Document:-

A/CN.4/SR.1593

Summary record of the 1593rd meeting

Topic:

Treaties concluded between States and international organizations or between two or more international organizations

Extract from the Yearbook of the International Law Commission:-

1980, vol. I

Downloaded from the web site of the International Law Commission (http://www.un.org/law/ilc/index.htm)

Copyright © United Nations

thereof. He wished to point out, however, that in his opinion regional organizations could not take coercive measures against a State without the authorization of the Security Council.

41. Sir Francis VALLAT observed that there were circumstances in which the Commission had to take a position with regard to the obvious meaning of an international instrument. He fully agreed that, in principle, a regional organization should not take coercive action without the authorization of the Security Council. Nevertheless, his point had been that perhaps the Commission could not afford to overlook the possibility that a regional organization might take such action without obtaining the necessary authorization.

42. The CHAIRMAN, noting that there were no further comments, invited the Commission to refer draft article 75 to the Drafting Committee.

It was so decided.[11]

ARTICLE 76 (Depositaries of treaties)

43. The CHAIRMAN invited the Special Rapporteur to introduce part VII of the draft articles (Depositaries, notifications, corrections and registration), and specifically draft article 76 (A/CN.4/327), which read:

Article 76. ***Depositaries of treaties***

1. The designation of the depositary of a treaty may be made by the negotiating States and the international organizations having participated in the negotiations, either in the treaty itself or in some other manner. The depositary may be one or more States, one or more international organizations or the chief administrative officer of one or more international organizations.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

44. Mr. REUTER (Special Rapporteur) said that part VII of the draft consisted mainly of technical articles, which required careful reading but did not appear to pose any serious difficulties. The principles enunciated in article 76 of the Vienna Convention had been adopted unanimously. In order to adapt that provision to the present set of draft articles, it had been necessary to refer to international organizations along with States.

45. There was a minor problem in that the Vienna Convention had provided for the possibility of more than one depositary, a practice that had become widespread in order to honour certain States and to meet political requirements. The question therefore was whether the option of designating more than one depositary should be extended to international organizations. He had considered it useful to provide for that possibility, since there was no reason to deny international organizations the benefit of such an arrangement, but he would support any solution favoured by members of the Commission.

The meeting rose at 11.55 a.m.

1593rd MEETING

Monday, 19 May 1980, at 3.05 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations *(continued)* (A/CN.4/327)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR *(continued)*

ARTICLE 76 (Depositaries of treaties)[1] *(concluded)*

1. Mr. USHAKOV proposed that, in order to bring the wording of the first sentence of draft article 76, paragraph 1, into line with that of the following articles, the words "or by the international organizations having participated in the negotiations" should be added after the words "by the negotiating States and the international organizations having participated in the negotiations". He also noted that the words "the chief administrative officer of one or more international organizations" might give rise to incorrect interpretations.

2. The text of article 76 of the Vienna Convention[2] did not rule out the possibility of the States parties to a treaty designating two international organizations as depositaries, although no such case had yet occurred in practice. The list given in the article was indicative rather than exhaustive; the Commission might therefore reproduce the text of the Vienna Convention word for word, so as to avoid conflicts of interpretation between the draft articles and the Convention.

---

[11] For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

[1] For text, see 1592nd meeting, para. 43.

[2] See 1585th meeting, foot-note 1.

3. Mr. FRANCIS said that article 76, paragraph 1, of the Vienna Convention, which provided that an international organization or the chief administrative officer of the organization could be the depositary of a treaty, reflected the practice of designating the United Nations or the Secretary-General of the United Nations as the depositary of multilateral treaties. In view of the subject-matter of the Convention, that article could hardly have referred to the possibility of having several depositary international organizations, but he did not think it too far-fetched to say that, in the case of treaties between international organizations, there could be the same multiplicity of depositaries as in the case of treaties between States. If it was agreed that article 76, paragraph 1, of the Vienna Convention could be interpreted to mean that more than one international organization could be depositaries of a treaty, he would have no objection to the inclusion of such a provision in draft article 76, paragraph 1.

4. Mr. ŠAHOVIĆ said that he would like the commentary to draft article 76 to explain the relationship between the three categories of depositaries enumerated in paragraph 1 and, in particular, why the text expressly mentioned "the chief administrative officer of one or more international organizations".

5. Mr. TABIBI said that the rule relating to depositaries embodied in draft article 76 was an important one because it conferred universality, legality and finality on international conventions and treaties. He therefore fully supported the draft article.

6. Nevertheless, the commentary to the draft article should, for the sake of clarity, explain in what "other manner"—apart from in the treaty itself—the designation of the depositary of the treaty might be made by the negotiating States and the international organizations having participated in the negotiations.

7. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 76 to the Drafting Committee.

It was so decided.[3]

ARTICLE 77 (Functions of depositaries)

8. The CHAIRMAN invited the Special Rapporteur to introduce draft article 77 (A/CN.4/327), which read:

Article 77. ***Functions of depositaries***

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and international organizations or the contracting international organizations, as the case may be, comprise in particular:

(*a*) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

(*b*) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States and international organizations entitled to become parties to the treaty;

(*c*) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(*d*) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or international organization in question;

(*e*) informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(*f*) informing the States and international organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, formal confirmation, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(*g*) registering the treaty with the Secretariat of the United Nations;

(*h*) performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention, as the case may be, of the signatory States and organizations and of the contracting States and organizations, or of the signatory organizations and the contracting organizations or, again, where appropriate, of the competent organ of the international organization which assumes the functions of depositary.

9. Mr. REUTER (Special Rapporteur) said that draft article 77 was a technical provision which, in the Vienna Convention, had been adopted unanimously, together with the other articles that made up the corresponding part of that instrument.

10. The adaptation of article 77 of the Vienna Convention to the set of draft articles nevertheless involved a problem of presentation, one to which Mr. Ushakov had rightly drawn attention in connexion with draft article 76 and which would arise later in connexion with draft article 79,[4] since the three articles expressly referred to the various categories of signatory and contracting entities.

11. There were three possible solutions. The first would be to divide draft article 77 into two parts (or even two articles), the first relating solely to treaties between States and international organizations, and the second to treaties between two or more international organizations. Such a solution would be clumsy and might surprise Governments, especially since the Government of Canada had already suggested that the wording of the draft should be simplified.[5] The second solution would be the one

[3] For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

[4] For text, see para. 38 above.

[5] See *Official Records of the General Assembly, Thirty-fourth Session, Sixth Committee*, 41st meeting, para. 34; and *ibid., Sessional fascicle*, corrigendum.

followed in the draft article, namely, to use the words "the contracting States and international organizations or the contracting international organizations". Lastly—and the Commission had already met with the problem in connexion with draft article 16—it would be possible to propose a new introductory definition and then refer in the text to "contracting parties" and "signatory parties". When the Commission came to consider draft article 79, it would be able to decide whether the second solution made the wording of the draft article too cumbersome.

12. Subparagraph 1(*f*) referred to "formal confirmation", which did not appear in the corresponding subparagraph of article 77 of the Vienna Convention. He pointed out that when the Commission had considered the conclusion of treaties it had been of the opinion that the final approval of treaties by international organizations could not be referred to as ratification. "Formal confirmation" by international organizations thus corresponded to ratification in the case of States.

13. Lastly, he drew attention to an inaccuracy in the text of the Vienna Convention which was also found in the draft articles. Article 77, paragraph 1 (*g*), referred to the registration of treaties, although in United Nations practice the term "registration" could not be used in the case of treaties to which no party was a Member of the United Nations. In such instances, use was made of the terms "filing and recording", which did in fact appear in the text of article 80 of the Vienna Convention. An involuntary error had thus been made in the drafting of article 77 of the Convention. The Commission must therefore decide whether to remain faithful to the text of the Convention and draw attention to the error in the commentary or to amend it at the risk of highlighting the inaccuracy.

14. Mr. CALLE Y CALLE said that, although draft article 77 did not in his opinion give rise to any great difficulties, the distinction between "registration of treaties" and "filing and recording of treaties" that had been explained by the Special Rapporteur had not been clearly spelled out in the Spanish text of foot-note 59 in the Special Rapporteur's commentary, which referred to "registro" and "archivará y registrará". That distinction was made clearly, however, in draft article 80, paragraph 1,[6] which used the terms "registro" and "archivo e inscripción".

15. At the end of draft article 77, paragraph 2, the words "the competent organ of the international organization which assumes the functions of depositary" should be replaced by the words, "the competent organ of the depositary international organization", in order to maintain a correlation with article 77 of the Vienna Convention on the Law of Treaties, which referred to "the competent organ of the international organization concerned".

[6] For text, see para. 42 below.

16. Mr. USHAKOV said that, in principle, he endorsed the text of the draft article.

17. He wished, however, to draw attention to a problem posed by subparagraph 1 (*g*). Article 102 of the Charter required every Member of the United Nations which entered into a treaty or international agreement to register it with the Secretariat of the United Nations as soon as possible, but was the Secretary-General allowed to register, file or record treaties entered into by international organizations? If not, the beginning of subparagraph 1(*g*) should be amended to read: "registering, where appropriate, the treaty . . ." in order to provide for the possibility of making a distinction between different types of contracting parties.

18. In subparagraph 1(*a*), the words "or powers" should be added after the words "full powers" so as to allow for cases in which international organizations were involved. In subparagraph 1(*b*), the words "or to the international organizations" should be inserted after the words "international organizations"; and in subparagraph 1(*f*), the words "or the international organizations" should be added after the words "the States and international organizations".

19. In paragraph 2, the words "or, again, where appropriate," should be replaced by the words "or, as the case may be,"; and in the last line, the phrase "which assumes the functions of depositary" should be deleted, in accordance with the proposal made by Mr. Calle y Calle.

20. Sir Francis VALLAT, referring to the problem connected with draft article 77, subparagraph 1(*g*), said that the wording of the introductory part of paragraph 1, which stated that "The functions of a depositary . . . comprise in particular", made it quite clear that the list of functions given in subparagraphs (*a*) to (*h*) was not an exhaustive one. The omission of the function of "filing and recording" from subparagraph 1(*g*) was thus less important than it would have been if the list of functions were exhaustive.

21. In view of the terms of Article 102 of the Charter of the United Nations, a difference did exist between article 80 of the Vienna Convention and draft article 77, subparagraph 1(*g*). In his opinion, subparagraph 1(*g*) had been drafted in contemplation of the obligation to register treaties imposed by Article 102 of the Charter. Whether it should also have contemplated the obligation embodied in article 80 of the Vienna Convention was another matter. There was, however, a clear distinction between "filing and recording" (an obligation under article 80 of the Vienna Convention) and "registration" (an obligation under Article 102 of the Charter). The distinction was not without significance, because Article 102, paragraph 2, of the Charter imposed a sanction that would not apply in the case of article 80 of the draft or article 80 of the Vienna Convention. The sanction could not apply to an international organization, particularly in the

context of Article 102, paragraph 1, which referred expressly to any treaty entered into by any Member of the United Nations. Hence Article 102 of the Charter distinguished between States and international organizations, for the latter could not be Members of the United Nations.

22. What had happened was that draft article 77, paragraph 1 (*g*), had followed the technique of Article 102 of the Charter rather than the technique of article 80 of the Vienna Convention. In his opinion, the absence of a provision in paragraph 1 (*g*) concerning the function of "filing and recording" in the case of a treaty between two international organizations was not too serious because the function was one that could readily be performed by an international organization. He therefore thought that the wording of draft article 77, paragraph 1 (*g*), should be based on that of article 77, paragraph 1 (*g*), of the Vienna Convention and that the problem should be explained in the commentary.

23. Mr. REUTER (Special Rapporteur) said that he had no objection to the comments concerning the wording of the draft article. Mr. Ushakov's remarks were very much to the point, and it also seemed possible to delete from paragraph 2 the phrase "which assumes the functions of depositary", as Mr. Calle y Calle had proposed.

24. As to paragraph 1 (*g*), Sir Francis Vallat's view seemed to be akin to that of Mr. Ushakov; in other words, the obligation under Article 102 of the Charter related solely to registration. It was a matter of interpreting article 77 of the Vienna Convention and of determining whether it constituted an authorization or actually established an obligation.

25. Mr. CALLE Y CALLE said that Article 102 of the Charter did not stipulate that all of the parties to a treaty to be registered must be Members of the United Nations. If only one of the States parties to a treaty between several States and one or more international organizations was a Member of the United Nations, that State was under an obligation to register the treaty, in accordance with Article 102, paragraph 1; otherwise, it would not be able to invoke the treaty before any organ of the United Nations because of the terms of Article 102, paragraph 2. The obligation to register a treaty could, however, be shifted to the depositary of the treaty. In other words, a State that was required to register a treaty could fulfil its obligation through the depositary.

26. Mr. REUTER (Special Rapporteur) said that the difficulty stemmed from the fact that there were two concepts of "registration": the Charter obliged Member States to register any treaty to which they were parties, but in United Nations practice the terms "filing and recording" were used for treaties to which an entity other than a Member State was a party. Article 77 of the Vienna Convention seemed to relate to the first concept of registration, whereas article 80 aimed specifically at distinguishing between the two situations possible. If that was so, the words "or, as the case may be," should be introduced in paragraph 1 (*g*), in line with the proposal made by Mr. Ushakov.

27. Sir Francis VALLAT said that the Commission might be needlessly complicating the matter under consideration because the draft articles did in fact cover the question of filing and recording. Draft article 80, paragraph 2, stated that:

> The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

Accordingly, "filing and recording" would be covered even if they were not mentioned in draft article 77, paragraph 1 (*g*).

28. Moreover, something approaching an obligation for a depositary State or depositary international organization was created in draft article 80, which provided in paragraph 1 that "Treaties *shall* ... be transmitted ...", and in paragraph 2 that "The designation of a depositary *shall* constitute authorization ...". In view of that obligation, the problem posed by draft article 77, paragraph 1 (*g*), might be considered relatively unimportant.

29. Mr. REUTER (Special Rapporteur) suggested that the Commission should refer the draft article as a whole to the Drafting Committee.

30. In his opinion, there was no doubt that the general functions of a depositary included that of performing all of the acts mentioned in draft article 77. The words "or, as the case may be" should therefore be added to paragraph 1 (*g*) and the commentary should indicate that the list of acts was simply indicative and did not rule out the possibility of the depositary performing other similar acts, and in particular that of filing and recording treaties.

31. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 77 to the Drafting Committee.

It was so decided.[7]

ARTICLE 78 (Notifications and communications)

32. The CHAIRMAN invited the Special Rapporteur to introduce draft article 78 (A/CN.4/327), which read:

Article 78. Notifications and communications

Except as the treaty or the present articles otherwise provide, any notification or communication to be made by any State or any international organization under the present articles shall:

(*a*) if there is no depositary, be transmitted direct to the States and international organizations for which it is intended, or if there is a depositary to the latter;

[7] For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

(*b*) be considered as having been made by the State or international organization in question only upon its receipt by the State or international organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(*c*) if transmitted to a depositary, be considered as received by the State or international organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 77, paragraph 1 (*e*).

33. Mr. REUTER (Special Rapporteur) said that draft article 78 was a basic and relatively straightforward provision. Its interpretation might nevertheless give rise to difficulties, which he had carefully avoided by simply adapting the wording of the corresponding article of the Vienna Convention.

34. Mr. USHAKOV said that it was chiefly the application, rather than the content, of the draft article that would give rise to difficulties.

35. He proposed that, in subparagraph (*a*), the words "or to the international organizations" should be inserted after the words "to the States and international organizations".

36. Mr. CALLE Y CALLE pointed out that the wording of the introductory part of the Spanish text of draft article 78, which employed the words "un Estado", should be brought into line with the introductory part of article 78 of the Vienna Convention, which spoke of "cualquier Estado".

37. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 78 to the Drafting Committee.

It was so decided.[8]

ARTICLE 79 (Correction of errors in texts or in certified copies of treaties)

38. The CHAIRMAN invited the Special Rapporteur to introduce draft article 79 (A/CN.4/327), which read:

Article 79. Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and international organizations and the contracting States and organizations or the signatory organizations and contracting organizations, as the case may be, are agreed that it contains an error, the error shall, unless the said States and organizations or, where appropriate, the said organizations, decide upon some other means of correction, be corrected:

(*a*) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(*b*) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(*c*) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and international organizations and the contracting States and organizations or the signatory organizations and contracting organizations, as the case may be, of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(*a*) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the parties and to the States and organizations entitled to become parties to the treaty;

(*b*) an objection has been raised, the depositary shall communicate the objection to the signatory States and international organizations and to the contracting States and organizations or to the signatory organizations and contracting organizations, as the case may be.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and organizations and the contracting States and organizations or the signatory organizations and contracting organizations, as the case may be, agree should be corrected.

4. The corrected text replaces the defective text *ab initio* unless the signatory States and international organizations, and the contracting States and organizations, or the signatory organizations and contracting organizations, as the case may be, otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and international organizations, and to the contracting States and organizations, or to the signatory organizations and contracting organizations, as the case may be.

39. Mr. REUTER (Special Rapporteur) said that article 79 of the Vienna Convention had been adopted without difficulty at the Conference on the Law of Treaties, and that a similar text should be included in the present draft articles. That caused a problem in the wording of the draft article, as he had already noted in the case of article 77. The solution chosen in draft article 79 was admittedly, cumbersome, and the Commission might wish to seek a better solution.

40. Mr. USHAKOV proposed that in paragraph 2 (*a*) the words "or to the organizations" should be inserted after the words "to the States and organizations".

41. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 79 to the Drafting Committee.

It was so decided.[9]

ARTICLE 80 (Registration and publication of treaties)

42. The CHAIRMAN invited the Special Rapporteur to introduce draft article 80 (A/CN.4/327), which read:

[8] *Idem.*

[9] *Idem.*

Article 80. Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

43. Mr. REUTER (Special Rapporteur) said that the text of the article was identical to that of article 80 of the Vienna Convention, and should be considered together with article 77. He therefore proposed that draft article 80 be referred to the Drafting Committee.

44. Mr. USHAKOV said he noted from the commentary that the Special Rapporteur considered that the wording of the draft article covered the case of treaties concluded between international organizations. The Commission should, however, ask itself whether that interpretation was borne out by the practice of the Secretariat of the United Nations and whether paragraph 1 of the draft article would place a duty on international organizations to transmit to the Secretariat treaties concluded solely between themselves. It would also be advisable to ascertain whether paragraph 2 imposed an obligation on the Secretariat to file and record agreements between international organizations.

45. Mr. SCHWEBEL said that, in his opinion, draft article 80 meant that treaties between international organizations had to be registered. In other words, international organizations were under an obligation to transmit treaties to the Secretariat of the United Nations for filing and recording. Since international organizations were intergovernmental organizations, and since States, as Members of the United Nations, had to fulfil the obligation set forth in Article 102, paragraph 1, of the Charter, it seemed to follow that, when States acted collectively through an international organization (or, in other words, as an international organization), they also had an obligation to register the treaties that they concluded. Since no question of invidious status arose when a sovereign State registered a treaty with the United Nations, there was no reason why such a question should arise in the case of an international organization. Having regard to the object and purpose of Article 102 of the Charter and to the need for conformity between the texts of the Vienna Convention, the draft articles and the Charter of the United Nations, the correct view was undoubtedly that international organizations were obliged to transmit their treaties to the Secretariat of the United Nations for registration or filing and recording.

46. Mr. REUTER (Special Rapporteur) said that the English version of draft article 80 dispelled any ambiguity, since the word "shall" implied an obligation, which would none the less be incurred only by organizations to which the draft articles applied. The same problem also arose in regard to the application of the Vienna Convention, under which a State that was not a member of the United Nations yet a signatory of the Convention would, when it became a party to a treaty, be required to transmit the treaty to the Secretariat of the United Nations for filing and recording.

47. Mr. FRANCIS said that, in his view, paragraph 1 of draft article 80 imposed a mandatory obligation upon international organizations to transmit treaties concluded by or between them to the Secretariat of the United Nations for registration. His interpretation of that paragraph was based on the fact that one of the main considerations underlying Article 102 of the Charter of the United Nations and one of the reasons why the Vienna Convention on the Law of Treaties provided that registration should be mandatory so far as States were concerned, had been to discourage secret agreements If international organizations were allowed to enter into agreements without making them public, the spirit, if not the letter, of that principle would be violated.

48. Mr. ROMANOV (Secretary to the Commission) pointed out that, under General Assembly resolution 33/141A, which responded to the need to reform

> the publication procedure currently provided for by the General Assembly regulations to give effect to Article 102 of the Charter of the United Nations in order to adapt it to the evolution of international treaty activities, with due respect for the spirit and intent of the Charter,

the Assembly had amended article 12 of those regulations to provide that the Secretariat would have

> the option not to publish *in extenso* a bilateral treaty or international agreement belonging to one of the following categories:
>
> (*a*) Assistance and co-operation agreements of limited scope concerning financial, commercial, administrative or technical matters;
>
> (*b*) Agreements relating to the organization of conferences, seminars or meetings;
>
> (*c*) Agreements that are to be published otherwise than in the series mentioned in paragraph 1 of this article by the United Nations Secretariat or by a specialized or related agency.

49. Since international organizations could enter into agreements falling within those three categories, it would seem that draft article 80—at least in its English version—imposed a binding obligation on the United Nations Secretariat to publish each and every treaty transmitted to it by an international organization or a State if an international organization was a party to the treaty in question. In the circumstances, the Commission might wish to consider the possibility of including in the draft article a reference to the relevant article of the General Assembly regulations.

50. Mr. CALLE Y CALLE said that the main purpose of Article 102 of the Charter of the United Nations, which, the Commission would recall, was based on the corresponding article (Art. 18) of the Covenant of the League of Nations, was to provide for the registration and publication of treaties with a view

to preventing the secret negotiation and conclusion of international agreements. Accordingly, if a treaty was not registered, its provisions could not be invoked before any organ of the United Nations as binding on the parties.

51. Mr. FRANCIS said he did not think that draft article 80 would be affected by the amendment to article 12 of the General Assembly regulations, since General Assembly resolution 33/141 had been adopted for a different purpose, namely, to deal with delays in the registration and publication of treaties.

52. Mr. REUTER (Special Rapporteur), summing up the discussion, said that, unlike the previous articles, draft article 80 had given rise to difficulties of substance rather than form. The question of the relationship between the draft article and Article 102 of the Charter had been raised. The members of the Commission had been unanimous in recognizing that the concept of registration, as embodied in the Charter, bore a special meaning, and that the obligation concerning registration created therein fell within the framework of the Charter. It was therefore necessary to determine whether the concept was exactly the same in the case of draft article 80, and whether the article provided, in principle, for a separate obligation that did not apply to the same subjects.

53. The Charter pertained to the Members of the United Nations, whereas draft article 80 pertained to the States and organizations that would be parties to a convention adopted on the basis of the draft articles or States or that, without becoming parties to the convention, would be bound by it in some other way. It was apparent, particularly from the English version, that draft article 80 created a binding obligation. Moreover, the act of registration provided for in the Charter was very general, but United Nations practice differentiated between registration and recording. The wording used in draft article 80, however, had been borrowed from United Nations practice. Consequently, should a separate obligation be created under article 80?

54. In the light of the English version of the provision, most members of the Commission were in favour of such an obligation; but what would it consist of and to whom would it apply? For States, it was simply a question of transmitting the treaties. Only in paragraph 2 of article 80 was it established that, in the event of designation of a depositary, the latter could perform the acts of registration, filing and recording on behalf of States. The authors of article 80 of the Vienna Convention had never intended, nor had he ever intended, to create an obligation to register or publish. Once the obligation to transmit the treaties was fulfilled, the official to whom those treaties were transmitted might in any event find that he was bound by regulations which prevented him from publishing them.

55. The Secretary to the Commission had referred to the restrictions imposed, largely for the sake of economy, on the publication of treaties. Under the existing regulations, all treaties and agreements to which the United Nations, a specialized agency or a United Nations body were parties were filed. In the present situation, it seemed that the Secretary-General could take the view that he was not authorized to file an agreement between two regional international organizations. Consequently, an obligation might exist to transmit a treaty but the Secretary-General was not necessarily empowered to file and publish such an instrument.

56. If the Drafting Committee agreed with his interpretation, it might wish to retain draft article 80 as it stood. Alternatively, it could supplement the provision in the way suggested by the Secretary to the Commission or add a more general reservation regarding the possibility of performing the acts in question. Also, it would be interesting to know how many agreements concluded by international organizations, other than the specialized agencies, had been registered. At the present time, the United Nations Secretariat was instructed to rank the United Nations, the specialized agencies and the United Nations bodies alongside non-member States. If the Drafting Committee decided not to modify the draft article, an explanation could be included in the commentary.

57. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 80 to the Drafting Committee.

It was so decided.[10]

ANNEX (Procedures established in application of article 66)

58. The CHAIRMAN invited the Special Rapporteur to introduce the draft annex (A/CN.4/327), which read:

[ANNEX.

Procedures established in application of article 66

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present articles and any international organization to which the present articles have become applicable shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph. A copy of the list shall be transmitted to the President of the International Court of Justice.

I. *Cases in which, in reference to a treaty between several States and one or more international organizations, an objection as provided for in paragraphs 2 and 3 of article 65 is raised by one or more States with respect to another State*

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

[10] *Idem.*

The State or States constituting one of the parties to the dispute shall appoint:

(*a*) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

II. *Cases in which an objection as provided for in paragraphs 2 and 3 of article 65 is raised by one or more international organizations or with respect to an international organization*

2 *bis.* The request referred to in article 66 shall be submitted to the Secretary-General; however, if the request is made by or directed against the United Nations, it shall be submitted to the President of the International Court of Justice. The Secretary-General or, as appropriate, the President of the International Court of Justice, shall bring the dispute before a conciliation commission constituted as follows:

If one or more States constitute one of the parties they shall appoint:

(*a*) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

One or more international organizations constituting one of the parties or the international organizations constituting both of the parties shall appoint:

(*a*) one conciliator, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) one conciliator included in the list on an initiative other than their own.

The four conciliators chosen by the parties shall be appointed within 60 days following the date on which the Secretary-General or, as appropriate, the President of the International Court of Justice, receives the request.

The four conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General or, as appropriate, by the President of the International Court of Justice within 60 days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General or, as appropriate, by the President of the International Court of Justice either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3 *bis.* The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4 *bis.* The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5 *bis.* The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6 *bis.* The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General or, as appropriate, with the President of the International Court of Justice and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and shall have no other character than that of recommendations submitted for the consideration of the parties in order to faciliate an amicable settlement of the dispute.

7 *bis.* The Secretary-General shall provide the Commission either directly or, as appropriate, through the intermediary of the President of the International Court of Justice with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.]

59. Mr. REUTER (Special Rapporteur) suggested that, in view of the length of the draft annex, the Commission should first consider paragraph 1, which was in a sense the preamble, then section I, which was reproduced word for word from the Vienna Convention, and lastly section II, which introduced major changes by comparison with the Convention and called for comment.

60. At the 1590th meeting, the Commission had decided to refer draft article 66 to the Drafting Committee with the recommendation that the square brackets he had placed around it should be deleted. The annex, too, had been placed between square brackets, for the same reason as article 66, namely, because both of them related to the final clauses and both of them had been drafted by the Conference on the Law of Treaties. However, the Commission had taken the view that articles 65 and 66 had been incorporated in the body of the Vienna Convention because they related to procedures which were closely linked to matters of substance and were crucial for the acceptance of part V of the Convention. Furthermore, it should be noted that the difficulties posed by draft article 66 related to the procedure for the settlement of disputes arising out of the application or interpretation of *jus cogens*, and not to the conciliation procedure which was the subject of the annex. That conciliation procedure had been introduced, both in the Vienna Convention and in the draft articles, as a method for settling not every kind of dispute but solely disputes that arose in connexion with part V.

61. In transposing the annex to the Vienna Convention to the draft articles, it was first necessary to differentiate between disputes in which States alone were involved and disputes in which either organizations or organizations and States were involved. The conciliation machinery, and particularly the first steps in the proceedings, such as the appointment of conciliators, could not be governed by the same rules whether the claimant and the respondent were, or were not, respectively a State and an international

organization. One part of the annex dealt with each of those categories of disputes.

62. As noted by the Commission in connexion with article 66, provision should also be made for the case of a dispute arising out of a multilateral treaty that occurred not only between States themselves but also between one or more organizations and one or more States. It was conceivable that, pursuant to section I, a State might institute conciliation proceedings against another State in connexion with a dispute arising out of a multilateral treaty to which an international organization was likewise a party and that the organization might institute proceedings pursuant to section II. In order to avoid such a situation, should a procedural measure be introduced requiring all the parties to a multilateral treaty to be informed of the institution of conciliation proceedings? In preparing the draft annex, he had not borne that possibility in mind, but during the Commission's consideration of paragraph 1 of the annex it should take a decision on that point.

63. Section I did not call for any comment, since it was reproduced in full from the Vienna Convention, but section II required at least some preliminary clarification. The conciliation procedure provided for under the Vienna Convention was organized entirely around the Secretary-General of the United Nations. In the draft annex, the same function had been vested in him, except in the case of disputes to which the United Nations might be a party. The Secretary-General had been chosen as an independent third party placed above the parties, and it was difficult to see how he could act in such a capacity for that category of dispute when he was, after all, an organ of the United Nations. For that reason, he (Mr. Reuter) had proposed that in such cases the Secretary-General should be replaced by the President of the International Court of Justice. In order to relieve the Court of the material problems which conciliation proceedings entailed, he had nevertheless suggested that the functions of the President of the Court should be confined to decision-making, since the administrative functions could be carried out by the Secretary-General with complete impartiality.

64. Lastly, he stressed that the nationality of the conciliators was always of great importance in constituting a conciliation commission between States. The conciliation procedure applicable to cases involving an international organization had had to be modified somewhat, since there was no nationality link between an individual and an organization.

65. The CHAIRMAN suggested that the Commission should consider paragraph 1, section I and section II of the annex, one by one, as proposed by the Special Rapporteur.

It was so decided.

The meeting rose at 6 p.m.

1594th MEETING

Tuesday, 20 May 1980, at 10.05 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/327)

[Item 3 of the agenda]

Draft articles submitted by the Special Rapporteur (*continued*)

Annex (Procedures established in application of article 66)[1] (*continued*)

1. Mr. REUTER (Special Rapporteur), introducing paragraph 1 of the annex, said that the paragraph differed in only two minor respects from the corresponding paragraph of the annex to the Vienna Convention.[2] Paragraph 1 referred to a phase prior to any dispute, the drawing up of the list of conciliators. In the draft annex it had been necessary to make provision not only for the nomination of conciliators by States but also for the nomination of conciliators by international organizations. The reason why his draft used the words "any international organization to which the present articles have become applicable" was that he did not want to prejudge the question as to how the organizations might become bound by the articles. For example, they might become parties to a convention incorporating the draft articles or, without being parties to it, they might declare themselves bound by the convention. At the end of the paragraph he had added a clause to the effect that a copy of the list should be transmitted to the President of the International Court of Justice. If the Commission accepted the suggestion that the President of the Court should intervene in the event of a dispute in which the United Nations was involved, it would of course be necessary for the President to have cognizance of the list.

2. The risk of several procedures being instituted simultaneously was not, he thought, a real one. The annex to the Vienna Convention itself referred to the case of a dispute in which several States were joint parties, for it spoke of "the State or States constituting

[1] For text, see 1593rd meeting, para. 58.

[2] See 1585th meeting, foot-note 1.