United Nations Conference on the Law of Treaties

Vienna, Austria
First session
26 March – 24 May 1968

Document:-
A/CONF.39/C.1/SR.79

79th meeting of the Committee of the Whole

Extract from the *Official Records of the United Nations Conference on the Law of Treaties, First Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

Copyright © United Nations

of depositaries. The use of the words " contracting States " overlooked two important considerations. First, it might be desirable to reach agreement on a correction before any of the signatory States had become " contracting States ". Secondly, there might be several contracting States within a relatively short period, but for various reasons certain signatory States might not yet have become contracting States; for example, their Parliament might not have been in session.

73. To replace the rule in article 74, which had been considered too strict, it had been suggested that States which had participated in the negotiation should be consulted before a treaty entered into force. That solution also seemed to be too restrictive. In some instances a multilateral treaty would be brought into force after only two ratifications by signatories and it would be unwise to deprive the other signatory States of the right to consider a proposed correction, particularly if only a very short period had elapsed since the treaty was signed. A literal application of article 74 would be unrealistic in view of the practice followed by depositaries. Some negotiating or signatory State might object to a correction yet never become a contracting State, but the likelihood of such an objection would seem so remote that it did not justify the restrictive wording of article 74.

74. Mr. MOUDILENO (Congo, Brazzaville) introducing his delegation's amendment (A/CONF.39/C.1/L.375), said that the verb " find " expressed an objective criterion, whereas the words " are agreed " contained a subjective element. Also, for the French version, the word " *rectification* " seemed more appropriate than the word " *correction* ".

75. Mr. WERSHOF (Canada), referring to the Austrian amendment to paragraph 2 (*b*) (A/CONF.39/C.1/L.9), said that the words " States entitled to become parties " had a wider meaning than " signatory and contracting States ". He was afraid that a hurried change of the terms used in the convention might be detrimental to the harmony of the terminology employed in the various articles. He wondered why the Austrian delegation had restricted its amendment to paragraph 2(*b*).

76. Mr. VEROSTA (Austria) said that, when proposing the change in question, his delegation had assumed that the Drafting Committee would examine all the articles containing expressions such as " negotiating States " and " contracting States ". The scope of article 74 had to be widened as much as possible in order to enable States entitled to become parties to express their views on the correction of errors.

77. Mr. HARRY (Australia) said there was a difference between the case covered by paragraph 2 (*b*) in the Austrian amendment, and the other cases to which the United States amendment (A/CONF.39/C.1/L.374) referred. Only contracting States, and States which by signing the treaty had expressed a wish to become contracting parties, should be entitled to decide whether the text contained an error and to make any appropriate corrections; but the depositary should notify the error, and the proposal to correct it, to all States entitled to become contracting parties.

78. Sir Francis VALLAT (United Kingdom) said he supported the observations of the Australian representative, which should be considered by the Drafting Committee. The words " signatory and contracting States " met all practical requirements with regard to the correction of errors in treaties.

79. The CHAIRMAN put to the vote the Austrian amendment to paragraph 2 (*a*) (A/CONF.39/C.1/L.8/Rev.1).

The Austrian amendment was adopted by 39 votes to 7, with 38 abstentions.

80. The CHAIRMAN put to the vote the Austrian amendment to paragraph 2 (*b*) of article 74 (A/CONF.39/C.1/L.9).

The Austrian amendment was adopted by 27 votes to 7, with 43 abstentions.

81. The CHAIRMAN put to the vote the United States amendment to paragraphs 1, 2 (*a*) and (*c*), and 3-5 (A/CONF.39/C.1/L.374).

The United States amendment was adopted by 65 votes to none, with 14 abstentions.

82. The CHAIRMAN put to the vote the Congo (Brazzaville) amendment (A/CONF.39/C.1/L.375).

The Congo (Brazzaville) amendment was rejected by 21 votes to 13, with 48 abstentions.

83. The CHAIRMAN said that, if there were no objections, he would take it that the Committee agreed to refer article 74, together with the amendments by Austria and the United States, to the Drafting Committee. [16]

It was so agreed.

The meeting rose at 5.50 p.m.

[16] For resumption of discussion of article 74, see 82nd meeting.

SEVENTY-NINTH MEETING

Tuesday, 21 May 1968, at 11 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 75 (Registration and publication of treaties)

1. The CHAIRMAN invited the Committee to consider article 75 of the International Law Commission's draft. [1]

2. Mr. KUO (China) said that the Chinese amendment (A/CONF.39/C.1/L.329 and Corr.1) was of a purely drafting nature. As article 75 was obviously based on Article 102 of the Charter, an express reference to the latter article should be made and its wording should be followed as closely as possible. For that reason the word " party " had been replaced by the words " any party ".

[1] The following amendments had been submitted: China, A/CONF.39/C.1/L.329 and Corr.1; Byelorussian Soviet Socialist Republic, A/CONF.39/C.1/L.371; United States of America and Uruguay, A/CONF.39/C.1/L.376.

3. Mr. AVAKOV (Byelorussian Soviet Socialist Republic) said that the aim of his delegation's amendment (A/CONF.39/C.1/L.371) was to simplify article 75 while keeping to its fundamental meaning. Every treaty must be registered with the United Nations Secretariat and that was important both for the theory and practice of international treaty relations, for reinforcing democratic trends and for upholding *jus cogens*. In the English text of the amendment the word " and " should be inserted after the word " filing " and the comma removed.

4. Mr. BEVANS (United States of America), introducing the amendment sponsored by the delegations of Uruguay and the United States (A/CONF.39/C.1/L.376), said that the United Nations Secretariat was in favour of the registration of treaties by depositaries, but in some instances certain technical difficulties stood in the way of such a procedure. For example, many treaties for which the Organization of American States (OAS) was depositary did not contain any provision regarding their registration, and in order for them to be registered with the United Nations, the OAS had first to obtain the agreement of all parties. Similarly, when States Members of the United Nations were depositaries for treaties containing no provision on registration, they were unable to register them unless every party agreed. The joint amendment was designed to overcome those technical difficulties. The new paragraph 2 would make it unnecessary for the OAS to obtain the agreement of each party to the many inter-American treaties awaiting registration, and would also make it possible for certain international organizations and States not members of the United Nations to register treaties for which they were depositaries.

5. Paragraph 2 did not relieve States of the duty to register a treaty in the event of an organization or a depositary failing to do so.

6. Mr. BADEN-SEMPER (Trinidad and Tobago) said that he did not think that the Conference was competent to consider what was in fact an amendment to Article 102 of the Charter proposed in the joint amendment (A/CONF.39/C.1/L.376). It was for the United Nations itself to ensure that the Regulations concerning the Registration and Publication of Treaties and International Agreements were observed. He had abstained from voting on the United States amendment to article 72 and would abstain on the joint amendment to article 75.

7. Mr. MARESCA (Italy) said that the difference between Article 102 of the Charter and article 75 was that the former was directed to States Members of the United Nations and the latter to the contracting parties to the present convention. The depositary had to register treaties as part of his international functions and as part of the duties assigned to him by the parties to the treaty. He agreed with the joint amendment, but considered that the Byelorussian amendment went outside the competence of the Conference, which could not create obligations for non-parties to the convention.

8. Mr. ALVAREZ (Uruguay) said it had been asserted that the joint amendment was not compatible with Article 102 of the Charter. But that was not the case. It could not in any way affect the provisions of Article 102, which were binding on all States Members and must take precedence over any other provision. The joint amendment prescribed a simple procedure for the registration of treaties. If the depositary or international organization acting as depositary failed to register a treaty, each State was under an obligation to do so. That obligation dated back to the Covenant of the League of Nations and originated in President Wilson's determination to have all treaties published, so that there should be no more secret agreements.

9. Mr. TALALAEV (Union of Soviet Socialist Republics) said that the amendment by the Byelorussian SSR was very useful because it removed any vagueness in the Commission's text and accorded with General Assembly resolution 97 (I) establishing the Regulations concerning the Registration and Publication of Treaties and International Agreements. It was also in keeping with the Commission's intention, as stated in the commentary to article 75.

10. The joint amendment, which provided a simplified procedure for registration, was acceptable, and he would vote for it. The Uruguayan representative was right in saying that it was in no way incompatible with Article 102 of the Charter.

11. Mr. BEVANS (United States of America) said that the joint amendment was certainly in conformity with Article 102 of the Charter, which was mandatory, but did not state who was to carry out the registration. The purpose of the joint amendment was to see that that act was carried out expeditiously, and it would in no way derogate from the United Nations regulations concerning registration.

12. He supported the Byelorussian amendment, which, among other merits, would have the advantage of saving the United Nations money.

13. Mr. RATTRAY (Jamaica) said he could not understand how the Committee could be discussing an amendment to article 75 when it had already reached a decision about the registration of treaties by approving the United States amendment (A/CONF.39/C.1/L.369) to article 72. The only difference was that there was no escape clause in article 75 as there now was in article 72, which contained the proviso " unless the contracting States otherwise agree ".

14. Mr. VEROSTA (Austria) said he supported the amendment by the United States and Uruguay, but suggested that it be modified so as to refer also to the possibility of the chief administrative officer of an organization carrying out the registration.

15. Mr. BEVANS (United States of America) said that a modification on those lines was acceptable. His delegation considered that the United States amendment to article 75 was complementary to its amendment to article 72, and that both were necessary.

16. Sir Humphrey WALDOCK (Expert Consultant) said that it would be appropriate to include in article 75 a reference to the filing and recording of a treaty, as suggested in the amendment by the Byelorussian SSR (A/CONF.39/C.1/L.371). However, the wording to be used should perhaps be " for registration or filing and recording, and publication ". In addition, the words " after their conclusion " should be replaced by the words "after their entry into force ". In accordance with Article 102 of the

Charter, it was not the conclusion but the entry into force of a treaty which generated the obligation to register it with the United Nations Secretariat.

17. The idea embodied in the amendment by the United States and Uruguay (A/CONF.39/C.1/L.376) was admirable; it would simplify the registration of certain types of treaties. The subject matter of the amendment could be covered by States in their treaties, and by international organizations by adopting a suitable general resolution on the subject.

18. He agreed with the slight misgivings expressed by the Italian representative on the subject of amendments which appeared to create obligations for States in general. A provision of that type could be said to encroach upon the rules which had been adopted in articles 30 to 33 on the subject of treaties and third States. The International Law Commission had been careful, when drafting article 75, to speak only of treaties " entered into by parties to the present articles ".

19. The CHAIRMAN said he would first put to the vote the principle embodied in the amendment by the Byelorussian SSR (A/CONF.39/C.1/L.371), on the understanding that the Drafting Committee would take into account the Expert Consultant's remarks. He would then put the joint amendment and the Chinese amendment to the vote.

The principle embodied in the amendment by the Byelorussian SSR (A/CONF.39/C.1/L.371) was adopted by 56 votes to 4, with 26 abstentions.

The amendment by the United States of America and Uruguay (A/CONF.39/C.1/L.376) was adopted by 61 votes to none, with 25 abstentions.

The amendment by China (A/CONF.39/C.1/L.329 and Corr.1) was rejected by 20 votes to 5, with 51 abstentions.

20. The CHAIRMAN said that, if there were no objection, he would consider that the Committee agreed to refer article 75 to the Drafting Committee with the amendments which had been adopted.

It was so agreed.

The meeting rose at 11.40 a.m.

EIGHTIETH MEETING

Tuesday, 21 May 1968, at 5.5 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)*

TEXT PROPOSED BY THE DRAFTING COMMITTEE

Article 50 (Treaties conflicting with a peremptory norm of general international law) *(jus cogens)*

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text of article 50 adopted by the Drafting Committee. [1]

[1] For earlier discussion of article 50, see 52nd-57th meetings.

2. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 50 adopted by the Drafting Committee read:

" *Article 50*

" A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. "

3. By adopting the United States amendment (A/CONF.39/C.1/L.302) the Committee of the Whole had decided that the opening words of article 50 should read: " A treaty is void if, at the time of its conclusion, it conflicts... ". It had then referred the article to the Drafting Committee with two amendments, one submitted by Romania and the USSR (A/CONF.39/C.1/L.258 and Corr.1) and the other by Finland, Greece and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2). The Committee of the Whole had specified that it had approved the principle of *jus cogens*, and that the amendments referred to the Drafting Committee related to drafting only.

4. The Drafting Committee had decided that the amendment by Finland, Greece and Spain would clarify the text, and had therefore inserted the phrase " a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole ". Only the word " recognized " was used in the three-Power amendment, but the Drafting Committee had added the word " accepted " because it was to be found, together with the word " recognized ", in Article 38 of the Statute of the International Court of Justice.

5. The Drafting Committee had also decided to divide article 50 into two sentences, the first setting out the rule, and the second defining a peremptory norm of general international law for the purposes of the convention.

6. In view of the new wording of article 50, the Drafting Committee had thought it unnecessary to adopt the Romanian and USSR amendment, because the new text was in keeping with the intentions of the sponsors of that proposal.

7. It appeared to have been the view of the Committee of the Whole that no individual State should have the right of veto, and the Drafting Committee had therefore included the words " as a whole " in the text of article 50.

8. Mr. CASTRÉN (Finland) drew attention to the amendment (A/CONF.39/C.1/L.293) which his delegation had submitted to the Committee of the Whole. In view of the link between the amendment and article 41 on separability, the Finnish delegation had provisionally withdrawn its amendment, pending a final decision on article 41, which was now being considered by the Drafting Committee. It therefore reserved the right to revert to the question of the application of the principle of separability to article 50 when article 41 came back from the Drafting Committee.

9. Mr. MIRAS (Turkey) said that, although he appreciated the Drafting Committee's efforts to produce a new text of article 50, he was unable, for the reasons he had already given, to support the new text, since it retained the