January, 1959.

terms, part of the agenda of European and North American statesmen, economists and legal technicians. On that date the heads of state and Government of France, the Federal Republic of Germany, the United Kingdom and the United States agreed to review the methods for continuing consultations dealing with the development of less developed countries and the pursuance of trade policies directed to the sound use of economic resources and the "maintenance of harmonious international relations, thus contributing to growth and stability in the world economy and to a general improvement in the standard of living."⁵⁵ Following this decision, representatives of all the member states of the OEEC, of Canada and the United States, as well as representatives of the European Economic Community, in January, 1960, approved a scheme for the reform of the OEEC, which instituted a group of four experts to make a detailed report on the subject, established the Development Assistance Group to consist of the representatives of eight capital exporting countries, and which set up a trade group for the study of the special problems resulting from the existence of the EEC and the EFTA within the framework of OEEC and the General Agreement on Tariffs and Trade (GATT).⁵⁶

In May, 1960, a conference of high-ranking government officials considered the report of the group of four experts and referred it for further study to a working party of representatives of the twenty governments and the European Communities. In the consideration of that report, particular emphasis was to be placed on the choice of machinery for the maintenance of OEEC acts on the coming into force of the OECD, and on the designation of the OEEC acts which should be so retained. At the same time the draft convention on the OECD which the group of four experts had submitted to the May Conference⁵⁷ was to be reviewed and the machinery to be proposed for the maintenance of OEEC acts on the taking effect of that convention was to be fitted into its procedural pattern.

At a ministerial conference in July, 1960, agreement was reached on the thus far controversial establishment of a trade committee.⁵⁸ This politically incisive problem having been settled, the conference proceeded to the designation of a new Secretary-General for the

⁵⁵ *Cf.*, Blue Paper, Doc. No. 1, at 91.

⁵⁶ Docs. Nos. 2-4. *Id.* at 93-97.

⁵⁷ Doc. No. 5—Resolution Pertaining to the Reconstitution of the O.E.E.C. *Id.* at 99.

⁵⁸ Resolution on Trade, July 23, 1960 (Doc. No. 7, OECD(60)9(Final)), BLUE PAPER at 103.

OEEC, who at the same time, was named Secretary-General Designate of the OECD.⁵⁹ Furthermore, a Preparatory Committee was established which, under the chairmanship of the new Secretary-General of the OEEC, should complete the draft convention on the OECD, the supplementary instruments relating thereto and should finalize the machinery for the choice of OEEC acts to be retained on the coming into force of the OECD Convention.⁶⁰ Between the beginning of September, 1960, and the signing of the OECD Convention on December 14, 1960, the Preparatory Committee completed its tasks successfully and submitted for signature by the ministers, apart from the convention itself, Supplementary Protocol One concerning the Representation of the European Communities in the OECD, Supplementary Protocol Two on the Privileges, Exemptions and Immunities of the OECD in member and non-member countries, a Protocol on the Revision of the OEEC Convention of April 16, 1948, and a Memorandum of Understanding on the Application of Article Fifteen of the OECD Convention.⁶¹

III

CONTINUITY RATIONE PERSONAE AS BETWEEN OEEC AND OECD

Influenced by such precedents as the transformation of the organization of the Brussels Treaty of 1948 into WEU and especially the revision of the ILO Convention, the draftsmen of the OECD Convention desired to affirm the identity *ratione personae* of the OEEC and OECD, but preferred a different principle, namely that of selection to the wholesale continuity *ratione materiae*. Therefore, it was provided that upon the taking effect of the 1960 Convention, the "reconstitution" of the OEEC should take effect and the legal personality possessed by the OEEC should continue in the OECD.⁶²

For political rather than legal reasons, the form of an autonomous

⁵⁹ The resolution appointing Mr. Kristensen Secretary-General of the OEEC effective as of September 1, 1960, was adopted on July 28, 1960. Resolution of the OEEC Council, July 28, 1960 (C(60)177). Mr. Kristensen's nomination as Secretary-General Designate of the OECD had been decided five days earlier. See Ministerial Resolution, July 23, 1960 (OECD/M(60)2); cf. OEEC Press Release, July 28, 1960 (Press/A(60)35).

⁶⁰ Resolution Relating to the Preparatory Committee, July 23, 1960 (Doc. No. 6, OECD(60)(Final)), in BLUE PAPER at 101.

⁶¹ BLUE PAPER at 9-22. With the exception of the protocol on the revision of the OEEC Convention, a reprint of these instruments may also be found in 107 CONG. REC. 3924-26, 3934 (daily ed. March 16, 1961).

⁶² Convention on the Organisation for Economic Co-operation and Development, art. 15, in BLUE PAPER at 13.

new convention, together with a protocol revising the OEEC Convention, was chosen to bring about the change, though an instrument of amendment might have sufficed as in the 1945-46 reform of the ILO.⁶³

Yet it was on legal grounds that in the early stages of the OEEC reform the solution was adopted "which does not terminate the OEEC's existence as a legal entity, but endows it with a new constitution."⁶⁴

There were evidently powerful arguments in favor of a new organisation and the abolition of the old one. The membership of the future organisation would not be the same, its principal tasks might be different, and all decisions and recommendations would lapse if they had not expressly been re-affirmed by the council of the future organisation. Still, this solution was considered as creating serious legal difficulties. It was argued that the property of the OEEC, its leases, the Staff Provident Fund, any assets held by it on its own behalf or on behalf of others, and its obligations under treaties and other agreements⁶⁵ would not have been automatically transferred to the future organisation. Likewise, it was pointed out that the assets of the European Fund which, under the EMA, were held in trust by the OEEC⁶⁶ would not have devolved *ipso jure* on the OECD and the credits granted by the fund would not automatically continue to be available. Finally, it was suggested that the termination of the legal personality as such would not entail the automatic release of the staff, since neither continuity *ratione personae*, nor discontinuity of the OEEC would free the OEEC from the obligation to bring about the dismissal by a notice of termination in each individual case in accordance with the Staff Regulations and Rules of the OEEC.⁶⁷

⁶³ The main reason for the choice of a new convention was probably that the Canadian and U.S. negotiators advocated it on the ground that public and parliamentary opinion would find it more palatable to enter into an organisation new in name and—at least partly—in functions, than to accede to an already existing organisation whose law, institutions, customs and practices had developed before the two North American States had changed their status from that of associate members to members. A similar view seems to underlie the declaration by Ambassador Tuthill, Head of the U.S. delegation to the OEEC on April 21, 1961. 16 *EUROPA ARCHIV* 249 (1961).

⁶⁴ *A Remodelled Economic Organisation, A Report by the Group of Four*, ¶ 170, at 55 (1960) [hereinafter referred to as *REPORT OF THE FOUR*].

⁶⁵ *I.e.*, arrangements which, if concluded by an ordinary subject of municipal law, would be considered as private law contracts, involving *e.g.*, supplies of stationery, water, and electricity.

⁶⁶ *Cf.* Elkin, 7 *EUROPEAN YEARBOOK* 148, 154 (1961).

⁶⁷ In spite of this array of reasons in favor of continuity *ratione personae*, it is

For "reasons of legal convenience" and in order "to avoid . . . technical complications,"⁶⁸ the *reconstitution* of the OEEC was chosen as the solution. The word itself has in common usage, as well as in legal language, more than one meaning. It is perhaps with that diversity in mind that the term was chosen to define an operation which was to ensure to the European members of the OECD the continuation of their fruitful co-operation within the framework of the OEEC, but at the same time permitted the executive branches of the Canadian and United States Governments to present the reconstitution of the OEEC as a fresh start. That could be done in good faith, since the textbook definition of reconstitution as a legal term is "a fresh constitution"⁶⁹ and the word is also used to denote the act of providing a new constitution.⁷⁰ Since in the law of private associations and corporations a reform of the basic instrument does not necessarily imply the replacement of one legal personality by another, and, in constitutional law proper, such a reform never involves succession, though it may have considerable repercussions on the functions and the form of governments, the term "reconstitution" has been used quite appropriately to signify identity *ratione personae* between OEEC and OECD. The legal personality of the former is continued in the OECD, the functions of which need not, and do not, coincide with those of the OEEC because the continuity *ratione materiae* as between the two organisations is subject to severe limitations. The "practical advantages" for which the maintenance of the legal personality was chosen in no way diminishes the significance of the constitutional reform with regard to the tasks of the new organisation.⁷¹

These practical advantages present themselves at various turns, but foremost with respect to the property of the OEEC, treaties concluded by it or under its auspices, and agreements of the OEEC other than treaties and relations with its staff.

As regards the property of the OEEC, chattels and immovables, no question of devolution, succession or transfer of title will arise since

suggested that the arguments against succession were, from a practical point of view, possibly not as weighty as they were considered to be by the group of four experts. The complications of the procedure required to ensure a selective continuity *ratione materiae* were at any rate much more considerable than was expected at the outset of the negotiations.

⁶⁸ REPORT OF THE FOUR, *supra* note 64 at 55, para. 173.

⁶⁹ SHORTER OXFORD ENGLISH DICTIONARY (3rd ed. 1955).

⁷⁰ *Ibid.*

⁷¹ REPORT OF THE FOUR, *supra* note 64 at 56, para. 175.

its legal personality continues in the OECD and the latter will have the rights and obligations the OEEC had. Nevertheless the French public registers in which the OEEC had been entered as the owner of its headquarters premises were amended to take account of the change in name.^{71a}

As regards treaties, two groups must be distinguished: those to which the OEEC was a party and those which were concluded under its auspices and relating to it. Treaties concluded by the OEEC⁷² were not affected by the transformation of OEEC into OECD. They continue to apply to the latter as they did to the OEEC and it would, therefore, be futile to consider here the problem whether and under what conditions treaties concluded by an international organisation survive the extinction of that organisation and whether it is conceivable that rights and obligations provided for in such a treaty might devolve in whole or in part on the former member states of the organisation.⁷³

^{71a} A notarial act to this effect was signed by Deputy Secretary-General Adair on December 6, 1961, which specifies: "Lequel (scilicet 'Secrétaire général adjoint de l'O.C.D.E.'), ès-qualité, a . . . déclaré . . . confirmer les énonciations . . . concernant spécialement le changement de dénomination de l'Organisation . . . sans que cette modification ait entraîné de changement dans la personne morale de ladite Organisation. . . . Mention des présentes est consentie partout où besoin sera . . . Une expédition des présentes sera publiée au troisième bureau des hypothèques de la Seine. . ." (Emphasis supplied.)

⁷² On the treaty making power of the OEEC cf. Elkin, *The Organisation for European Economic Co-Operation Its Structure and Powers*, 4 *EUROPEAN YEARBOOK* 96, 133 (1958), who provides examples for its exercise. The Preparatory Committee had before it a list of treaties and contracts of the OEEC remaining in force after June 30, 1961, i.e., the end of the OEEC fiscal year in which the signature of the OECD Convention occurred. Doc. OECD (60)22 (1960).

⁷³ These questions are most likely to arise in cases of automatic succession. The more far-reaching problem, whether a constitutional reform or "reconstitution" which purports in terms to leave the identity *ratione personae* of an organisation untouched, may nevertheless change that entity *ratione materiae* so incisively that contracting parties to treaties concluded with it could claim that the arrangement had lapsed because the *ratione materiae* with which they were dealing, other than the original subject of international law, did not arise as a contentious matter in the case here at issue. The Board of Governors of the International Atomic Energy Agency considered the problem at its 286th meeting on March 5, 1962, in view of the agreement of that agency with the OEEC of September 30 and November 24, 1960. The Board noted that the Act of the OEEC Council approving the agreement [C/M(60)20] had been retained by the OECD and that, accordingly, no further confirmation was needed. Yet, it is suggested that the views of the Board were as well influenced by the fact that the functions of the OECD in respect of the peaceful use of nuclear energy—to which the arrangement with the OEEC related—and the pertinent organs were the same as those of the OEEC at the time of the agreement's conclusion. The same consideration may be held to be responsible for the

Similarly, treaties concluded under the auspices of the OEEC, *i.e.*, those to which that organisation had invited signature by a recommendation of its Council, such as the EMA, various treaties concluded in the field of nuclear energy,⁷⁴ and the Turkish Debt Agreement,⁷⁵ are unaffected by the OEEC reform. Provisions of those treaties which provide for action by the OEEC bind the OECD in the sense that obligations and rights incumbent on the OEEC by virtue of such provisions must be exercised in the future by the OECD.

Finally, on legal grounds, it would not even be necessary to substitute for the references to the OEEC and its organs references to the OECD, since Article Fifteen of the OECD Convention provides that on its coming into force, the aims, organs, powers, and name of the OECD shall be as provided in the OECD Convention. This entails replacement of the present references to the OEEC and its organs by references to the OECD.⁷⁶ If, nevertheless, formal amendments of such nature were made to the treaties here at issue, they were a matter of factual convenience but not of legal necessity. Therefore, they are declaratory of, and not constitutive for, the modifications for which they provide.

As regards agreements other than treaties, *i.e.*, consensual arrangements between the OEEC and the subjects of municipal law which do not involve the display of the attributes of an international personality on the part of the OEEC,⁷⁷ they are likewise unaffected by the transformation of OEEC into OECD. By and large, the same rules apply as in the case of treaties concluded by the OEEC.

However, at this stage it should be emphasized that continuity of

maintenance of the agreement with the Bank for International Settlements of March 6 and 13, 1959, and December 16 and 22, 1959, on the functions of that bank in the framework of the EMA, the arrangement with the European Conference of Ministers of Transport of January 20 and February 1, 1954, and the agreement with the French Government on the Application of French Social Security Legislation to the Staff of the Organisation of March 5, 1959.

⁷⁴ *Legal Series of the International Atomic Energy Agency, No. 1, MULTILATERAL AGREEMENTS, 187-258 (VIENNA 1959); CONVENTION ON THIRD PARTY LIABILITY IN THE FIELD OF NUCLEAR ENERGY (OEEC Publication 12680) (1960).*

⁷⁵ *Agreement of May 11, 1959, on COMMERCIAL DEBTS OWED BY RESIDENTS OF TURKEY (OEEC Publication) (1959).*

⁷⁶ *SECOND REPORT OF THE LEGAL SUB-COMMITTEE TO THE PREPARATORY COMMITTEE, para. 2 (OECD/P/33).*

⁷⁷ *KASME, LA CAPACITÉ DE L'ORGANISATION DES NATIONS UNIES DE CONCLURE DES TRAITÉS 13-37 (1960); Mosler, Die Erweiterung des Kreises der Völkerrechtssubjekte, 22 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1 (1962).*

rights and obligations deriving from treaties and other agreements of the OEEC prevails without limitation in the relationship between the OECD and the other parties to the arrangements only. Since these arrangements involve financial obligations on the part of the OECD, their fulfillment requires within the organisation an authority to disburse monies accordingly. That authority could only be derived from a decision of the Council adopted under Article Twenty of the OECD Convention, unless a budgetary decision of the Council of OEEC allocating corresponding amounts had been retained under Article Fifteen of the OECD Convention. For, each annual budget of the OEEC and its financial regulations having been adopted in the form of decisions of the OEEC Council, these acts lapse on the entry into force of the OECD Convention, since they were not recommended for retention under its Article Fifteen. When, therefore, deliberative organs of the EPA and the OSTP, for example, had, before the coming into force of the OECD Convention, adopted long-term projects in their respective fields of activity and the OEEC had accordingly concluded contracts providing for payments several years after the entry into force of the OECD Convention only, it was necessary that the Council of the OECD appropriate the amounts required for these payments in accordance with the budgetary and financial rules then prevailing.⁷⁸

In general, the staff hired by the OEEC was not affected by the demise of the OEEC and the advent of the OECD as such, since the entry into force of the 1960 Convention did not automatically terminate contracts or alter the terms of appointment set out therein. On the other hand, nothing could stop the Secretary-General of the OECD from making use of the possibilities for the release of staff which the staff regulations offered where he considered that this was required by changes in tasks and objectives.⁷⁹

⁷⁸ This procedure is likely to involve a redistribution of the financial burdens ensuing from these operational activities since the United States, on the coming into force of the OECD Convention, no longer made grants in support of such tasks covering a considerable part of the expenditure involved as it did before that date, but restricted itself to the contributions due from it as a member state.

⁷⁹ REPORT OF THE FOUR, A REMODELED ECONOMIC ORGANISATION, ¶ 177, at 56 (1960). *But cf.* 1 Bulletin de la Fédération de la Fonction Publique Européenne at 5 (No. 2, July 1962): "In its recommendation No. 310, the Consultative Assembly of the Council of Europe expresses concern at the treatment accorded to officials who may be dismissed when their posts are abolished as a result of reorganisation of European institutions. Citing a particular case, the Assembly deplores the inadequate compensation paid to those who lost their jobs when OEEC became OECD."

This array of consequences flowing from the identity *ratione personae* as between the OEEC and OECD raises the question as to the legal significance of the Protocol of December 14, 1960, on the Revision of the OEEC Convention of 1948. That protocol was signed by the eighteen member states of the OEEC only, since the 1948 Convention remained for Canada and the United States, non-members of the OEEC though closely associated with it, a *res inter alios acta* in spite of their factual and legal links with that organisation. It is suggested that this protocol was concluded largely for the purpose of meeting the requirements of the constitutional law of certain participating states. Purely from the point of view of international law, the protocol might have been avoided.

If the aims, organs, powers and name of the OEEC are those provided in the OECD Convention once that treaty has entered into force and the reconstitution of the OEEC has thus taken effect,⁸⁰ it would be difficult to conceive that the OEEC Convention could remain unaffected by this change, since originally and until the taking effect of the OECD Convention, the aims, organs, powers and name so modified had been specified in the OEEC Convention of April 16, 1948. To this end, the Protocol of December 14, 1960, stipulates that the 1948 Convention is replaced by the constituent instrument of the OECD. A separate arrangement of the eighteen members of OEEC was required to revise the 1948 Convention because several member governments of the OEEC had found it incompatible with their constitutional rules to bring about that revision by implication only, while the United States and Canada were anxious to present the OECD Convention as a new venture.⁸¹

Apart from these elements of substantive law, it may be noted in passing that procedurally, the provisions of the protocol on the coming into force of the revision of the OEEC Convention and the cessation of

⁸⁰ CONVENTION ON THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD] art. 15 (1960).

⁸¹ The analogy to the transformation of the Brussels Treaty Organisation into the Western European Union [WEU] (1955) is not in point here. It is true that the revision of the 1948 Brussels Treaty was brought about by a protocol concluded by the original signatories only and allowing for the accession of Germany and Italy, and not by an international act to which these two states were parties. But that protocol specified all amendments required and set them out textually whereas the Protocol on the Revision of the OEEC Convention was concluded among the eighteen OEEC members and yet refers for all particulars of the constitutional reform to a treaty concluded among twenty nations, eighteen of which are identical with the parties to the protocol.

the latter⁸² specify only what Article Fifteen of the OECD Convention already clearly implies, namely that the revision of the OEEC Convention shall take effect with the entry into force of the OECD Convention and that as from that time the OEEC Convention ceases to have effect with regard to the eighteen members of the OEEC. This parity of legal prescriptions was, however, inevitable once a separate protocol on the revision of the OECD Convention had been accepted as the only feasible solution.

IV

LEGAL CAPACITY: PRIVILEGES AND IMMUNITIES OF THE OECD IN MEMBER AND NON-MEMBER STATES

Once it is accepted that, *ratione personae*, OECD is identical with the OEEC, it is understandable that the privileges and immunities of the OEEC have by and large devolved on the OECD. To be sure, nothing would have prevented the member states of the new venture from agreeing otherwise. And yet by a mere chance, which is in line with the innate logic of the factual situation, its legal assessment in the OECD Convention and the Report of the Preparatory Committee, the legal capacity, and the privileges and immunities of the OECD are almost the same as those accorded to the OEEC. This is provided for in Supplementary Protocol No. Two of the OECD Convention. In remaining faithful to the legal position as it prevailed during the lifetime of the OEEC, that protocol provides for a system of privileges and immunities which is probably unique in the law of international organisations, in that it imposes on the member states three sets of privileges and immunities for the OECD, its officials, its communications and the representation of members. From the taking effect of its constituent instrument, the OECD will enjoy:

- (a) in the territory of its European members the legal capacity, privileges, exemptions and immunities provided for in Supplementary Protocol No. One to the OEEC Convention of 1948;⁸³
- (b) in the United States of America the legal capacity, privileges,

⁸² PROTOCOL ON THE REVISION OF THE CONVENTION FOR EUROPEAN ECONOMIC CO-OPERATION, art. 2 (1948): "1. This Protocol shall come into force when the Convention on the Organisation for Economic Co-operation and Development comes into force. 2. The Convention shall cease to have effect as regards any Signatory of this Protocol when the Convention on the Organisation for Economic Co-operation and Development comes into force."

⁸³ See JENKS, *INTERNATIONAL IMMUNITIES passim* (1961).

- exemptions and immunities provided for in Executive Order 10,133 of June 27, 1950 with regard to the OEEC;⁸⁴ and
- (c) in Canada, which had not yet accorded any privileged status to the OEEC, such legal capacity, privileges, exemptions and immunities as may be provided for in an agreement on that subject between the Canadian Government and the OEEC.

It was, of course, understood that in non-member states the legal capacity, privileges, exemptions and immunities of the OECD would depend on special arrangements agreed upon with the governments concerned.

V

THE PARTICIPATION OF THE EUROPEAN COMMUNITIES AND OF EFTA IN THE WORK OF THE OECD

As regards the participation of the European Communities and of the EFTA in the activities of the OECD, a new approach was followed. Recognizing that as a result of the foundering of Free Trade Area negotiations within the framework of the OEEC, two economic organisations were in existence in Western Europe, those making the policy decisions wanted to give to the economic union of the six member states of the European Communities and to their institutional counterpart, EFTA, equal standing in the bodies of the OECD.

As regards the European Communities, this was accomplished by Article Thirteen of the OECD Convention, which deals with representation of these institutions in the OECD, and by Supplementary Protocol Number One thereto, providing that representation of the Communities was to be determined in accordance with their constituent texts and that the Commissions of the EEC and EURATOM, as well as the High Authority of the ECSC, were to take part in the work of the OECD.⁸⁵ Contrary to what one might surmise on the basis of

⁸⁴ "By virtue of the authority vested in me by section 1 of the International Organizations Immunities Act, approved December 29, 1945 (59 Stat. 669) [22 U.S.C. § 288 (1952)], and having found that the United States participates in the Organisation for European Economic Co-operation under the authority of the Economic Co-operation Act of 1948 (62 Stat. 137) [22 U.S.C. § 1501 (1952)], as amended, and acts making appropriations therefor, I hereby designate such organisation as a public international organisation entitled to enjoy the privileges, exemptions, and immunities conferred by the said International Organizations Immunities Act. Harry S. Truman." 15 Fed. Reg. 4159 (1950).

⁸⁵ "1. Representation in the Organisation for Economic Co-operation and Develop-

these provisions, the representation of the Communities is not at all exclusively the task of the Commissions and of the High Authority. The basic instruments of these supra-national organisations which, under paragraph one of Supplementary Protocol No. One to the OECD Convention, govern the problem of representation as such, vest, in principle, the Councils of the Communities with the power to decide in each case which organ is to represent the communities—as distinguished from specific organs of the communities—in their external relations.⁸⁶ In the light of these developments, the relations of the OEEC with the three Communities, which by and large were carried on by the Secretariat and the executives of the supranational bodies may require re-consideration.

The participation of the EFTA was ensured in a less solemn manner. By a Ministerial Resolution adopted on July 23, 1960, the future member states of the OECD decided upon that matter affirmatively.⁸⁷ Though not transformed into a treaty provision, the substantive value of the engagement is equivalent to an international agreement among the states taking part in the resolution, since the effect of that resolution on each participating government is to bind it as if it had concluded a treaty.

VI

CONTINUITY RATIONE MATERIAE BETWEEN OEEC AND OECD

In the hierarchy of norms which govern the continuity *ratione materiae* between OEEC and OECD, the second part of the second sentence of Article Fifteen of the OECD Convention stands at the

ment of the European Communities established by the Treaties of Paris and Rome of 18th April, 1951, and 25th March, 1957, shall be determined in accordance with the institutional provisions of those Treaties.

2. The Commissions of the European Economic Community and of the European Atomic Energy Community as well as the High Authority of the European Coal and Steel Community shall take part in the work of that Organisation." SUPPL. PROT. No. 1.

⁸⁶ See 18 CARSTENS, *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 460, 516, 519 (ECSC), 501-2 (EEC); WOHLFARTH, EVERLING, GLAESNER & SPRUNG, *DIE EUROPÄISCHE WIRTSCHAFTSGEMEINSCHAFT*, note 2 to art. 116, notes 15, 17 and 23 to art. 228, note 3 to art. 231 (1960); See also, Pescatore *Les Relations Extérieures des Communautés Européennes*, 103 *RECUEIL DES COURS* 8-238 (1961, II).

⁸⁷ DOC. No. 9, *Resolution concerning the Participation of the Secretary-General of the European Free Trade Association in the Work of the O.E.C.D.*, OECD (60)15(Final), BLUE PAPER at 107.

summit. In specifying that acts of the OEEC require the approval of the Council of OECD in order to be effective after the coming into force of the OECD Convention, the provision subjects the continuity of functions between the two institutions to the choice of the OECD Council. In other words, article fifteen, while affirming without restriction the identity, and therefore continuity, *ratione personae* between OEEC and OECD, subordinates the continuity *ratione materiae* to the rule of selection.

This is all the more valid since, apart from those relating to the distribution of United States aid, the functions of the OEEC had been only vaguely described in the 1948 Convention and had been defined with precision only in subsequent enactments of its Council and, under its authority, of subsidiary bodies. The great achievements of the OEEC were thus not accomplished in the execution of specific provisions of the 1948 Convention, as would be the case, for example, with the European Economic Community,⁸⁸ but in implementation of decisions, recommendations, and resolutions of the OEEC Council, which in that sense, contained the norms determining the policy of the OEEC. Since in the 1960 Convention, the objectives of the OECD were likewise very broadly defined and did not force the OECD Council to determine specific terms of reference for the day-to-day work of the organisation which would in fact provide for the continuity of functions as between OEEC and OECD, the second sentence of article fifteen might have permitted the juxtaposition to the continuity *ratione personae* of an overt discontinuity *ratione materiae*, *i.e.*, the complete discarding of the tasks assumed by the OEEC. If this prospect did not become reality the result is due to a political decision of the members of OECD, since the legal mechanism provided for in the second sentence of Article Fifteen of the OECD Convention would not have precluded the elimination of any and all OEEC activities and a fortiori a radical modification of their formal and procedural aspects.

It is true that from the outset the members of the OEEC, as well as Canada and the United States, had recognized the desirability of continuing the functions of the OEEC in fields where no change was necessary,⁸⁹ notably the work under the EMA, the liberalisation of

⁸⁸ See 9 WOHLFARTH, *JAHRBUCH FÜR INTERNATIONALES RECHT* 12 (1960).

⁸⁹ "Wishing to ensure the continuity of co-operation in the fields where no change is called for"; Doc. No. 2, *Resolution on the Study of the Reorganisation of O.E.E.C.*, approved by Ministers of Members and Associate Members of the O.E.E.C. on January 14, 1960, preamble, par. (b), in OEEC, *BLUE PAPER* at 93.

invisible transactions and capital movements⁹⁰ and in the field of nuclear energy.⁹¹ But the hammering out of the particulars of this concept—continuity *ratione materiae* with regard to specific subject matters only—was accomplished in the last stage of the negotiations by the Preparatory Committee with the support of its Legal Sub-Committee.⁹²

As continuity *ratione materiae* between OEEC and OECD is based on the retention of acts of the OEEC after the taking effect of the OECD Convention, the Preparatory Committee had, in accordance with its terms of reference,⁹³ to choose those decisions, recommendations and resolutions of the OEEC which it deemed suitable to maintain. To alleviate that choice, the Secretary-General of the OEEC had submitted to the Preparatory Committee lists of acts grouped by functional sectors. That method in itself implied a selection since it discarded those acts which, though never expressly repealed, had lost their object, had become obsolete or for other reasons had no longer legal effect.

The review of the remaining acts of the OEEC led the Preparatory Committee to classify them into four categories⁹⁴ according to their legal standing on the coming into force of the OECD Convention and the legal machinery employed to secure their continuing validity after that date.⁹⁵ That legal standing was determined by the proposals made to the ministers of the twenty participating nations and set out in the form of recommendations in the report of the Preparatory Committee, which the Ministerial Conference approved on December 13, 1960.

The first category comprises those OEEC acts which the Preparatory Committee recommended for retention in whole or in part without modifications of substance. These acts required for the most part purely formal amendments, as they contained references to bodies of the OEEC, the functions and powers of which were to be transferred to analogous bodies of the OECD.⁹⁶ Some of the acts had become obsolete

⁹⁰ REPORT OF THE FOUR, *op. cit. supra* note 79, at 30-31.

⁹¹ *Id.* at 36.

⁹² The Legal Sub-Committee produced, in particular, Part II (Introduction to the Review of the Acts of the OEEC) and Part IV (Comments on the Convention and Supplementary Instruments) of the PC Report.

⁹³ See DOC. No. 6, *Resolution Relating to the Preparatory Committee*, July 23, 1960, OECD(60)14(final), in OEEC, BLUE PAPER at 101.

⁹⁴ PC REPORT *Part II: "Review of the Acts of the O.E.E.C."*, paras. 41-43.

⁹⁵ *Id.* paras. 41-42, at 37.

⁹⁶ *Id.* paras. 43-46, at 37-38. These acts were submitted to the Preparatory Committee with the amendments required after the signature of the OECD Convention

in part as a result of contrary provisions in subsequent acts of the OEEC which were also retained or, in consequence of other legally relevant elements which made them no longer binding. As the Preparatory Committee was unable to amend the acts in question before the Ministerial meeting of December, 1960, the modifications required were made by the Preparatory Committee between the date of the signature of the Convention and its entry into force.

It was expressly recognized⁹⁷ that in the absence of an indication to the contrary in the report of the Preparatory Committee, a retained act carried with it any reservations concerning it or any of its provisions made in the course of its consideration by the OEEC Council or another relevant organ of the OEEC or in the course of its consideration by the Preparatory Committee and noted in the latter's report. As to reservations and interpretations made during deliberations of organs of the OEEC, they were reproduced in their entirety, together with the acts to which they pertained, in the documents submitted to the OECD Council in preparation for the latter's action under Article Fifteen of the OEEC Convention, *i.e.*, the approval of those acts.

The second category comprises those OEEC acts which the Preparatory Committee in its report recommended for retention, while at the same time proposing substantive modifications. The Preparatory Committee was not able to specify the actual wording for all of these amendments. In those instances, the Preparatory Committee confined itself to agreeing on the general sense in which any such act, or part thereof, should be amended and instructed the Preparatory Committee to prepare an amended text for approval by the OECD Council. Experience may prove that *mutatis mutandis* the ruling made by the Preparatory Committee on reservations and interpretations attached to retained OEEC acts applies to the second as it does to acts of the first category.

In order to give the signatories of the OECD Convention the "maximum possible degree of certainty as regards the approval" by the OECD Council⁹⁸ of OEEC acts which were later classified as be-

in docs. OECD/P(61)3, OECD/P(61)5, OECD/P(61)10, the first of which documents was referred to in *Hearings on the Organisation for Economic Co-operation and Development Before the Senate Committee on Foreign Relations*, 87th Cong., 1st Sess. at 307-09 (1961).

⁹⁷ TPC REPORT, *supra* note 94, para. 45, at 37.

⁹⁸ *Memorandum of Understanding on the Application of Article 15 of the Convention on the Organisation for Economic Co-Operation and Development*, December 14, 1960 (preamble).

longing to the first and second categories, the Ministerial Meeting of July 23, 1960, had already instructed the Preparatory Committee to draft an instrument ensuring that the representatives of the signatories of the convention on the OECD Council would vote for the approval of those acts in accordance with the recommendations of the Preparatory Committee.⁹⁹ The form chosen by the Preparatory Committee for that instrument was a Memorandum of Understanding on the Application of Article Fifteen of the OECD Convention which, in order to avoid constitutional problems in certain signatory states,¹⁰⁰ specified that its provisions relating to action to be taken *before* the voting in the Council, would take effect on signature, while the provisions relating to voting in the Council would take effect for each signatory upon the entry into force of the OECD Convention as regards that signatory.

In substance, the memorandum, apart from binding its signatories to honor the recommendations of the Preparatory Committee, furnished a procedure whereby Canada and the United States could be relieved from the commitment to accept acts recommended for retention by the Preparatory Committee as binding on themselves.¹⁰¹ To this effect, the memorandum provided that each of these two states would not be so bound with respect to any recommendation of the Preparatory Committee, or part thereof, which it specified in a notice to the Preparatory Committee not later than ten days after the deposit of its instrument of ratification or acceptance of the OECD Convention. Thereupon any other signatory could ask for reconsideration of the recommendation in question, with a view to bringing about a new recommendation of the Preparatory Committee. Some delegations felt that in the event of a signatory requesting the reconsideration of a recommendation which had been the subject of a notification by Canada or the United States, this request would entail for the other signatories a derogation from the undertaking to vote for the approval of the OEEC act concerned if the reconsideration did not result in a new recommendation unanimously accepted by the Preparatory Committee. Other delegations could not agree to this interpretation. Fortunately, the controversy

⁹⁹ Addendum 1 to OECD (60)—1st Revision, cited in PC REPORT, *supra* note 94, para. 144, at 73.

¹⁰⁰ *Memorandum of Understanding*; see comment in PC REPORT, *supra* note 94, para. 147, at 74.

¹⁰¹ *Memorandum of Understanding*, paras. 2-4.

remained theoretical as Canada and the United States did not make use of the legal facilities accorded to them by the Memorandum of Understanding. The instance is therefore reported here as an interesting contribution to the development of the law of international organization and the law of treaties.

Canada and the United States abided by the terms of the Report of the Preparatory Committee which indicated the acts which would not or might not apply to them. Such inapplicability resulted either from the subject matter of an act,—*e.g.*, it goes without saying that an act concerning interconnected electrical networks could not apply to Canada and the United States as well as to the European member states for geographical reasons—or from specific provisions contained in it or proposed to be inserted therein by the Preparatory Committee. The indications to this effect in the report of the Preparatory Committee were considered as equivalent to recommendations of that committee¹⁰² and permitted the new members to abstain from voting in the OECD Council on the acts to be retained without the necessity of invoking the escape clauses of the Memorandum of Understanding.

Yet that memorandum dealt solely with recommendations of the Preparatory Committee which related to the retention of acts of the OEEC and their amendment. It did not even refer to the third category of acts of the OEEC, those which the Preparatory Committee did not recommend for retention as such though it agreed that certain activities, principles or rules provided for therein should be retained or should be the subject of further consideration under conditions specified in the Preparatory Committee's report. The recommendations by the Preparatory Committee to this effect could not come within the scope of the Memorandum of Understanding since they did not provide for the retention of *acts of the OEEC*. Nevertheless, to bind the signatories of the OECD Convention on the policies set out in acts of the third category and the recommendations relating thereto, the Preparatory Committee, at the suggestion of its Legal Sub-Committee, fell back on a technique which had been used by the League of Nations and which the Permanent Court of International Justice in an Advisory Opinion in 1931, had recognized as a valid basis for the assumption of international obligations by states.¹⁰³ That is acceptance by the governments con-

¹⁰² PC REPORT, *supra* note 94, para. 46, at 38.

¹⁰³ Railway Traffic Between Lithuania and Poland, P.C.I.J., ser. A/B, No. 42 (1931) (advisory opinion).

cerned of a recommendation or resolution of a hortatory nature addressed to them by an international body.¹⁰⁴

As a rule, recommendations by themselves are not binding on the governments or organizations to which they are addressed.¹⁰⁵ At the most, the latter are required to take them into consideration, but retain freedom of judgment as to action to be taken on them.¹⁰⁶ For this reason it appeared necessary that the Ministerial Meeting in approving the report of the Preparatory Committee should accept the recommendations contained in it and should thereby create obligations for the participants. This acceptance, which took the form of a ministerial resolution,¹⁰⁷ confirmed the determination of governments that the subsequent work of the Preparatory Committee and the OECD should be carried on in accordance with those recommendations.¹⁰⁸

The fourth category of OEEC acts comprised those which the Preparatory Committee did not recommend for retention in its report. Those acts lapsed by virtue of Article Fifteen of the OECD Convention as soon as that convention came into force.

It was understood by the twenty governments which were signatories of the OECD Convention that the OEEC would continue to make decisions and resolutions and to make recommendations in accordance with its 1948 Convention as long as the latter remained in force. This implied that the problem of continuity *ratione materiae* might arise with respect to acts of the OEEC adopted in the interval between signature and the effective date of the OECD Convention. Consequently, the report of the Preparatory Committee envisaged recommendations which could be made after the signature of the OECD Convention and the Memorandum of Understanding.¹⁰⁹ Thus an act of the OEEC adopted during that span of time could have fallen into any of the four categories recognized by the Preparatory Committee, that is, it might have been recommended for wholesale retention with

¹⁰⁴ *Id.* at 116: "The two Governments concerned *being bound by their acceptance of the Council's Resolution*, the Court must examine the scope of this engagement." *Ibid.*

¹⁰⁵ 2 DAHM, *VÖLKERRECHT* 32-36 (1961).

¹⁰⁶ See Nagel, *Lassen die Empfehlungen der Vereinten Nationen Rückschlüsse auf die Rechtliche Natur der Empfehlungen des Europarates und des Nordischen Rates Zu?*, 30 *NORD. TSS. INT. RET OG JUS GENTIUM* 52 (1960).

¹⁰⁷ DOC. NO. 10, *Resolution Concerning the Report of the Preparatory Committee, December 13, 1960*, in *BLUE PAPER* at 109. "APPROVE the Report of the Preparatory Committee and ACCEPT the recommendations contained therein." *Ibid.*

¹⁰⁸ PC REPORT, *supra* note 94, paras. 51-52, at 38-39.

¹⁰⁹ *Id.* ¶ 145, at 75.

purely formal amendments, retention with amendments of substance, discarded as an enactment though activities, principles or rules provided for therein might be proposed for retention, or it might have been discarded in its entirety. This classification was in each case the work of the Preparatory Committee, which continued to sift the enactments of the OEEC adopted after the signature of the OECD Convention.

No problem arose with respect to the position of the two contracting parties within the Preparatory Committee which had not been members of the OEEC, since that committee was subject to the rules governing the conduct of any diplomatic conference,¹¹⁰ notably the unanimity rule. Thus Canada and the United States had a voice in decisions as to whether an act should be recommended for retention at all, or should be recommended for retention as among the eighteen member states of the OEEC but should not apply to either of the two newcomers.

The question remains whether the acts recommended for retention and effectively retained by the Council of the OECD in accordance with Article Fifteen of its convention, continue to be acts of the OEEC, or became acts of the OECD. The wording of article fifteen leaves little doubt that the legal basis of their continuing validity on the taking effect of the OECD Convention is their approval by the OECD Council.¹¹¹ Yet, since article fifteen likewise specified that acts of the OEEC are effective *as such* once they are approved by the Council of the OECD, there is little doubt that they also continue to be acts of the OEEC for the purposes of their application and interpretation. This is in line with the logic of the system on which the transformation of the OEEC into OECD is based.

The question cannot be deemed immaterial simply on the ground that *ratione personae* OEEC and OECD are identical. For the continuity *ratione materiae* is subject to such limitations as may be enacted by the supreme body of the OECD.¹¹² Once an act of the OEEC has

¹¹⁰ DUNN, *THE PRACTICE AND PROCEDURE OF INTERNATIONAL CONFERENCES passim* (1929); Jessup, *Parliamentary Diplomacy*, 89 *RECUEIL DES COURS* 185 (1956, I).

¹¹¹ "[D]ecisions, recommendations and resolutions of the Organisation for European Co-operation shall require approval of the Council to be effective after the coming into force of this Convention." CONVENTION ON THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT art. 15.

¹¹² The report of the Preparatory Committee left little doubt that entire sectors of the activity of the OEEC would be either shelved or considerably revamped; *cf.* also on this aspect the French *Expose des Motifs*, at 8; *Rapport . . . par M. de la Malène*,

been approved pursuant to the procedure set out in Article Fifteen of the OECD Convention, in conjunction with the Memorandum of Understanding on the application of that article, the OECD Council will be bound to apply it in accordance with the practice of the OEEC. Not only will the OECD Council be held to honor the interpretations and reservation with respect to an act, or part thereof, which were expressly noted in the report of the Preparatory Committee to the OECD Council; but that council will be bound, in applying a retained OEEC act, to abide by the general rules of interpretation of the OEEC. Thus a term or device of substantive or procedural law, which had a specific meaning as a result of thirteen years of trial under the 1948 OEEC Convention, is likely to be applied in the same sense on the coming into force of the OECD Convention, unless the convention, the supplementary instruments thereto, or the report of the preparatory committee provide otherwise.

Nevertheless, there is a method of doing away with this rule by mutual agreements of *all* members of the organisation. Once it has approved the retained OEEC acts in accordance with Article Fifteen of the 1960 Convention, the Council of the OECD may set aside precedents established by the OEEC and provide for or allow a novel interpretation of such acts.¹¹⁸

VII

THE IMPACT OF THE PARTICIPATION OF CANADA AND THE UNITED STATES ON THE CONTINUITY RATIONE MATERIAE BETWEEN OEEC AND OECD

The impact of participation of the two North American states in the new structure is manifold. Evidently the widening of the membership of the OECD as compared to that of the OEEC is one of the major elements. It makes the OECD an Atlantic institution. But far from stopping short at this point, the OECD Convention, in Article Sixteen,¹¹⁴ abandons any geographical limitation with regard to ad-

Député, Assemblée Nationale No. 1178 (Annexe due procès-verbal de la séance du 12 mai 1961 Organisation de Coopération et de Développement Économiques) at 6; Avis présenté . . . par M. Janvier, Député, Assemblée Nationale No. 1190 (Annexe au procès-verbal de la séance du 17 mai 1961) at 22; BT-Drucksache 2670 at 30.

¹¹⁸ The question whether the OECD is bound by practice and custom as developed within the OEEC and its bodies in interpreting acts originally adopted by the Council of the OECD and its subsidiary bodies is not discussed here.

¹¹⁴ "The Council may decide to invite any Government prepared to assume the

herence of additional states to the new association of nations. Where Article Twenty-Five of the OEEC Convention of 1948¹¹⁵ excluded non-European states from accession, Article Sixteen of the 1960 Convention leaves the door open for the adherence of "any government prepared to assume the obligations of membership."¹¹⁶

The factual implications of this metamorphosis of the OEEC are evident. It is not only because the gross national product of its members attains 775.5 billion dollars.¹¹⁷ The OECD is, moreover, the institutional recognition of the economic inter-dependence of the highly industrialized states in the Atlantic basin. It may be going too far to consider that in the OECD, "for the first time, a group of countries with common interests, beset by common problems, will be free to discuss their goals and problems within an organisation designed precisely for 'the purpose of finding a rational use of their' scientific and technical resources,"¹¹⁸ since the OEEC in its way had provided such a forum already. But it is appropriate to see in the OECD one instrument for the safe-guarding of economic equilibrium in Western Europe and North America and, by reason of the impact of these regions on the economic development of the world, for the maintenance of economic growth generally. A realistic assessment of the political merits of the OECD may, therefore, recognize the new venture as an acknowledgment by the member states of their responsibilities vis-à-vis other nations, especially those which depend for their economic development on aid from Europe and North America.

Though not likewise appreciated by all member states, the considerations put forward by the promoters of the OECD from the beginning seem to have centered around that idea.¹¹⁹ They wanted the Atlantic community to be strong economically in order that it might

obligations of membership to accede to this Convention. . . ." CONVENTION ON THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT art. 16.

¹¹⁵ "[A]ny non-signatory European country may accede to it [the OEEC Convention] by notification addressed to the Government of the French Republic, and with the assent of the Council of the Organisation." CONVENTION ON THE ORGANISATION FOR EUROPEAN ECONOMIC CO-OPERATION art. 25.

¹¹⁶ In the *Hearing Before the U.S. Senate Committee on Foreign Relations op. cit. supra* at 58-59, Secretary of the Treasury Dillon, in reply to a question from Senator Morse whether consideration was given "to inviting Japan to be a full-fledged member of OECD," stated: "Japan may become a full member. I think for our part we would like to see that happen. But it is a question of all other members agreeing."

¹¹⁷ Senate Report 14.

¹¹⁸ *Ibid.*

¹¹⁹ Cf. statement by Secretary of the Treasury Dillon, Senate Hearing 7, 44, 195; statement by Under Secretary of State for Economic Affairs Ball, *supra* 2, 44, 195.

play its role as a helper and promoter in the economic field vis-à-vis other nations. The measures designed to facilitate economic intercourse and growth in the member states are primarily, though not exclusively, intended as a means to that end. This is the impact which the participation of Canada and the United States has on the continuity *ratione materiae* as between OEEC and OECD. Its legal significance appears from the report of the Preparatory Committee on the structure and activities of the OECD, which for the initial period and subject to such modifications as the OECD Council may agree on, defines in greater detail the objectives of that organisation as they were broadly set out in the 1960 Convention.¹²⁰

CONCLUSION

Any summary of these reflections on the nature of the transition from OEEC to OECD which did not distinguish between the legal personality of the OEEC and its functions would not meet the particular nature of the case.

The provisions of the OECD Convention, of the supplementary instruments of December 14, 1960, and of the report of the Preparatory Committee, as well as the *travaux préparatoires* of the convention and its presentation in national parliaments by the representatives of the executive branches of member governments, leave no doubt that the OECD is identical with, and therefore continues the legal personality of, the OEEC. The choice of this solution, adopted for "reasons of legal convenience,"¹²¹ had not only legal consequences of a technical or procedural nature, but also had considerable political importance, since it binds the OECD to any arrangement of the OEEC with third parties, be they treaties, agreements analogous to private law

¹²⁰ A matter of predominantly national concern is the extended discussion between members of the U.S. Senate Foreign Relations Committee and the legal spokesman of the executive branch of the U.S. Government, Professor Abram Chayes, as to whether the OECD Convention, notably its Articles 5 and 6, might enlarge the powers of the executive vis-à-vis the other branches of the Federal Government. Professor Chayes' negative answer is summed up in appendices four and five to the Report of the Senate Foreign Relations Committee. Senate Report 18-21. For a penetrating analysis of the legal and policy problems involved, see Miller, *American Participation in Multinational Economic Institutions: A Problem in Constitutional Law and Policy*, 1959 WASH. U.L.Q. 325. Miller, *Foreign Trade and the "Security State": A Study in Conflicting National Policies*, 7 J. PUB. L. 37 (1958), is a valuable tool for the understanding of, and provides valid arguments against, the views which unsuccessfully opposed the ratification of the OECD Convention by the U.S.

¹²¹ REPORT OF THE FOUR 55, para. 175.

contracts, or relationships of a semi-contractual, semi-statutory nature like the relationship between the OEEC and its staff.

Identity, and thus continuity, *ratione personae* between OEEC and OECD, though it goes along with a far-reaching similarity of the privileges and immunities accorded to the two institutions, must not, however, veil the far-reaching functional discrepancy between the old and the new entity. In piercing the veil which the evident identity *ratione personae* might throw over the encroachments on the continuity *ratione materiae* as between the OEEC and the OECD, it is not intended to belittle the legal merits inherent in this as in any kind of continuity.

While a wide area of the law of the OEEC—that which concerned its relations to third parties and was not dependent on unilateral and discretionary acts of organs of the OEEC—thus comes under the first sentence of Article Fifteen of the OECD Convention, a much larger portion of the substantive law of the OEEC and, in fact, that part of its law which constituted for the major part the life of that organisation, was subjected to the rule of selection.

It would be following the easy method if one were to deal with the functional aspect of the OEEC-OECD transition by explaining that the partial lack of topical continuity on the one hand and the addition of new tasks on the other was nothing more than an adaptation to changing political and economic circumstances. That pattern of thought may be appropriate for the political scientist and it is probably susceptible of producing a desirable insight into the maelstrom of economic relations as one of the prime movers of world politics.

Legally, the evident antimony between identity *ratione personae* and the much less pronounced continuity *ratione materiae* demonstrates the flexibility of the law of international organisation which, by the transformation of the OEEC into the OECD, proves that, if it is admitting analogies from the law of nations, it is susceptible of emptying them at the same time of their original notional content. As has been amply shown,¹²² identity of states implies not only the continuity of legal personality and the observance of existing international obligations, but also postulates the principle of, and usually in fact signifies, a far-reaching identity of other functions, so far-reaching that the identity

¹²² MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW passim* (1954); SCHEUNER, *FESTSCHRIFT NAWIASKY, VOM BONNER GRUNDGESETZ ZUR GESAMTDEUTSCHEN VERFASSUNG passim* (1956).

ratione materiae is a predominant element of continuity as between states¹²³ even where their territory has been subject to considerable modifications.

That this does not hold true at all with regard to international organisations is not only apparent from the outcome of the reform of the OEEC, but also from the transformation of the Brussels Treaty into WEU, and to a lesser extent from the revision of the ILO constitution. True, where the device of continuing the legal personality of an existing organization has been chosen, any outward obligations assumed at the time of the organisational metamorphosis from one entity into another must be honored whether they are conventional, contractual, quasi-contractual or statutory in nature.^{123a}

But even in the case of the specialized agencies of the United Nations which are all linked to that organisation by treaties supposedly determining the short-term and the long-term aspects of their policy, it would be unrealistic to assume that such outward obligations incurred through arrangements with one third party went beyond regulating specific and limited aspects of their functional tasks. This is all the more true for other outward obligations such as those resulting from headquarters agreements or from arrangements which are governing what is known as the "aspect matériel" of the life of international organisations, *i.e.*, the physical and technical facilities that are required for the appropriate display of their predominant functional assignments. These assignments for the carrying out of which organisations are founded and exist may, however, be curtailed in so incisive a manner that in the functional field the legal and factual situation resulting from the reform of an organisation is equal or substantially similar to the outcome of

¹²³ *Ibid.*

^{123a} *But cf.* note 73. Generally speaking, identity *ratione personae* accompanied by a far-reaching discontinuity *ratione materiae* cannot be imposed on non-member states and other international persons by unilateral decision of an organisation or by way of a treaty among its members, but requires the consent of third parties. This applies in particular in respect of treaties concluded by the organisation before constitutional revision or "reconstitution." Non-member states and other international persons may, however, recognize continuity *ratione personae* in spite of far-reaching discontinuity not only by a positive pronouncement to this effect, but also by conduct which constitutes a manifestation of assent. If third states or other subjects of international law in such cases do not notify their non-recognition of continuity *ratione personae* between the signature or adoption and the coming into force of the legal instrument implementing constitutional reform or reconstitution, they would appear to be estopped from doing so thereafter and would have to accept that they are treated as if they had recognised the personal identity claimed by the organisation.

a succession, since the whole direction of an organisation may have been changed, particularly in objectives and substantive functions.

It is perhaps too early to assess the reform of the OEEC from this viewpoint, since the broad language of the OECD Convention permits large-scale continuity *rationae materiae* even without a formal recommendation of the Preparatory Committee to this effect. But the decisions of policy on structure and functions of the OECD set out in the report of the Preparatory Committee already foreshadow that this organisation may be quite different from the OEEC in the aims it actually pursues, in the substantive activities which it displays most forcefully, and in short, in the objectives it will attempt to achieve. It is significant in this respect that the procedural vehicle used for determining the policy of the OECD is one which thus far has been applied only in cases of inter-organisational succession, notably that from the League of Nations to the United Nations, *that vehicle being the discretionary decisions of a political body of the new organisation.*

Furthermore, the complicated machinery established to maintain part of the functions of the OEEC, on the coming into force of the OECD Convention, that is, the Memorandum of Understanding on the Application of Article Fifteen of the OECD Convention, the report of the Preparatory Committee and the ministerial resolution transforming the totality of the recommendations set out in that report into an instrument binding on governments, proves that the freedom of choice of the OECD Council takes precedence over the principle of continuity *rationae materiae* as between the OEEC and OECD with respect to all activities which the participating governments are not obligated to admit for maintenance in the OECD.

Substantively, then, the continuity of functions of OEEC, where it will be ensured by the OECD, is the result of a deliberate choice and does not ensue automatically from the identity *ratione personae* between the two organisations. This tends to prove the proposition suggested at the outset of this article, that continuity in the law of international organisations does not necessarily refer, either by parity of reasoning or law, as it would seem to do in the law of nations, to identity *ratione personae* between the international entities concerned. It has been seen that, with respect to the functions which OECD took over from OEEC, the participating governments agreed not only on the continued usefulness of the internationalization of the activities, but also that the OECD would be the legally, politically, and economically

appropriate body to exercise them. As for the functions of the OEEC not carried on by the OECD, such as some tasks of the OEEC relating to trade which coincided with those of GATT, they were left, in part, to other international organisations. Other tasks of the OEEC were re-nationalized, such as some aspects of the OEEC activities in the field of productivity which were not continued in other international organisations. It is believed that only the latter case is an example of *discontinuity* in the law of international organisations.

The purpose of continuity in the law of international institutions is not the maintenance of the existence of an international personality. It is rather the continued exercise of a given set of functions which have been internationalized and are required to remain internationalized in the interest of the states participating in the venture. For that purpose the functions concerned need not necessarily be exercised by an international institution which is identical with the one initially entrusted with those tasks. This principle is likely to remain so long as international organisations are devoid of territorial sovereignty, devoid of that historical bond among their member states and the people living there which transforms a populace into a nation, and finally, so long as the very existence of international organisations is at the mercy of their member states. In other words, the conclusions arrived at herein will probably remain true as long as international organisations have their legal basis in rules of international public law and not in the constitutional law of a state-like community resembling a federal union. Short of this evolution—seemingly Utopian thus far—the legal personality of international organisations is only accessory to the substantive tasks which alone justify its corporate existence in international law apart from States.