MEMORANDUM TO CABINET BY THE MINISTER OF COMMONWEALTH AND FOREIGN AFFAIRS AND THE MINISTER OF JUSTICE AND PARLIAMENTARY AFFAIRS

Accession to the Convention on the Law of Treaties

1. On the 9th April, 1969 started in Vienna and will end on the 21st May, 1969, the Second Session of the United Nations International Conference of the Law of Treaties. Malta was not represented at the First Session of the said Conference held between the 26th March and 24th May, 1968, but the Crown Advocate-General has attended during the first eleven days of the Second Session and will be attending during the last ten days of that session, which will precede the opening of the Convention on the Law of Treaties for signature.

2. The Conference on the Law of Treaties was called by the General Assembly of the United Nations for the purpose laid down in the Charter of "encouraging the progressive development of International Law and its codification" and the draft placed before the Conference was the result of long years of work by the International Law Commission. If such draft in its original version or as amended by the Conference is approved at the end of the Conference, it will be opened for signature.

3. The scope of the formulation of the Law of Treaties is to avoid or at least reduce uncertainties in the international relations by the laying down of rules which are to govern the manner of conclusion of treaties and of becoming parties thereto, their validity, the cause of their invalidity and the consequences ensuing therefrom, their interpretation and application, the extent of their operation, the methods of amending them, suspending or terminating their operation, the admissibility of reservations and their effect, the inter-relation of successive treaties relating to the same subject matter, the separability of treaty provisions, reservations, the supervening impossibility of performance of a treaty, the effect of treaties in regard to third parties, the capacity of states to conclude treaties and other ancillary matters.

4. The main controversial points which have emerged at the Conference are the following:-

(a) the insertion in the Law of Treaties of a new concept, the concept of "General multilateral Treaties", which would allow any State, even if not invited, to become as of right a party to a treaty of that class, such treaties being those which are of a common interest for the whole international community;

(b) the insertion in the Law of Treaties of an article which provides that treaties conflicting with a peremptory norm of a general international law (jus cogens) are void;

/(c) the insertion .....

(c) the insertion in the Law of Treaties of provisions which confer upon a State the right to invoke the invalidity of a treaty in the case of error, fraudulent conduct of another negotiating state, corruption of a State's representative, coercion of the representative of a State, conclusion of a Treaty by the threat or use of force in violation of the principles of the Charter of the United Nations;

(d) the insertion in the Law of Treaties of a provision whereby disputes arising out of or in connection with the interpretation and application of the provisions referred to under (b) and (c) above would be referable for settlement by conciliation or arbitration to a third party.

5. The introduction in the law of Treaties of the concept of "General Multilateral Treaties" was sponsored at the Conference by the Ukrainian Soviet Socialist Republic and eleven other countries, but it was strongly opposed by the Western Group of countries on both legal and political grounds, since such a concept would introduce an element of coercion in the conclusion of treaties, by restricting and interfering with the freedom of States to determine at the time of negotiation of a multilsteral treaty, the circle of parties thereto: this restriction on contractual freedom would, in fact, destroy the very basis of the law of treaties since it encroaches into the concept of treaties wilfully entered into with parties with which a State might wish to enter into agreement. There is the added difficulty of determining which treaties would actually be "General Multilateral Treaties".

Finally such a concept would enable States who have not been so far recognised by the majority of Western countries to impose their presence in the community of nations by acceding to a general multilateral treaty.

From the proceedings of the second session of the Conference, it does not appear that the amendment proposed by the Ukrainian and other delegations will obtain the simple majority required in the Committee stage of the Conference, much less the 2/3 majority required in the plenary of the Conference.

6. The other 3 points mentioned under (b), (c), and (d) above, are closely interlinked. The Western countries look with great disfavour at (b) and (c), (namely the provisions giving place to the invalidity of a treaty on the grounds of error, fraudulent conduct, contravention of jus cogens, etc.) not because the Western countries are in principle against the substance of those provisions, but because, if the application of such provisions is left to the unilateral decision of States, any State and the more so any big power, could easily interpret and apply those provisions in a way which would enable such State for its own convenience to choose a particular interpretation in particular

/circumstances .....

circumstances or political situations so as to invoke the invalidity of a Treaty. Consequently the Western States expressed their willingness to accept such provisions, subject to the introduction referred to at (d), of provisions in terms whereby the question of the alleged invalidity of a treaty on any grounds referred to above would have to be settled by independent conciliation and, failing this, by independent arbitration. Accordingly, the Netherlands and other twelve States prpposed at the first session of the Conference a new article 62 bis, providing the machinery for such conciliation and arbitration. A vote on that article was postponed to the second session of the Conference and at the beginning of such session a new article 62 bis, containing improvements in the light of observations made by participants to the Conference, was submitted to the Conference and sponsored by Austria, Bolivia, the Central African Republic, Columbia, Dahomey, Denmark, Finland, Gabon, Ivory Coast, Lebanon, Madagascar, Mauritius, Netherlands, Peru, Sweden and Tunisia. Later it was co-sponsored, at the invitation of the Netherlands delegation, by Malta and Uganda. This article enjoys the whole support of the Western countries but is opposed by U.S.S.R., its sattelites and by some Afro-Asian countries. Indeed, several countries have stated that they will be unable to sign the Convention of the Law of Treaties unless the Convention contains adequate provision to prevent the possibility of causes of invalidity of treaties being invoked and applied by countries unilaterally without recourse to the independent decision of an independent body. The Crown Advocate-General is of the opinion that this should be also Malta's attitude towards the future Convention.

7. Hon. Ministers are requested to approve that subject to the Crown Advocate-General, who is the Malta delegate to the Conference, being satisfied that the said safeguards are under any form incorporated in the Convention, the said Convention be signed on behalf of Malta.

25th April, 1969.