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article 70 of the International Law Commission's draft and would oppose the amendments. A fundamental issue was involved which could not be referred to the Drafting Committee. The amendments should be put to the vote.

76. Mr. YASSEEN (Iraq) said be also thought that article 70 was very clear and presented no difficulty. The argument that aggression had not been defined could not be accepted, because the application of a legal rule did not depend on the definition of the terms it contained. The organs responsible for applying the Charter were obliged to define aggression in each particular case. Under the present international legal system, aggression constituted the supreme crime. Consequently it must be expressly mentioned in the draft convention, even if only in connexion with a reservation.

77. With regard to the amendments by Japan and Thailand, he did not question the good faith of their authors, but they were not acceptable because they did not mention aggression. Even if the Committee wished to broaden the scope of the rule stated in article 70, it would be necessary to mention aggression and then add something to cover the other measures that might be taken by the United Nations. His delegation was in favour of the original text and against the proposed amendments.

78. Mr. BREWER (Liberia) said that the amendments by Japan and Thailand went a little further than the original text in that they dealt with measures taken against a State in conformity with the Charter of the United Nations, whether or not it was an aggressor State. It should be remembered, however, that the title of the article was " Case of an aggressor State ". It would be preferable to amend both the title and the text to ensure that the article applied equally to the aggressor State and the State against which measures had been taken in conformity with the Charter. All that was needed was to add the words " or any other State " after the words " for an aggressor State " in the third line, and the words " or any other activities contrary to the provisions of the Charter of the United Nations " at the end of the article.

79. The CHAIRMAN said he would first put to the vote the amendments by Japan (A/CONF.39/C.1/L.366) and Thailand (A/CONF.39/C.1/L.367).

The amendment by Japan was rejected by 58 votes to 7, with 27 abstentions.

The amendment by Thailand was rejected by 54 votes to 4, with 30 abstentions.

80. Mr. DE BRESSON (France) said, in explanation of his vote, that his delegation could not subscribe to any proposal intended to settle within the limits of the debate the most difficult political problems. He was convinced that the proposed amendments could not have had that purpose, and had preferred to abstain from voting on texts which it considered to be technical, and the scope of which was accordingly difficult to assess. His delegation supported article 70 as it stood.

81. The CHAIRMAN said that, if there were no objection, he would take it that the Committee agreed to refer article 70, with the oral amendment by Liberia, to the Drafting Committee.[6]

It was so agreed.

The meeting rose at 6 p.m.

[6] For resumption of the discussion of article 70, see 82nd meeting.

SEVENTY-SEVENTH MEETING

Monday, 20 May 1968, at 10.45 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 71 (Depositaries of treaties) and *Article 72* (Functions of depositaries) [1]

1. The CHAIRMAN invited the Committee to consider articles 71 and 72 of the International Law Commission's draft.

2. Mr. CASTRÉN (Finland), introducing his amendment to article 71 (A/CONF.39/C.1/L.248), said that its purpose was to complete the provisions of the article so as to take into account those cases where there was more than one depositary. In its written comments, the IAEA had mentioned the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water of 1963 and the Treaty on Outer Space of 1966 as recent examples of treaties providing for three depositaries instead of the traditional number of one. It was necessary to have due regard to that novel practice, which would no doubt continue in the future.

3. The first part of his amendment to article 72 (A/CONF.39/C.1/L.249) was designed to modify the wording of paragraph 1 (*a*) so that the depositary's duties regarding custody should cover amendments to the treaty, as well as the original text of the treaty, as suggested by FAO in its written comments. The second part purported to alter the wording of paragraph 1 (*e*) so as to make clear that it was not only the States entitled to become parties to the treaty, but also those which were already parties, that must be informed of all acts, communications and notifications relating to the treaty.

4. Mr. ARIFF (Malaysia), introducing his delegation's amendments to articles 71 and 72 (A/CONF.39/C.1/L.290/Rev. 1 and L.291), said that they would have the

[1] The following amendments had been submitted:

To article 71—Bulgaria, Romania and Sweden (A/CONF.39/C.1/L.236 and Add.1), Finland (A/CONF.39/C.1/L.248), Bulgaria, Byelorussian SSR, Cambodia, Guinea, Mali and Mongolia (A/CONF.39/C.1/L.351), Mexico (A/CONF.39/C.1/L.372).

To article 72—Finland (A/CONF.39/C.1/L.249), Byelorussian SSR (A/CONF.39/C.1/L.364), Mongolia (A/CONF.39/C.1/L.368), United States of America (A/CONF.39/C.1/L.369), Mexico (A/CONF.39/C.1/L.372).

To articles 71 and 72—Malaysia (A/CONF.39/C.1/L.290/Rev.1 and 291) and China (A/CONF.39/C.1/L.328).

effect of transferring from article 71 to article 72 the statement that the " functions of a depositary of a treaty are international in character ". Since article 72 dealt with the functions of depositaries, that improvement was fully in line with the International Law Commission's conception of the two articles and the principles underlying them.

5. Mr. KIANG (China), introducing his delegation's amendment (A/CONF.39/C.1/L.328), said that it purported to make two changes in articles 71 and 72. The first was to insert the adjective " multilateral " before " treaty " in both paragraphs of article 71; it was only multilateral treaties, as distinct from bilateral treaties, which called for the services of a depositary.

6. The second change was to transfer paragraph 2 of article 71, which set out the character of the functions of the depositary, to article 72. That arrangement would be more logical in view of the title of article 72, " Functions of depositaries ".

7. Mr. SEPULVEDA AMOR (Mexico), introducing his delegation's amendment to article 71 (A/CONF.39/C.1/L.372), said that it purported to insert in paragraph 1, after the words " international organization ", the additional words " or the chief administrative officer of the organization ". That amendment was based on a suggestion by the Secretary-General of the United Nations (A/6827/Add.1, p. 17), who had pointed out that " In the practice of the United Nations, the depositary is the Secretary-General and not the organization itself ".

8. His delegation's amendment to paragraph 1 (*a*) of article 72 (A/CONF.39/C.1/L.373) was based on the written comment by FAO (A/6827/Add.1, p. 26) that the paragraph in question " refers only to the original text of the treaty; amendments are not mentioned in this sub-paragraph, nor in any of the subsequent provisions ". Accordingly, it was proposed in his amendment to insert the words " and of any amendment thereto " after the words " of the treaty " in the sub-paragraph in question.

9. Mr. BLIX (Sweden), introducing on behalf of the sponsors the three-State amendment to article 71 (A/CONF.39/C.1/L.236 and Add.1), said that its purpose was to cover the present State practice of occasionally designating more than one State as depositaries. Without expressing any opinion on that novel practice, his delegation felt that it was undoubtedly permissible and must be taken into account in the wording of paragraph 1 of article 71.

10. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that the depositary played an essential role in the implementation of a treaty, and treaties were, as was well known, one of the most important means of strengthening friendly relations between States and thus in furthering the cause of international peace. Consequently, the articles on the depositaries of treaties were important.

11. Introducing the six-State amendment to paragraph 2 of article 71 (A/CONF.39/C.1/L.351), he said that its sponsors fully accepted the provisions of that paragraph but felt it desirable to specify the obligation of a depositary State to act impartially, irrespective of the state and character of the relations between itself and another State transmitting any of the notifications and communications referred to in article 73. As a sovereign State, the depositary State was entitled to have its own policy. That policy, however, must only affect its acts as an ordinary party to the treaty; when acting as depositary, a State was in duty bound to act impartially, regardless of the state and character of its relations with any other State.

12. Introducing his delegation's amendment to article 72 (A/CONF.39/C.1/L.364), he said that it purported to make two changes in the article, the first to replace in sub-paragraph 1 (*d*) the words " a signature, an instrument or a reservation is in conformity with the provisions of the treaty and with its articles " by the words " the documents relating to the treaty are correctly drawn up ". The language of the International Law Commission's text was unduly wide; it appeared to suggest that the depositary could interpret the treaty, and a reservation to a treaty in particular. Such functions belonged to a State party to a treaty, not to a depositary. That amendment was fully in line with the concept that a depositary must act impartially and not as a State party, when performing the international function of depositary.

13. Mr. STREZOV (Bulgaria), speaking as a sponsor of the three-State amendment to paragraph 1 of article 71 (A/CONF.39/C.1/L.236 and Add.1), said that it would take into account the existing State practice of designating not one depositary State but several. Apart from the examples already given, he believed that the same idea had been incorporated in the draft treaty on the non-proliferation of nuclear weapons. The practice appeared to be growing and had not given rise to any technical difficulty.

14. Speaking as one of the sponsors of the six-State amendment to paragraph 2 of article 71 (A/CONF.39/C.1/L.351), he said that the proposed addition was fully in keeping with the text of the paragraph as drafted by the International Law Commission. The concept of impartiality in the performance of the international functions of the depositary logically implied that the state and character of the relations between a depositary State and the State transmitting a notification or communication should have no effect on the performance of those functions. If they had any such effect, the depositary would not be acting impartially.

15. Mr. KHASHBAT (Mongolia), introducing his delegation's amendment to paragraph 2 of article 72 (A/CONF.39/C.1/L.368), said that it was for the insertion of a sentence reading: " The appearance of a difference shall not affect the impartial performance by the depositary of its functions as specified in paragraph 1 of this article. " The text as it stood merely indicated that, in the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary had the duty to bring the question to the attention of the other States concerned or of the organization concerned. The purpose of his amendment (A/CONF.39/C.1/L.368) was to make it clear that the impartial performance of the functions of the depositary must not in any way be affected by the emergence of a difference. The obligation of the depositary to act in that manner was implicit in the duty to perform its functions impartially and was in keeping with the inter-

national character of those functions. The amendment was therefore essentially of a drafting character.

16. Mr. BEVANS (United States of America), introducing his delegation's amendment to article 72 (A/CONF.39/C.1/L.369), said that its purpose was to bring the article into conformity with customary depositary practice. A treaty normally specified at least some of the functions to be performed by the depositary. Certain other functions were understood to exist as a result of practice. From time to time, however, certain functions needed to be performed which had not been anticipated and had therefore not been specified in the treaty. Such functions were usually related to the customary depositary functions and could be performed more efficiently and conveniently by the depositary than by any other agent. In such cases, the States concerned agreed to entrust the new functions to the depositary.

17. The United States amendment to the opening sentence of paragraph 1 (A/CONF.39/C.1/L.369) would make it clear that any functions not specified either in the treaty or in draft article 72 could appropriately be performed by the depositary by agreement of the States concerned, without the treaty actually having to be amended.

18. The United States amendment further purported to introduce a new paragraph 1 (*a*) which would include in the enumeration of the depositary's functions " Preparing the original text for signature in the languages specified ". The text of a treaty that was signed was almost invariably prepared by the depositary, either in typescript or in printed form.

19. His amendment would also alter the wording of the present paragraph 1 (*a*) so as to introduce a reference to the custody of " full powers, instruments of ratification, accession, acceptance or approval and notifications communicated to " the depositary. All such instruments and notifications were integral parts of the depositary's secretariat records and were of considerable importance.

20. It further proposed the inclusion, as one of the functions of the depositary, of registration of the treaty with the Secretariat of the United Nations. Almost invariably, the depositary had the most complete and authoritative information regarding a treaty and was in the best position to perform not only the initial function of registration but also to register subsequent developments, additional signatures, ratifications, accessions, acceptances or approvals, as well as any corrections, amendments or terminations. It was customary for the depositary to perform all the registration functions and he understood that the United Nations Secretariat had informally indicated its preference that registration of a treaty be effected by the depositary.

21. Lastly, his amendment proposed that, in paragraph 2 of article 72, the words " other States entitled to become parties to the treaty " be replaced by the words " other signatory or contracting States ". That wording would cover not only States that had signed the treaty but also States that had given their consent to be bound by it without being signatory States. The change was necessary in paragraph 2 because the proviso, " unless the treaty otherwise provides ", in paragraph 1 did not apply to paragraph 2. Actually, even if it did apply, it would be necessary, in order to give it effect, to include a special provision in the treaty, and such a provision was rarely, if ever, included in a multilateral treaty.

22. The phrase " States entitled to become parties " was inappropriate in paragraph 2 because States that had signed a treaty, or had given their consent to be bound by it, had a much more direct and serious interest in the performance of the functions of the depositary than States which had not had anything to do with the treaty. The present provisions of paragraph 2 would be cumbersome, and would delay not only the bringing of questions to the attention of the States most concerned but also the settlement of those questions. The proposed change would bring the text of the article into conformity with the statement in paragraph (8) of the commentary to article 72 that paragraph 2 laid down the general principle that the duty of the depositary was to bring the question to the attention of the other negotiating States. Paragraph (1) of the commentary to article 72 stated that the article had been patterned on the lines of the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7). The practice outlined in that publication might be appropriate for a world-wide international organization like the United Nations but would not necessarily be the most appropriate where a relatively small international organization, or a State, served as depositary.

23. Mr. RATTRAY (Jamaica) said that the draft convention covered all written international agreements, bilateral and multilateral, formal and informal. In view of the wide variety of instruments involved, it would be most unwise to make it mandatory to designate a depositary for each and every treaty, irrespective of its character. The International Law Commission's text of article 71 merely established the procedure for designating the depositary, and article 73 indicated the procedure to be followed where no depositary was designated. State practice showed no trend towards making designation of a depositary mandatory, and the three-State amendment (A/CONF.39/C.1/L.236 and Add.1) introduced an unnecessary complication by indicating that a depositary should be designated in all cases. The Jamaican delegation could not vote for that amendment.

24. Mr. WERSHOF (Canada) said that his delegation strongly supported the purpose of paragraph 2 of article 71, but had some doubts concerning the usefulness of paragraph 1 as drafted by the International Law Commission. His delegation could not agree with the Jamaican representative that the Commission's text did not make the designation of a depositary mandatory. It would be more appropriate if the imperative " shall " were replaced by the permissive " may ". In practice, depositaries were seldom designated for bilateral treaties in simplified form, while in the case of multilateral treaties with a very limited number of parties, each State often received a copy of the original treaty, none being designated as depositary. The Canadian delegation hoped that the Expert Consultant would comment on that point, and also on the question, raised in the Chinese amendment (A/CONF.39/C.1/L.328), whether article 71 should relate only to multilateral treaties.

25. His delegation agreed with the proposals in the three-State amendment (A/CONF.39/C.1/L.236 and Add.1) and

the Finnish amendment (A/CONF.39/C.1/L.248), that more than one State could be designated as depositaries of a multilateral treaty. On the other hand, it could not support the six-State amendment (A/CONF.39/C.1/L.351), although it sympathized with the motives for it; the wording was too vague and broad to justify the inclusion of the additional phrase.

26. With regard to article 72, the Canadian delegation would be grateful if the Expert Consultant would enlarge on the intentions of the International Law Commission with regard to the use of the word " reservations " in sub-paragraph 1 (*d*). It was stated in paragraph (4) of the commentary that it was no part of the functions of the depositary to adjudicate on the validity of an instrument or reservation; also that, if an instrument or reservation appeared to be irregular, the proper course of a depositary was to draw the attention of the reserving State to the matter and, if the latter did not concur with the depositary, to communicate the reservation to the other interested States and bring the question of the apparent irregularity to their attention in accordance with paragraph 2 of article 72. His delegation presumed that, in drafting the sub-paragraph, the Commission had tried to reflect the existing practice of the Secretary-General of the United Nations, as set out in paragraph (8) of the commentary to articles 16 and 17. It would accordingly like to know whether the Expert Consultant agreed with its understanding of the effect of sub-paragraph 1 (*d*) in the following hypothetical case. If a depositary received a reservation which was not prohibited by sub-paragraphs (*a*) or (*b*) of article 16, but which might be considered by the depositary to be incompatible under sub-paragraph (*c*), it should refrain from commenting on the possible incompatibility of the reservation, and simply inform the States mentioned in sub-paragraph 1 (*e*) of article 72 of the text of the reservation, leaving it to each of them to draw its own conclusion. On the other hand, if the reservation were prohibited by sub-paragraphs (*a*) or (*b*) of article 16, the depositary would have the right and duty, under sub-paragraph 1 (*d*) of article 72, to bring the matter to the attention of the reserving State.

27. His delegation considered that the amendments by the Byelorussian SSR (A/CONF.39/C.1/L.364) and Mongolia (A/CONF.39/C.1/L.368) introduced undesirable substantive changes into the article, and it would therefore vote against them.

28. Mr. ROSENNE (Israel) said that his delegation had re-examined article 71 in the light of certain comments particularly those of the Secretary-General of the United Nations (A/6827/Add.1) and the Council of Europe (A/CONF.39/7), which were in various ways reflected in the amendments of Bulgaria, Romania and Sweden (A/CONF.39/C.1/L.236 and Add.1), Finland (A/CONF.39/C.1/L.248) and Mexico (A/CONF.39/C.1/L.372). Although his delegation had no serious objection to those amendments, if it were decided to retain paragraph 1 of article 71, it wished to point out that the proposals were possibly more controversial than they would at first sight appear to be.

29. That had led his delegation to question whether paragraph 1 was necessary at all, and whether in any event it was correctly worded, for it could be read as a mandatory directive to States to designate a depositary when no such directive was intended. The paragraph stated no essential legal rule and it might be preferable to delete it altogether, rather than amend it; his delegation hoped that the Drafting Committee would consider that suggestion, which seemed to be supported by the statement in paragraph (1) of the commentary that, in re-examining the article at its seventeenth session, the Commission had revised its opinion as to the utility of the rules and had concluded that the matter should be left to the States which had drawn up the treaty to decide. Since no residual rule was proposed, a purely descriptive paragraph seemed to be out of place.

30. On the other hand, paragraph 2 stated an essential rule of law, consisting of the two elements of the international character of the depositary functions and the depositary's duty to act impartially in their performance. Since those two elements went together, the Israel delegation could not support the proposals of Malaysia (A/CONF.39/C.1/L.290/Rev.1) and China (A/CONF.39/C.1/L.328) to transfer the element of international character to article 72, which merely dealt with the technical aspects of the depositary's functions. It also considered that the point raised in the six-State amendment (A/CONF.39/C.1/L.351) was adequately covered in the original text, so that the amendment was not essential.

31. With regard to paragraphs 1 and 2 of the Chinese amendment (A/CONF.39/C.1/L.328), his delegation believed that there was no justification for introducing such an inflexible rule, since, although occasions on which a depositary was designated for treaties which were not multilateral were certainly rare, they were not unknown; the International Law Commission had considered the matter carefully in 1962 and 1965, and had deliberately decided not to be so restrictive.

32. His delegation believed that article 72 should be kept more or less as it had been drafted by the Commission, subject to appropriate changes to take into account the views of those governments and international organizations which had had wide experience of administering treaties as depositaries. It would be prepared to support the amendments of Finland (A/CONF.39/C.1/L.249), the United States (A/CONF.39/C.1/L.369) and Mexico (A/CONF.39/C.1/L.373), all of which contained useful and necessary clarifications; it should be borne in mind, however, that in some cases the depositary of amendments was different from the depositary of the original treaty, and the text should therefore not be too rigid. Although paragraph 3 of the Byelorussian amendment (A/CONF.39/C.1/L.364) was correct in principle, his delegation considered that, as in the case of the six-State amendment to article 71 (A/CONF.39/C.1/L.351), the point was adequately covered in article 71, and that it was not essential to repeat it in article 72. The same could be said of the Mongolian amendment (A/CONF.39/C.1/L.368).

33. Mr. ZEMANEK (Austria), referring to the provision in paragraph 1 of article 71 that the depositary could be a State or an international organization, said that in practice the depositary in the latter case was often the chief administrative officer of the organization, not the international organization itself. That differentiation had been recognized by the International Law Commission when it had referred to the competent organ of an international organization in sub-paragraph 1 (*a*)

of article 28 of its 1962 draft; but in 1965 the article had been rephrased as a residuary rule, and it had then been pointed out that the reference to a competent organ might give rise to difficulties, by necessitating a detailed examination of the constitution of the organization concerned. Since the paragraph was no longer drafted in residuary terms, however, the Austrian delegation considered that those objections no longer held good, and it could therefore support the Mexican amendment (A/CONF.39/C.1/L.372).

34. Mr. DE BRESSON (France) said that his delegation considered it essential to state unequivocally in article 71 that a depositary must act exclusively as the mandatory of the parties, that its functions were, so to speak, notarial, and that it consequently had no right to prejudge the opinion of the parties when a problem arose which affected not the form but the substance of the treaty or cast doubt on the relations between the parties. His delegation did not consider that the Commission's text made the position clear enough, and it would support any amendment which would remedy that shortcoming.

35. With regard to article 72, the French delegation wished to raise two major points. First, it was important to specify whether the term " States entitled to become parties to the treaty ", used in sub-paragraph 1 (*b*), 1 (*e*) and 1 (*f*) and in paragraph 2, meant all the States interested in the treaty by reason of its object, or only the contracting States and the States which had taken part in the negotiation, or perhaps the signatory States which had subsequently failed to ratify the treaty. The extent of the depositary's responsibility would depend on the answer to that question. For example, if it meant all the States interested in the treaty by reason of its object, then the depositary would have to notify all the States Members of the United Nations, and if the definition extended to signatories which had not ratified the treaty, the depositaries might be obliged to send notifications to States which had failed to ratify signatures appended as long as 50 years previously. Those illustrations showed how important it was to clarify the point.

36. Secondly, sub-paragraph 1 (*d*) gave the erroneous impression that a depositary had the right to decide whether the substance as well as the form of an instrument or reservation was or was not compatible with the provisions of the treaty. It was self-evident that the depositary had no such right, and sub-paragraph 1 (*d*) should be reworded so as to eliminate any possible ambiguity in that respect.

37. With regard to some points of lesser importance, his delegation doubted whether it was realistic to provide in sub-paragraph 1 (*a*) for cases where the custody of the original text of the treaty was not entrusted to the depositary. If sub-paragraph 1 (*a*) were retained in its existing form, sub-paragraph 1 (*b*) should be amended to provide for cases where the depositary did not have custody of the original text. His delegation also considered that the depositary could hardly be made responsible for preparing " any further text in such additional languages as may be required by the treaty ", if that meant that the translations were to be prepared by the depositary. The Drafting Committee should consider all those points very carefully.

38. Mr. SARIN CHHAK (Cambodia) said that the purpose of the Byelorussian amendment to article 72 (A/CONF.39/C.1/L.364) was to clarify the meaning of the Commission's text and emphasize the impartial character of the depositary. That point had been clearly brought out in the last sentence of paragraph (2) of the Commission's commentary to article 71. The Commission had reflected both theory and practice in articles 71 and 72, making it plain that a depositary could not exercise control over contracting States. That consideration would guide him in the way he voted on the amendments to the two articles.

39. Mr. MARESCA (Italy) said that the role of the depositary had changed in recent years. Previously it had always been a State, but now it could also be the executive head of an international organization. Sometimes there were several depositaries, as in the case of the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water. A depositary's functions were international and called for complete impartiality. The notion of the international character of the depositary had been well brought out in the Malaysian amendment to article 72 (A/CONF.39/C.1/L.291) and should be expressed at the beginning of Part VII. An explanation was also needed of the meaning of the phrase " the States entitled to become parties to the treaty ", used throughout article 72.

40. He supported the Finnish amendment to article 71 (A/CONF.39/C.1/L.248) and the United States (A/CONF.39/C.1/L.369) and Mexican (A/CONF.39/C.1/L.373) amendments to article 72. The Mongolian amendment (A/CONF.39/C.1/L.368) was unnecessary, because the term " impartially " in article 71, paragraph 1, was already quite comprehensive.

41. Mr. HARRY (Australia) said that the Commission's text was generally acceptable. It was merely descriptive but usefully recognized the modern practice of designating international organizations as depositaries. He had understood article 71, paragraph 1, as not requiring the parties to appoint a depositary in all cases but as saying that, if they wished to do so, they could provide for it either in the treaty itself or in some other manner. He could accept the change suggested by Canada whereby the word " shall " would be replaced by the word " may ".

42. The Finnish amendment (A/CONF.39/C.1/L.248) provided for the appointment of more than one depositary and should be adopted. The three-State amendment (A/CONF.39/C.1/L.236 and Add.1), which seemed to require negotiating States to designate a depositary in all cases, did not conform to practice. As was contemplated in article 73 of the draft, there could be cases where no depositary was appointed. The Chinese amendment (A/CONF.39/C.1/L.328) was perhaps not absolutely necessary but could be examined by the Drafting Committee, which could also consider what should be the best place for article 71, paragraph 2.

43. The intention of the six-State amendment to article 71 (A/CONF.39/C.1/L.351) was not clear. He assumed that it was intended to add something to the principle laid down in article 71 that a depositary's functions were international in character and that it was under an obligation to act impartially. In the event of a difference between a State and a depositary over the performance of the latter's functions, the depositary could not act irrespective of the state of its relations with other States

entitled to become parties. It could not be expected to communicate direct with States with which it did not have diplomatic relations, but it could still impartially communicate notifications through the competent organ of the United Nations or through a third State. He did not consider that the six-State amendment clarified the Commission's text, which was adequate.

44. He supported the Finnish (A/CONF.39/C.1/L.249) and United States (A/CONF.39/C.1/L.369) amendments to article 72 but did not think there was any justification for the Mongolian (A/CONF.39/C.1/L.368) or Byelorussian (A/CONF.39/C.1/L.364) amendments, which sought to deal with situations already sufficiently provided for in paragraph 2 of article 71.

45. One point should be made more explicit in paragraph 2 of article 72, namely, that the depositary had no competence to adjudicate in the event of a difference between a State and the depositary.

46. Mr. MEGUID (United Arab Republic) said that, as stated in paragraph (4) of the commentary to article 72, it was no part of the functions of a depositary to adjudicate on the validity of an instrument or reservation. That principle had been confirmed in General Assembly resolution 528 (VI). As the Conference was engaged in codifying the law of treaties, it should refrain from extending the functions of depositaries. Therefore article 72 1 (*d*) should be interpreted restrictively.

47. Miss POMETTA (Switzerland) said that article 71 indicated sufficiently clearly the impartial character of a depositary's functions; there was therefore no need to elaborate that point.

48. The terms of article 72 corresponded to the practice of Switzerland with respect to the treaties of which it was the depositary; in particular, it was correct that, as stated in paragraph 1 (*e*), it was the depositary's function to transmit acts, communications and notifications relating to the treaty and to its application. The Swiss delegation wished to state, however, that in the opinion of its Government, the depositary was not required to transmit communications of a purely political nature relating to disputes which might arise between contracting States or States entitled to become parties. That was how her Government understood paragraph 1 (*e*).

49. Mr. RAJU (India) said that, as indicated in article 71, a depositary might be a State or an international organization, as designated by the negotiating States in the treaty or in some other manner. Its functions were international and it had to act impartially, without giving any weight to its political opinion as to the status of the State or government sending in notifications or communications. Even if the depositary had not recognized the State which was entitled to send its notifications or communications under the terms of the treaty, it must perform its functions impartially and irrespective of its own opinion. It must also be impartial in regard to whether the objection or reservation filed by a State was compatible with the provisions of the treaty and whether that State was entitled to be counted for the purposes of bringing the treaty into force.

50. A difference might arise between a State and a depositary about the latter's performance of its functions. In that event, under article 72, paragraph 2, the depositary had to bring the question to the attention of the other States entitled to become parties to the treaty or to the competent organ of the international organization concerned.

51. The Commission's draft articles did not refer to the recent practice of having several depositaries, nor were the consequences of the various entities acceding to a treaty by depositing their instruments with one or other depositary made clear. Ostensibly all the parties to the treaty would have identical status regarding their rights and obligations *inter se* under the treaty.

52. The three-State amendment to article 71 (A/CONF.39/C.1/L.236 and Add.1) was of a drafting nature and could be considered by the Drafting Committee. He would prefer to see the clause concerning the international character of the depositary's function kept in article 71, paragraph 2, rather than transferred to article 72, as proposed in the Malaysian amendment (A/CONF.39/C.1/L.291). The six-State amendment (A/CONF.39/C.1/L.351) would clarify the Commission's text and he supported it. The Chinese amendment (A/CONF.39/C.1/L.328) should be considered by the Drafting Committee, but he could not support the second part of it. Neither the Byelorussian (A/CONF.39/C.1/L.364) nor the Mongolian (A/CONF.39/C.1/L.368) amendments seemed necessary. The United States amendment (A/CONF.39/C.1/L.369) was acceptable, with the exception of paragraph 5. He supported the first, but not the second, part of the Finnish amendment (A/CONF.39/C.1/L.248) and also the Mexican amendment (A/CONF.39/C.1/L.373) to article 72.

53. Mr. SINCLAIR (United Kingdom) said that his delegation supported the Commission's text of article 71, which was expository and clearly reflected established international practice. Article 28 of the draft adopted by the Commission in 1962 had been formulated in terms of residual rules for the appointment of a depositary of a multilateral treaty when the treaty made no provision. A formulation in terms of residual rules would have been useful, but his delegation could still support the expository article proposed by the Commission.

54. Most of the amendments to article 71 were of a drafting character and he doubted whether they would significantly improve the text. The additional wording proposed in the six-State amendment (A/CONF.39/C.1/L.351) was unnecessary because the obligation of a depositary to act impartially already covered the point. He was puzzled to know what was intended by the phrase " the state and character of the relations between the depositary State and the State transmitting the notifications ". If it referred to the absence or severance of diplomatic relations between the two, then he would not dispute that the obligation of impartiality imposed on the depositary the duty to receive notifications through a protecting power. But the amendment could be interpreted as going wider than that, and his delegation could not therefore support it.

55. Passing to article 72, he said that there seemed to be some inconsistency in the drafting of paragraph 1. Subparagraph (*e*) required that the depositary should inform the States entitled to become parties to " acts, communications and notifications relating to the treaty ", but under paragraph 1 (*c*) the depositary was required to receive only notifications. Under paragraph 1 (*d*), the function of

the depositary was limited to examining whether " a signature, an instrument or a reservation " was in conformity with the provisions of the treaty and of the present articles. That function should surely equally extend to the examination of notifications and communications. The Drafting Committee should consider the wording of those sub-paragraphs carefully.

56. The United States amendment (A/CONF.39/C.1/L.369) had considerable merit. In the case of a multilateral treaty, it was normally the function of a depositary to prepare the original text for signature in the various languages and he could therefore support paragraph 2 of the United States amendment. He also agreed that the depositary retained custody not only of the original text of the treaty but also of the various instruments referred to in paragraph 3 of the United States amendment. Unless the treaty otherwise provided, the depositary normally registered the treaty with the United Nations, so that the new sub-paragraph (*h*) proposed in paragraph 4 was acceptable. The differences between a State and a depositary should be considered only by those States which had taken definite steps in the direction of becoming parties to the treaty and he therefore supported the slight revision of paragraph 2 proposed in paragraph 5 of the United States amendment. The Mongolian amendment (A/CONF.39/C.1/L.368), on the other hand, was neither necessary nor desirable and might weaken the force of the obligation to act impartially.

57. The Byelorussian amendment (A/CONF.39/C.1/L.364) seriously affected the scope of the depositary's functions. The depositary was the guardian of the treaty and was not only entitled but obliged to examine whether signatures, instruments, notifications or reservations conformed to the provisions of the treaty and of the present convention. He would vote against that amendment.

The meeting rose at 1 p.m.

SEVENTY-EIGHTH MEETING

Monday, 20 May 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

TEXTS PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text of articles 35, 40 and 43 to 49 proposed by the Drafting Committee.

Article 35 (General rule regarding the amendment of treaties) [1]

2. Mr. YASSEEN, Chairman of the Drafting Committee, said that only the Spanish version of article 35 had been altered. The Drafting Committee had replaced the words " *todo tratado* " by the words " *los tratados* ".

Article 35 was approved.

[1] Fore arlier discussion of article 35, see 36th and 37th meetings.

Article 40 (Obligations under other rules of international law) [2]

3. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 40 adopted by the Drafting Committee read as follows:

"*Article 40*

" The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it is subject under any other rule of international law."

4. In addition to replacing the words " present articles " by " present convention ", the Drafting Committee had made further changes in the International Law Commission's text. In order to bring the French version into line with the English and Spanish versions, it had replaced the words " *lorsqu'ils découlent de la mise en œuvre* " by the words " *résultant de l'application* ". In the English version, it had substituted the word " provisions " for " terms " before the words " of the treaty ", and in the French text the word " *dispositions* " for " *termes* " before the words " *du traité* ". That brought those versions into line with the Spanish version, which used the word " *disposiciones* ".

5. It had rejected the three amendments referred to it by the Committee of the Whole and had decided to re-examine the terminology of the article later, in the light of other provisions of the draft articles, in particular article 39 when it was referred to it by the Committee of the Whole.

Article 40 was approved.

Article 43 (Provisions of internal law regarding competence to conclude a treaty) [3]

6. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 43 adopted by the Drafting Committee read as follows:

"*Article 43*

" 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

" 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

7. At its forty-third meeting, the Committee of the Whole had referred article 43 to the Drafting Committee after making two changes. First, it had approved an amendment by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1) to alter the closing words of the article to read: " unless that violation of its internal law was of fundamental importance and manifest ". The Drafting Committee had considered that the discussion, and particularly the statement by the Peruvian representative, had clearly shown that the Committee of the

[2] For earlier discussion of article 40, see 40th meeting.

[3] For earlier discussion of article 43, see 43rd meeting.