Some Considerations Regarding the Function of the Depositary

Comments on Art. 72 Para. 1 (d) of the ILC's 1966 Draft Articles on the Law of Treaties

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I

The Determination of the States toward which the Depositary has to fulfil his Functions

(1) Arts. 71, 72, 73, 74 use different criteria in determining the States in regard to which the depositary has any obligations. Some clarification seems to be necessary in this respect.

(2) Art. 72 para. 1 (b) stipulates that the depositary has to transmit copies to the "States entitled to become parties to the treaty". That is, of course, a possible regulation of the duties of the depositary, although it might be doubted if it is really appropriate to send copies of a treaty open to all States even to those, which have shown no interest at all in the treaty. The United States has expressed its wish to limit the number of States to which the depositary has to send the copies automatically. According to this proposal, which the author considers reasonable, copies would only be received by the signatories, the ratifying or acceding States, and the States entitled to become parties and requesting copies[1]).

The same remarks can be made regarding art. 72 para. 1 (e) and (f), which would oblige the depositary to inform of every accession, etc. to an open multilateral treaty all the States of the world, even those States that had definitely decided not to become parties of the treaty. One

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1) A 6309/Rev. 1, p. 176.

wonders if this burden is necessary, especially after some time has lapsed since the treaty came into force. A good point can be made, it is submitted, to limit this function of the depositary toward the States having signed the treaty or consented to be bound by it.

(3) Art. 72 para. 2 raises a question not only of appropriateness but of the correct legal solution. Differences between a State and the depositary as to the performance of the latter's functions must be decided by the "interested States", as the Commentary to art. 72 correctly points out (para. 6). Which are these? It does not seem correct to designate all the "States entitled to become parties to the treaty" as interested States, as art. 72 para. 2 does. States having decided not to become parties to a treaty should have nothing to do with the functions of the depositary. The Commentary to art. 72, interestingly enough, changes the term into "negotiating States" as defined in art. 2 (para. 8).

The correct solution would seem to be one distinguishing between the different phases of treaty-making. If the treaty is in force, the parties of the treaty should be consulted. Before the treaty comes into force the contracting States in the sense of art. 2 certainly have a right to be consulted. It seems appropriate, however, to include all the negotiating States, since they might be considered "interested States" in the first phase of the treaty-making. After the treaty has come into force, on the other hand, the negotiating States who have not become parties, do not seem to have a close enough interest to be consulted regarding differences with the depositary. It certainly is too broad an extension to consult even those States which are not negotiating States but which are entitled to become parties. The 1965 draft was more correct, it seems, in limiting the States to be consulted by the qualification "interested", art. 29 para. 8. That would have made possible a reasonable interpretation.

(4) Art. 74 dealing with the correction of errors in texts of treaties does not seem to be in harmony with art. 72. Art. 74 uses the term "contracting States" to designate the ones which must agree to the correction. According to the regulation found in art. 72 one should certainly expect to find all the "negotiating States" consulted as to the error in art. 74. The ILC explains in para. 7 of the Commentary that only contracting States should be considered to have a legal right in any decision regarding correction. At least for the time after the authentication, the negotiating States should be included. Otherwise, there would be no possibility to correct a treaty after authentication but before any State has consented to be bound by it. Even after some States have consented to be bound by it, one could argue that the negotiating States should at least be asked,

since they took part in the adoption of the treaty[2]). It certainly does not fit together if the correction is a matter for the "contracting States", while differences with the depositary under art. 72 para. 2 are to be discussed with all the States entitled to become parties.

When the Commentary to art. 74 points out in para. 4 that the consent not only of the "States having signed the offending text" but of "all the contracting States" should be required, one is surprised: the number of States having signed, usually as authentication (art. 9 (b)), will most likely be larger than the number of the "contracting States" having consented to be bound by the treaty. It is submitted that the argument in para. 4, Commentary to art. 74, could only be used to include all the "negotiating States".

II

The Functions of the Depositary as to Entities not Recognized by all the Parties

(1) In recent years a difficult problem has arisen for depositaries regarding the manner in which they should treat instruments of ratification, etc. of entities with questionable status. These entities are the ones claiming to be States but recognized as such only by some members of the international community. From a theoretical point of view the correct procedure for the depositary would seem to be to decide if the entity is a State or not. The different theories concerning the declarative or constitutive character of recognition would then come into play. But that would not seem to be a possible answer for practical purposes if one could show that those States that do not recognize a specific entity as a State, do treat its ratification in a specific way and are not willing to let the depositary decide the question of its membership in the treaty. State practice in this matter seems to justify two conclusions:

a) Generally, non-recognizing States do not admit the existence of treaty relations originating from the ratification, etc. by non-recognized entities.

b) In specific cases non-recognizing States may, however, admit the existence of treaty relations toward non-recognized entities.

a) In a number of cases non-recognizing States have expressly declared that they would not admit to be bound toward non-recognized entities[1]).

[2]) Art. 27 para. 1 (a) of the 1965 draft included the negotiating States.

[1]) Alexy, Die Beteiligung an multilateralen Konferenzen, Verträgen und internationalen Organisationen als Frage der indirekten Anerkennung von Staaten, Zeitschrift

Declarations of this kind which cannot be considered reservations in the sense of arts. 16 *et seq.* are not known in all the cases. But there is evidence of another kind that States feel free not to consider themselves bound toward non-recognized entities. In the lists containing the members of multilateral treaties which many States publish, some of them as parts of their statute books, these States do not include non-recognized entities as having ratified the treaty[2]) or they add a note saying that no legal significance is attached to this ratification[3]).

b) It is possible to show, however, that in specific cases non-recognizing States do admit treaty relations with non-recognized entities. In a number of instances non-recognizing States publish these entities as parties in their treaty-lists[4]). There are also declarations whereby non-recognizing States notice the accession, etc. of the entity; these declarations should, it is suggested, be considered as estopping the non-recognizing State from arguing that he is not bound toward the non-recognized entity[5]).

How can this practice be understood? The correct explanation seems to be that States ratifying a treaty with an accession clause opening the treaty to other "States" do not feel themselves bound to admit as parties of the treaty those entities which they do not consider to be "States". This attitude

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für ausländisches öffentliches Recht und Völkerrecht (ZaöRV), vol. 26 (1966), pp. 495, 517 *et seq.* has collected many of these declarations. For the Nuclear Test Ban Treaty compare also Schwelb, AJIL, vol. 58 (1964), pp. 642, 654 *et seq.*, as well as the Opinion of the Legal Adviser of the Department of State, AJIL, vol. 58 (1964), p. 174.

[2]) The Federal Republic of Germany and Belgium do not include ratifications, etc. of non-recognized entities in Bundesgesetzblatt (BGBl.) II or Moniteur Belge.

[3]) Great Britain, the United States and the Netherlands usually follow this practice: General Index to British Treaty Series 1958–1960, Treaty Series No. 121 (1961) Cmnd. 1748, pp. 5, 12, 20, 22, 33, 56 *et seq.*, 65 *et seq.*, 83, 90 *et seq.*, 102 *et seq.*; Treaties in Force, A List of Treaties and Other International Agreements of the United States in Force on January 1, 1965, pp. 224, 254, 260 *et seq.*, 262, 267 *et seq.*, 279, 301 (until 1964 the ratification, etc. of non-recognized entities was not mentioned); Tractatenblad 1959 N. 11, p. 3, 1963 N. 179, p. 5, 1964 N. 159, p. 4.

[4]) Switzerland and Sweden include non-recognized entities: Sammlung der eidgenössischen Gesetze 1958, p. 1010 *et seq.*, 1959, p. 313 *et seq.*, 1963, p. 675 *et seq.*, 1964, p. 887, 1965, p. 372; Sveriges Överenskommelser med främmande makter 1963 N:o 40, p. 2, N:o 63, p. 3. The Federal Republic of Germany has published the ratification of the Geneva Conventions by North Viet-Nam and North Korea, BGBl. 1957 II, pp. 1443, 2328. The United States do not add the note that the ratification has no legal significance in the case of the Geneva Conventions, Treaties in Force, *loc. cit.*, pp. 278, 281. The ratification of these treaties was also included in the list before 1964.

[5]) Whiteman, Digest of International Law, vol. 2, p. 56; AJIL, vol. 58 (1964), p. 173 *et seq.* Several declarations of the United States show that she considers North Viet-Nam bound by the Geneva Conventions and recognizes thereby the existence of treaty-relations between herself and the non-recognized entity originating from the accession of this entity. Compare for instance Department of State Bulletin, vol. 53 (1965), p. 447, and Revue internationale de la Croix-Rouge 48 (1966), p. 359 *et seq.*

is consequent and – apart from all recognition theories – might find its justification in the interpretation of the accession clause[6]). On the other hand, States feel free in certain cases to treat non-recognized entities as "States" in the sense of the accession clauses.

(2) State practice in this area shows that the depositary has no possibility to decide according to objective standards the question of membership of entities with questionable status[7]). Only in the situation where no State participating in the treaty has recognized the entity, might the depositary decide on its own that the entity is not qualified to become a party[8]). Where some of the parties have recognized the entity while others have not, the obligation of the depositary to act impartially must come into play and must compel him to send the instrument of the entity to all the States which he has to notify[9]). It does not seem to be correct for the depositary to give his opinion as to the effect of the instrument[10]) or to refuse to

[6]) Schwarzenberger, A Manual of International Law, 4th ed., vol. 1 (1960), p. 64 *et seq.*; the problems are discussed at length by Frowein, Das de facto-Regime im Völkerrecht, to be published 1967. Compare also the decisions of the Bundesgerichtshof, International Law Reports, vol. 28, p. 82, and the Portuguese Supreme Court, Revista dos Tribunais, vol. 77 (1959), p. 347. Alexy, *loc. cit.*, pp. 573–580, is of the opinion that treaty relations between the non-recognizing State and the non-recognized entity always come into existence if there is no declaration to the contrary. That does not seem to be the understanding of many States, compare notes 2 and 3.

[7]) The Secretary-General of the United Nations has pointed out: "I would not wish to determine on my own initiative the highly political and controversial question whether or not the areas, the status of which was unclear were States within the meaning of the amendment to the draft resolution now being considered. Such a determination, I believe, falls outside my competence" A/PV. 1258, p. 9. The resolution concerned the opening of treaties concluded under the League of Nations. The difficulties experienced in this area have the result that in most cases the accession clauses determine by objective standards the states which may become parties: members of the United Nations, the Specialized Agencies, etc.

[8]) That was the curious case, when the "Prince of Trinidad" wanted to become a member of the Universal Postal Union. The Swiss Federal Council declined to treat the accession as valid, Revue générale de droit international public, vol. 1 (1894), p. 179, Schweizerisches Jahrbuch für internationales Recht, vol. 20 (1963), p. 78. The Consultative Committee of the League of Nations which had to consider the Manchoukuo-problem proposed that a depositary receiving an instrument from Manchoukuo should ask all the parties as to their attitude. The parties should declare that Manchoukuo could not become a member and the depositary should inform Manchoukuo of this attitude, SdN Journal Officiel Supplément Spécial No. 113, p. 11.

[9]) Opinion of the Political Department of the Swiss Federal Council, Schweizerisches Jahrbuch für internationales Recht, vol. 20 (1963), pp. 76 *et seq.*, 82 *et seq.*

[10]) When Croatia which was only recognized by a small number of States declared its accession to the Universal Postal Union, Switzerland notified all the members of the Union of the declaration. Afterwards the Swiss Consulate in Zagreb issued a note verbale to the Croatian authorities saying: «D'après cette note circulaire l'Etat Indépendant de Croatie est un membre de l'Union Postale Universelle depuis le 7 avril 1942» Vertragssammlung des Unabhängigen Staates Kroatien, p. 67 *et seq.*

transmit the instrument[11]). It must be left to the parties of the treaty to judge for themselves if the instrument of the entity has any effect.

The draft recognizes this situation. Although a first reading of art. 72, para. 1 (d) might imply that the depositary has to investigate if the entity signing, ratifying, etc. is a "State" in the sense of the treaty and the draft, this cannot be the sense of the provision. First of all, art. 71 stipulates that the depositary whose functions are "international" has to act "impartially". That can only mean that in a case where some parties recognize an entity while others do not, the depositary cannot force his opinion on the parties. He must perform the regular functions of the depositary, while as a party he might express his opinion as to the quality of the entity in question[12]). Furthermore, art. 72 makes it quite clear that the depositary can only make a preliminary investigation as to the validity of the instruments, etc. According to art. 72, para. 2 the depositary has to bring any difference between a State and himself as to the performance of his functions to the attention of the States therein mentioned. As is made clear by the Commentary that means that every decision of the depositary can only be a preliminary one and leaves each party free to decide the question for itself or – if possible – lay the problem before some competent organ provided for by the treaty. The provisions of the draft seem correctly to define the depositary's functions.

As to the question of counting signatures, etc. of entities with questionable status for the entry into force of the treaty, the depositary cannot do more than make a preliminary determination which should take into account the number of States recognizing the entity. A final determination can only be made by the particular States concerned[13]).

(3) With the Nuclear Test Ban Treaty the practice has developed of having several depositaries. The sense of the regulation was quite clear. No depositary should be forced to deal with entities which he did not recognize, while all entities recognized by one depositary should have the possibility to adhere to the treaty[14]). Since all depositaries were agreed on this sense of the regulation, it is difficult to see why entities recognized by one depositary would not become parties to the treaty[15]). The correct legal solution would seem to be that under these circumstances all the parties of

[11]) Whiteman, *loc. cit.*, vol. 2, pp. 57 *et seq.*, 561 *et seq.* The depositary might add his opinion as a party to the treaty, but not in his function of depositary.

[12]) Compare note 11. Commentary to art. 71 para. 2.

[13]) Commentary to art. 74, para. 6.

[14]) Whiteman, *loc. cit.*, vol. 2, p. 562.

[15]) This, however, is the opinion of some States not recognizing the German Democratic Republic. Compare ZaöRV, vol. 25 (1965), p. 336 *et seq.*

the treaty are bound to admit the possibility that entities recognized by only one depositary can become parties of the treaty[16]).

The draft does not mention the practice of having several depositaries. Since art. 72, para. 1 expressly states the possibility that the treaty might provide otherwise regarding the functions of the depositary, it does not seem necessary to include a specific rule for the case of several depositaries. If the treaty makes provision for several depositaries, the sense will usually be that no depositary has to deal with entities which he does not recognize. The normal duty of impartiality is then, for the specific case, abrogated by the treaty.

(4) Our considerations apply as well if there are two rival-governments each one controlling one part of the territory of the State. The depositary has to transmit instruments of ratification, etc. both of these governments, since he cannot decide which one has power to speak for the State concerned if some parties recognize one, some parties the other government. It is possible also that States recognizing one of the governments will nevertheless treat as valid the ratification of the non-recognized government for the territory controlled by it[17]). The regulation of having several depositaries may have the result that both governments become able to ratify the treaty which should be considered to have the effect that both of them are bound for their territory[18]). If one government controlling the whole area of one State is not recognized, its instruments must certainly be transmitted by the depositary and in this case all the parties should be considered under the obligation to treat them as valid[19]).

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[16]) For a different attitude compare Schwarzenberger, The Misery and Grandeur of International Law, Current Legal Problems, vol. 17 (1964), p. 193.

[17]) The Netherlands as well as Switzerland treat ratifications of the Republic of China as valid although they have recognized the People's Republic. The Netherlands mention "China (Taiwan)" as party of the Test Ban Treaty (Tractatenblad 1964, N. 159, p. 2). For Switzerland Sammlung der eidgenössischen Gesetze 1965, p. 372.

[18]) Not very clear the answer of Secretary of State Dean Rusk as to the effect of a ratification by the People's Republic of China or the German Democratic Republic: "... If they had signed the treaty and undertook what we would consider to be unilateral obligations with respect to this subject, this might well be considered by us as a violation". Nuclear Test Ban Treaty, Hearings before the Committee on Foreign Relations U.S. Senate, 88th Congress, 1st Session, p. 34.

[19]) It might be possible, however, to exclude the obligation to treat a ratification of the non-recognized government as valid by a declaration made at the ratification by the non-recognizing State. Compare Hackworth, Digest of International Law, vol. 1, p. 349.