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ON THE

LAW OF TREATIES

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COMMENTARY AND INSTRUCTIONS FOR THE CANADIAN DELEGATION

Introduction

In its work during the Conference the Canadian Delegation should pay particular attention to three issues of political significance to Canada. The first of these is the question of compulsory settlement of disputes. Preliminary meetings in London and Paris among the Old Commonwealth-U.S.A. and the Western European and Other States groups served to underline the importance which the major western powers attach to compulsory adjudication of disputes arising out of the application of Part V of the draft articles. It is a major objective of the western group to secure a satisfactory disputes article. The draft articles, particularly those concerning entry into force and termination, contain a number of provisions which are susceptible of highly subjective interpretation, e.g. fundamental change of circumstances, norms of jus cogens, compatibility with the object and purpose of a treaty, coercion, material breach and error concerning a fact which formed an essential basis of a state's consent to be bound. If each state party to a treaty is left with an unfettered right to interpret for itself these largely subjective criteria, the security of treaty relations could be seriously impaired. Canada agrees therefore that a satisfactory disputes provision is an important element if the proposed Convention is to contribute to stable treaty relations and secure the adherence of the world's major treaty-making states. It is particularly important that the Canadian position on this question be carefully co-ordinated with other members of the Western group.

The second major political issue, this one of particular significance to Canada, is Article 5 on the treaty-making powers of component members of federal states. It must be assumed that the Canadian position on this question will be reported back to Quebec and perhaps made public in the context of the present constitutional controversy in Canada. The instructions on Article 5 have been prepared with this possibility in mind and have been approved by the Minister. In view of the sensitivity of this issue in Canada, it is particularly important that the delegation operate within its instructions on this point and exercise particular care even in private discussions with other delegations.

The third important political issue which will arise at the Conference is the "all-states" question. An earlier version of the draft articles contained an Article 8 which raised a presumption that "every State" was entitled to accede to every general multilateral convention. Western representatives on the I.L.C. were successful in having this article deleted from the final draft and the Canadian representative, Mr. Marcel Cadieux, played an important part in these efforts. The question is expected to be raised again by Eastern European states at the Conference, probably in the discussion on Article 12 dealing with accession. The Canadian delegation should coordinate closely with other members of the W.E.O. group in determining the tactics to be followed in opposing the reinsertion into the articles of an "all-States" formula.

SOME PRELIMINARY ISSUES

Commentary

0.01 Code or Convention

This issue, which was discussed at length in the International Law Commission, in the Sixth Committee and in the comments of governments, appears to have been resolved in favour of a convention by the decision to place Draft Articles before the Conference. Unlike the third and immediately previous I.L.C. Special Rapporteur, Sir Gerald Fitzmaurice, the final I.L.C. Special Rapporteur, Sir Humphrey Waldock, preferred a convention rather than a code.

Comments by delegates to the Sixth Committee indicated support for a convention rather than a code. Delegates speaking in support of a convention included Hungary (843rd meeting), Iraq (849th meeting), Jordan (842nd meeting), Lebanon (852nd meeting), Romania (848th meeting), Yugoslavia (842nd meeting), Bolivia (909th meeting), Czechoslovakia (906th meeting), Dahomey (912th meeting), Hungary (907th meeting), Kuwait (911th meeting), Liberia (912th meeting) and perhaps Ghana (905th meeting).

Canada prefers the relative certainty of a binding convention as contrasted with a code, which would merely offer guidelines.

0.02 Single Convention or Several Conventions

Although the Eastern European delegations all explicitly insisted on a single convention (with the possible exception of Hungary which at the 843rd meeting of the Sixth Committee hedged by urging a convention in three parts), there might be substantial advantages in splitting the draft articles into three or more conventions. Certain parts of the draft articles seem much less controversial than others and might be preserved from being rejected along with the more extreme articles. More particularly, controversy may prevent any agreement on the draft articles dealing with peremptory norms, on termination as the consequence of a breach and on fundamental change in circumstances. If some form of adjudication is not generally acceptable, it is quite likely that a single convention, even if it is accepted by the Vienna Conference, cannot obtain the approval of the U.S. Senate and be ratified by the U.S. Since the United States is Canada's leading treaty partner, a domestic controversy in the United States over the law of treaties would not be to Canada's benefit.

0.03 A Question of Style

If numbers of paragraphs within articles were placed within parentheses in the final text, this would simplify the citation of a provision. Thus Article 2, paragraph 1, subparagraph (a) should be able to be cited as Article 2(1)(a) in less formal communications.

Instructions

Code or Convention

This issue must be regarded as settled in favour of a convention, however should discussion arise, the delegation may express support for a convention as being in accord with the wishes of the large majority of U.N. members and on the ground that, because a convention binds the parties to it, it is of greater juridical value.

More than one Convention

This question is likely to arise, if at all, only in the latter part of the session, when it appears that a Part V satisfactory to all major groups cannot be obtained. While the initial position of the Canadian delegation should be in favour of a single convention, proposals to divide the draft articles into two or more conventions will have to be considered in the light of the circumstances existing at the time the proposal is considered.

DRAFT ARTICLES ON THE LAW OF TREATIES

PART I: INTRODUCTION

Article 1

The scope of the present articles

The present articles relate to treaties concluded between States.

Commentary

1.01 Although the Guide to Draft Articles (U.N. Doc. A/C.6/376) refers to a Canadian comment on this article, the relevance of the Canadian comment is only marginal. In fact the Canadian reply of 17 January 1950 consisted only of copies of extracts from the Canadian Abridgment, of a copy of the Privy Council judgment in the Labour Conventions Case, of a copy of the House of Commons Resolution of 21 June 1926, and of extracts from a 1928 statement in the House by Prime Minister Mackenzie King. The 1926 Resolution distinguishes heads of state treaties from intergovernmental agreements.

1.02 Article 1 must be considered together with Article 2, paragraph 1, subparagraph (2), and paragraph 2 and with Article 3.

1.03 The most important effect of Article 1 is that the draft articles are not to apply to treaties of international organizations. Article 3 saves the legal force which treaties of international organizations would have independently of the draft articles but this has no effect on the exclusion of the use of the proposed convention in dealing with treaties of international organizations.

1.04 The magnitude of this exclusion may be judged by noting that, according to Rohn's analysis of volumes 1 to 453 of the United Nations Treaty Series, "14 per cent of all U.N.T.S. treaties show an international organization as a signatory, that 23 per cent of all treaty-making entities in the U.N.T.S. are international organizations, and that 38 per cent of all U.N.T.S. treaties have at least one reference to an international organization in the treaty text itself." (Rohn, "Canada in the United Nations Treaty Series" (1966) 4 Can. Y.B. of I.L. 102 at 118.) In his examination of 7129 treaties, Rohn found that among the top 20 treaty-making parties the International Bank for Reconstruction and Development stood 6th with 323 treaties, the U.N. stood 19th with 175 treaties and W.H.O. stood 20th with 162 treaties (Ibid., 128). Gotlieb's statistical summary respecting Canada's Treaty Partners, 1946-1965 shows that of 519 bilateral treaties, only 9 were with international organizations (Gotlieb, "The Method of Canadian Treaty-Making" (1967), Can. Legal Studies 181 at 208). Though it is likely that international

organizations were parties to a higher percentage of the 236 multilateral treaties to which Canada became a party during the same period, no statistics for multilateral treaties have been published. However, it is likely that a significant percentage of Canadian treaties will be treaties to which an international organization is a party.

1.05 At its 481st Meeting (22 April 1959), the International Law Commission decided to deal first with treaties among states and then to examine to what extent the articles are applicable to treaties concluded between international organizations and between them and states. In the draft provisionally adopted in 1962, the definition of treaties referred to treaties "concluded between two or more states or other subjects of international law". The comments by governments in the Sixth Committee indicated a division of opinion whether treaties of international organizations should be covered. Ceylon (850th and 908th meetings), Jordan (842nd meeting), Yugoslavia (842nd meeting), Dahomey (912th meeting), Kuwait (911th meeting), Liberia (912th meeting) and Sierre Leone (911th meeting) and perhaps Ghana (905th meeting) and Tanzania (912th meeting) all seemed to want some provisions covering treaties by subjects of international law other than states. Hungary (843rd meeting), Iraq (849th meeting), Lebanon (852nd meeting), Romania (848th meeting), Bolivia (909th meeting), Czechoslovakia (906th meeting) and Hungary (907th meeting) supported the exclusion of treaties of international organizations. Probably, one should expect a proposal to extend the draft articles to include international organizations' treaties.

1.06 It is uncertain whether Article 1 precludes the application of the draft articles between two states parties to a multilateral treaty if an international organization is also a party. It would be incongruous if the articles should at one moment be applicable between the parties to a multilateral treaty, but on the accession of an international organization to the treaty, cease to be applicable between those original parties.

1.07 Draft Article 1 may lead to disagreements about what constitutes a treaty concluded between states. There are many international commitments made between Canadian agencies, government departments, ministers or other officials on the one hand and comparable foreign authorities. Is an agreement with a state trading corporation an international agreement with that state? Is the Agreement of December 16, 1963 between Atomic Energy of Canada Limited and the President of India respecting an exchange of information respecting development of heavy water moderated reactor systems a treaty to which the draft articles will apply? Is an agreement such as the Long Term Wheat Agreement of April 22, 1961 between the Canadian Wheat Board and China National Cereals, Oils and Foodstuffs Import and Export Corporation? Is the Agreed Statement of July 31, 1963 between representatives of Canada and the United States respecting the U.S. interest equalization tax? Is the understanding between Justice Minister Fulton and Attorney General Robert Kennedy respecting consultation prior to antitrust prosecutions? Are the agreements between the F.B.I. and the R.C.M.P. concerning reciprocal arrangements for investigations within each other's jurisdiction? Is the Agreed Statement of July 31, 1963 between representatives of Canada and the United States respecting the U.S. interest equalization tax?

1.08 The International Law Commission, after discussion, accepted the view that the term "treaties" should be used generically to cover a broad group of agreements rather than specifically to cover a narrow class of formal agreements. This is indicated by the generic definition in Article 2, paragraph 1, subparagraph (2). Thus the term "treaties" in article 1 should be interpreted widely and the Canadian delegation should resist any attempt to substitute a cumbersome term such as "international agreements".

1.09 The restrictive scope of Article 1 prevents the application of the articles to Concordats or to other agreements to which the Holy See (which is not a state) is a party. Although this problem was discussed by the International Law Commission, and although Article 3, paragraph 1, subparagraph (2) was added, this has not solved the difficulty. Taken literally, Article 1 still may be interpreted as meaning that the draft articles cannot be invoked unless all parties to a treaty are states. If so, a very substantial number of multilateral treaties to which the Holy See is a party are outside the articles. For example, the Holy See is a party to postal agreements.

1.10 A similar problem exists respecting certain small principalities. Is San Marino, for example, a state within Article 1? If not, are the draft articles inapplicable to bilateral agreements with such principalities (such as the Extradition Treaty of 16 October 1899 with San Marino)? Does an accession by San Marino to a multilateral treaty take that treaty outside the draft articles?

1.11 Article 1 presumably precludes the application of the draft articles to agreements made by insurgents. Are the draft articles inapplicable to an agreement such as the Cease-Fire Agreement of 1954 between the Commander-in-Chief of the Peoples' Army of Viet-Nam and the French Union Forces in Indochina?

Instructions

The U.S. proposes to submit an amendment to extend the draft articles to all subjects of international law, not just states. There was little support for the substance of this proposal among the W.E.O. group, however it was recognized that the introduction of the proposal and possibly its reference to a working group might offer certain tactical advantages should it appear desirable, at a later stage, to prolong the work of the Conference. The Canadian delegation, while it should not support the substance of the proposed amendment, should not oppose its introduction and possible reference to a working group.

The delegation should press for clarification of the question whether the proposed convention is to apply to relations between States parties to a multilateral convention to which an international organization is also a party, e.g. will it apply to the relations between Canada and Japan under the Canada-Japan-I.A.E.A. Agreement of June 20, 1966 on

nuclear safeguards. There was no agreement at London or Paris on whether Articles 1 and 3(a) had the effect of including or excluding such relations. It would probably be preferable that the Convention apply to States' relations inter se. However, the delegation need not press for a particular solution to the ambiguity but rather to remove the ambiguity by amending Article 1, and perhaps 3(a) as well. Depending upon the interpretation agreed upon, Article 1 might read "The present articles relate to all treaty relations between States." or "The present articles relate to treaties to which States only are parties.".

Article 2

Use of terms

1. For the purposes of the present articles:

   (a) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

   (b) "Ratification", "Acceptance", "Approval", and "Accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.

   (c) "Full powers" means a document emanating from the competent authority of a State designating a person to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.

   (d) "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or to vary the legal effect of certain provisions of the treaty in their application to that State.

   (e) "Negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty.

   (f) "Contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force.

   (g) "Party" means a State which has consented to be bound by the treaty and for which the treaty is in force.

   (h) "Third State" means a State not a party to the treaty.

   (i) "International organization" means an inter-governmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Commentary

2.01 Subparagraph (a) must be considered together with Article 1 and Article 3. Many of the comments made respecting Article 1 are relevant here too.

2.02 Probably the most important problem in defining a "treaty" is distinguishing an international agreement to which the draft articles should apply from agreements akin to private law contracts. The definition in the draft article attempts to do this by confining the term to agreements "governed by international law". This restriction may be inadequate as a test. It assumes that the agreements in the nature of contracts are made with reference to a national system of law rather than international law, which need not be the case. Indeed, even an agreement made with reference to a particular national system of law may be "governed by international law" in the sense that international law may forbid the making by states of certain types of private contracts, may govern such matters as the responsibility of one state to another under a private agreement, or may determine which system of national law may assert jurisdiction over the transaction. Thus, "governed by international law" may be an unsatisfactory test because all relations between states are in a broad sense governed by international law.

2.03 The alternative form, "intended to be governed by international law", suffers from the same defects. This suggestion is probably based on a questionable analogy between this issue and the private law requirement of "intention to enter a contractual relationship". A more adequate use of this analogy would be to define a "treaty" as an agreement intended to be governed by <u>treaty law</u>. Alternately, a "treaty" as an agreement should be defined so as to exclude agreements made without a reasonable expectation of entering treaty relations. Although this type of definition may at first glance appear circular, in practice it is not. Once there is an existing body of articles stating the law of treaties, it is quite conceivable that there may be agreements so informal that neither party should reasonably anticipate that they would be made subject to that corpus of treaty law.

2.04 The restriction of the definition of "treaty" to an agreement "in written form" is not presently of great significance, although it is possible that the development of new techniques of transmitting information may make verbal or other non-written forms of agreement more common at some future date. At present, most discussion seems to revolve around one incident - the "Ihlen Declaration". Gotlieb states that no examples are known of verbal agreements in Canadian practice: (Gotlieb, "The Method of Canadian Treaty-Making" (1967) 1 Can. Legal Studies 181 at 191).

2.05 Some question may arise whether unilateral declarations can be "related instruments" within the definition of "treaty". The most obvious example around which such a discussion might revolve is a declaration made under Article 36(2) of the Statute of the International Court of Justice. Opinion differs as to whether such a declaration is comparable to an accession or whether it is a unilateral declaration. Other examples are the U.S. declaration concerning the 1954 Geneva Agreements on Indo-China and the 16 nation declaration on Korea.

2.06 Subparagraph (b) appears satisfactory as drafted.

2.07 Subparagraph (c) is acceptable, although the final phrase "or for accomplishing any other act with respect to a treaty" may be too general. The wording might be improved by substituting "or for expressing the desire

of the state to terminate, denounce or withdraw from a treaty". Since the definition is only "for the purposes of the present articles", it seems unnecessary to provide a general term to cover possible usages of "full powers" not considered within the articles.

2.08 Although subparagraph (d) still leaves great scope for argument whether a particular declaration is or is not a reservation, it is probably as good a definition as can be achieved.

2.09 The definitions in subparagraphs (e), (f), (g) and (h) appear to be acceptable.

2.10 There are international organizations to which not only governments, but also other international organizations and individuals corporations or the like belong. Are such organizations totally outside the draft articles, or within the draft articles vis-à-vis relations between the State members?

2.11 Since municipal systems of law and international law are distinct systems, paragraph 2 seems superfluous. This is particularly the case where, as here, paragraph 1 defines the terms only "for the purposes of the present articles".

Instructions

The definition of "treaty" in Article 2(1)(a) has been the subject of considerable discussion within the I.L.C., particularly in respect of the element of intention. Should discussion on this point arise at the Conference, the delegation may indicate that Article 2(1)(a) clearly contemplates the existence of agreements between States which are not governed by international law and it would be desirable for the article to lay down a criterion for determining into which category (i.e. governed or not governed by international law) a particular agreement falls.

The delegation may raise, in discussion, the criterion referred to in paragraph 2.03 of the Canadian commentary. The delegation need not press for a particular amendment, however, and the whole of Article 2 is acceptable as drafted.

Article 3

International agreements not within the scope of the present articles

The fact that the present articles do not relate:

(a) to international agreements concluded between States and other subjects of international law or between such other subjects of international law; or

(b) to international agreements not in written form

shall not affect the legal force of such agreements or the application to them of any of the rules set forth in the present articles to which they would be subject independently of these articles.

Commentary

3.01 This article is intended to prevent two arguments based on expressio unius or a contrario reasoning. It is intended to preserve the doctrine that international organizations have treaty-making power, and to preserve the legal force of oral or other unwritten agreements. Since Article 1 confines the scope of the present articles to treaties between states and since the definition of "treaty" in Article 2 is only "for the purpose of the present articles", there is probably no need for Article 3. It should be pointed out that there are other obligations to which the present articles do not relate besides the two listed in paragraphs (a) and (b). For example, the present articles presumably would not relate to a concessionary agreement between a corporation and two states. It is assumed, however, that the fact that the present articles do not relate to any topic by definition prevents the articles from affecting any legal question respecting that topic.

Instructions

Provided Article 1 is redrafted to clarify the question whether the Convention is to apply to the relations between States parties to a treaty to which an international organization is also a party, Article 3 (though probably unnecessary) is acceptable as drafted.

Article 4

Treaties which are constituent instruments of international organizations or are adopted within international organizations

The application of the present articles to treaties which are constituent instruments of an international organization or are adopted within an international organization shall be subject to any relevant rules of the organization.

Commentary

4.01 In one important case, Article 4 may be too narrow. Because of the peculiar derivation of GATT, it is doubtful whether either the General Agreement itself or any protocol or other agreement made at a round of negotiations of the Contracting Parties can satisfy the test of this article. Strictly speaking, for GATT, there is no international organization and hence neither any constituent instrument of the organization nor any treaties adopted within an organization. Yet there may well be rules adopted at a round of negotiations - particularly concerning reservations, accessions and remedies for breaches of an agreement - which will be inconsistent with the draft articles.

4.02 In another respect, Article 4 may be too broad. An examination of the discussion within the I.L.C. indicates that the "rules" of an organization were considered as matters governing voting arrangements and similar procedural questions. Yet the term "rules" may be sufficiently broad to enable this article to be used to evade any provisions of the draft articles. Unless "international organization" is defined more precisely than in subparagraph (i) of paragraph 1 of Article 2, any group of states which form an "intergovernmental organization" may, by agreeing upon suitable rules, proceed to make treaties with provisions inconsistent with the requirement of the draft articles. The language of Article 4 would permit an international organization to enact rules inconsistent with Articles 35 and 36 respecting the amendment of multilateral treaties, thus binding states to an amendment procedure inconsistent with that agreed upon in the constituent instrument of the international organization itself.

Instructions

The U.S. wishes to delete this general article and replace it with exceptions in favour of international organizations in Articles 6, 8, 9, 13, 16, 17, 37, 55, 57 and 72. Other western European States have indicated a desire to broaden the exception provided for by the article to make the Convention subject to the practice as well as the rules of international organizations and the U.N. Secretary General has proposed that Article 4 be extended to include any treaty deposited with an international organization.

The varying approaches to this article reflect two legitimate interests. The first is that the Convention have as wide a field of application as possible. Thus, the proposal of the Secretary General that the exception under Article 4 from the application of the article be extended to include any treaty deposited with an international organization appears unnecessarily broad and should be resisted. The second interest is that the convention not upset the established procedures of international organizations and in this respect the suggestion that the article be broadened to include practices as well as rules is a valid point. (Much of the operations of the Berne and Paris Unions, particularly relating to successive treaties, is not governed by formal rules). Where these two interests conflict, it would appear preferable for practical reasons to give precedence to the second. Thus the delegation should not support a version of Article 4 which appears likely to disrupt the established procedures of international organizations.

Paragraph 4.01 of the Canadian commentary refers to a difficulty which may result from the restriction of Article 4 to formally constituted international organizations only because certain bodies (the example of GATT is given) may not be properly considered as organizations in that sense. Article 2(1)(i) provides that "'international organization' means an intergovernmental organization". This helps clarify the meaning of international, but not the meaning of organization. The issue here is whether "organization" refers only to an organization formally constituted by an international agreement or may refer also to an organization, such as the GATT, not formally constituted. The latter may be an "organization" no less than the former, and certainly the GATT is an organization the procedures and practices of which should not be disrupted by the present Convention.

The question is essentially one of interpretation. It would appear desirable for the delegation, in discussion of this article, to 'flag' the question by expressing its understanding that the word 'organization' in the article is not intended to be interpreted in a narrow way to refer only to organizations formally constituted by international agreement but includes organizations such as the GATT.

In the event a working group should be established to consider the application of the articles to international organizations, the delegation may support a move to refer Article 4 to that group.

PART II: CONCLUSION AND ENTRY INTO FORCE OF TREATIES

Section 1 - Conclusion of treaties

Article 5

Capacity of States to conclude treaties

1. Every State possesses capacity to conclude treaties.

2. States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.

Commentary

5.01 The capacity of states to conclude treaties is implicit in Article 1 and in the definition of "treaty" in Article 2. Thus paragraph 1 is redundant.

5.02 If Article 5 purports to be an exhaustive enumeration of entities possessing treaty-making capacity, it is incomplete. There are many instances of dependent territories with varying treaty-making capacities. By not including such territories in the enumeration of entities with treaty-making capacities, Article 5 may inhibit the evolution of such territories toward full statehood.

5.03 Paragraph 2, purporting to deal with the treaty-making capacity of members of a federal union, is inconsistent with Article 1 confining the scope of the draft articles to treaties between states. The term "state" is used in two different senses or meanings in paragraph 1 and in paragraph 2. "States members of a federal union" are not states in the same sense as the states referred to in paragraph 1. States members of a federal union are not internationally responsible, under the law of state responsibility. Many provisions of the draft articles are clearly inapplicable to such "states". For example, paragraph 2 of the next article, Article 6, clearly cannot be applied to such a "State".

5.04 Paragraph 2 of Article 5 is an attempt to explain the continuity of treaty-making by states which later become absorbed into other states - the classic cases being the German laender and the Swiss cantons. The explanation is based not so much on the law of treaties, but on the law of state succession - a subject excluded from the Draft Articles and reserved for future I.L.C. consideration. The continuity of treaties following the absorption of a state into a larger entity and the capacity to continue making treaties are matters inextricably entangled - and should be reserved for discussion as matters of state succession.

5.05 Article 5 overlooks significant problems of the recognition of states. There still is serious disagreement whether recognition is constitutive or declaratory. Some may feel that paragraph 1 comes close to an assertion that there is some type of obligation to acknowledge a state's treaty-making capacity and hence, implied the validity of the declaratory theory.

5.06 The recognition problems involved in Article 5 are practical as well as theoretical. Can a state member of a federal union, by making treaties, adopt recognition policies independent of those of the federal state?

5.07 In democratic countries, there may be at times different opinions honestly held as to the correct interpretation of a federal constitution. Thus, some may believe that the units of a federal state possess treaty-making powers distinct from those of the federal government; others may disagree and may regard such powers as limited. Article 5 paragraph 1 may compel other states and more particularly, the depositaries of multilateral treaties, to assess the validity of these competing claims and to publicly interpret the meaning of the constitution in question. If a state member of a federal union may possess the capacity to conclude treaties, it presumably will also possess the capacity to accede to treaties. In the case of treaties open to accession by all states, the depositary who receives a purported accession from a component unit of a federal state is obliged to judge whether that component unit satisfies the requirements of paragraph 2. Few tasks more invidious for depositaries can be imagined than weighing competing interpretations of a constitution; few decisions are so potentially productive of disharmony between depositaries and federal states.

5.08 Moreover, paragraph 2 is an open invitation to mischief-making by those who would seek to disrupt relations within federal states. It gives carte blanche to State A to assert that a unit of federal State B possesses independent treaty-making powers under the federal constitution and to incite that unit to enter into treaty relations with State A. No provision is made for the federal State B or for other units of the federation to object to these international acts of quasi-recognition. Again, Article 5 in its present form appears to be potentially productive of disharmony.

March 22, 1968.

MEMORANDUM FOR THE PRIME MINISTER

Treaty Making Capacity of the Provinces
U.N. Conference on the Law of Treaties

The forthcoming (March 26 to May 25) first session of the U.N. Conference on the Law of Treaties will have as its basic document draft articles prepared by the International Law Commission. Article 5 of the ILC draft provides:

1. Every State possesses capacity to conclude treaties;

2. States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.

2. Advocates of a treaty making power for Quebec have already seized on this draft article and the ILC commentary on it to support their thesis. It must be assumed that the Canadian position on this Article at the Conference will be reported back to interested persons in Quebec and perhaps publicized in the context of the present constitutional discussion in Canada.

3. Paragraph 2 of Article 5 is open to several objections, the most serious being that it refers to political subdivisions of a federal State as themselves States and fails to take account of the fact that a power conferred by the constitution must be recognized by other States before it has validity on the international plane. (Gabon could conceivably try to justify its recent actions on the basis of the article).

4. A number of States, including the U.S., propose to urge the deletion of this Article at the Conference. Its deletion would be of advantage to Canada in that the Article, if accepted, may provide the appearance of legal justification for those who claim that the provinces may conclude treaties. On the other hand there would be presentational disadvantages if Canada were to appear to be initiating or leading opposition to the Article, particularly if such opposition were to fail.

5. If you agree, the Canadian delegation to this conference will be instructed:

a) to support (but not to initiate) any move to delete the Article;

b) if the Article cannot be deleted,

(i) to support amendments to paragraph 2 so that political subdivisions are not termed "States"; (the delegation should work for such an amendment but avoid any formal initiatives)

(ii) to support amendments intended to take account of the need for recognition by States before treaty-power can be said to exist;

(iii) to affirm in its statement at the Conference that the constitution is an internal law of the federal State and can be interpreted only by the competent internal judicial body. It cannot be interpreted by any international tribunal or by outside States.

M.C.

Article 6

Full powers to represent the State in the conclusion of treaties

1. Except as provided in paragraph 2, a person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty only if:

   (a) he produces appropriate full powers; or

   (b) it appears from the circumstances that the intention of the States concerned was to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

   (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

   (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

   (c) representatives accredited by States to an international conference or to an organ of an international organization, for the purpose of the adoption of the text of a treaty in that conference or organ.

Commentary

6.01 The wording of Article 6 appears compatible with the Canadian practice referred to in Canada's comments in the letter of 26 November 1963, paragraphs 1 and 2 (reprinted in U.N. Doc. A/6309/Rev. 1 at p. 110).

6.02 The definition of "full powers" in Article 2, when read together with the commentary to that article, indicates that the term "full powers" may be used to describe the document designating a person with authority to denounce or otherwise terminate a treaty or to perform other acts in respect to a treaty, and not merely the document designating a person with authority to conclude a treaty. Presumably, the draftsman of Article 6 has omitted referring to these other sorts of full powers because he was dealing with the general topic of conclusion of treaties. Since, however, no reference to such other sorts of "full powers" appears elsewhere in the Draft Articles, it might be wise to change the title of Article 6 to "Full powers to represent the State" and to reword the first part of paragraph 1 to read:

> 1. Except as provided in paragraph 2, a person is considered as representing a State for the purpose of expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty only if.....

6.03 The effect of Article 6, paragraph 1 is to create a presumption that full powers are required for the conclusion of treaties. Thus, unless there are full powers, it would appear necessary to show that the circumstances indicate an intention on the part of the States concerned to dispense with full powers. In view of the preponderance of informal treaties in Canadian treaty practice, it is debatable whether the presumption should not be reversed and full powers be unnecessary unless the circumstances indicate an intention on the part of the States concerned to require full powers. A similar reversal of a presumption took place during consideration of Article 11, respecting the necessity for ratification.

Instructions

The delegation may support proposals removing the presumption of a need for full powers for adopting or authenticating a text.

It is not Canadian practice to issue full powers to heads of mission to conclude treaties in Exchange of Note form.

The delegation should raise the point referred to in paragraph 6.02 of the delegation's commentary. This would involve a change in the title of the Article as well as its content.

Article 7

Subsequent confirmation of an act performed without authority

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 6 as representing his State for that purpose is without legal effect unless afterwards confirmed by the competent authority of the State.

Commentary

7.01 This article appears satisfactory, although problems might conceivably arise respecting a purported withdrawal from a treaty by State A on discovering the lack of authority of State B's representative and prior to a confirmation of the treaty by State B. In the comparable agency situation in private law, a considerable number of cases have arisen respecting the ratification of the act of an unauthorized agent.

7.02 The text might be improved by adding words to require that the confirming of the unauthorized acts must take place within a reasonable time.

Instructions

At the Paris meeting, Japan proposed deletion of this article. This proposal was rejected by the meeting. The delegation should support this article for the reason given at Paris, namely that it provides a way of overcoming any excessive rigidity in practice which may result from the strict application of Article 6.

Article 8

Adoption of the text

1. The adoption of the text of a treaty takes place by the unanimous consent of the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States participating in the Conference, unless by the same majority they shall decide to apply a different rule.

Commentary

8.01 Article 8 would be improved if "international conference" were defined more fully. Paragraph 2 surely is not intended to apply to every meeting of a small group of states.

Instructions

The delegation should support any effort to add precision to the expression "an international conference" since, strictly speaking, any conference of two or more states is an international conference.

Article 10

Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

   (a) the treaty provides that signature shall have that effect;

   (b) it is otherwise established that the negotiating States were agreed that signature should have that effect;

   (c) the intention of the State in question to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

   (a) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;

   (b) the signature ad referendum of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

Commentary

10.01 The drafting of this article would be improved by the addition of the word "or" at the end of paragraph 1(a) and again at the end of paragraph 1(b). This will make it absolutely clear that the lettered paragraphs refer to three distinct cases, as the commentary indicates.

Instructions

See instructions following commentary on Article 11.

Article 11

Consent to be bound by a treaty expressed by ratification, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when:

   (a) The treaty provides for such consent to be expressed by means of ratification;

   (b) It is otherwise established that the negotiating States were agreed that ratification should be required;

   (c) the representative of the State in question has signed the treaty subject to ratification; or

   (d) the intention of the State in question to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Commentary

11.01 As noted in the commentary to this article, the provisional text of 1962 presumed that ratification was required, subject to certain exceptions. The present text is a significant improvement. Thus, Gotlieb states that:

> In the period 1953-57, of the 395 treaties listed in the British Treaty Series, 307 or slightly over 77.5 percent did not require ratification. In Canada, of the 166 treaties entered into during the same period, 117 or slightly over 70% of the total number did not require ratification. Thus, the assumption of the earlier draft that ratification is the norm is questionable.

Instructions (Articles 10 and 11)

The W.E.O. group has expressed a desire that these articles raise a presumption either that signature is sufficient to bind a state or that ratification is required, though it could not agree on which of these alternatives to choose. This will presumably be the subject of further discussion within the W.E.O. group. A residuary presumption that signature binds a State would appear more in accord with present State practice than a presumption that ratification is required and may be supported by the delegation; however, the main objective should be to establish a residuary rule, whether it be in favour of signature or ratification.

Article 12

Consent to be bound by a treaty expressed by accession

The consent of a State to be bound by a treaty is expressed by accession when:

(a) the treaty or an amendment to the treaty provides that such consent may be expressed by that State by means of accession;

(b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or

(c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

Commentary

12.01 In its present form, Article 12 is satisfactory. However, one may anticipate an attempt to restore some provision comparable to Article 8 of the 1962 draft. That article created a presumption, capable of being rebutted by a provision in the treaty or by the established rules of an international organization, that a general multilateral treaty is open to participation by "every state". Such a provision of course would have the effect that a vote of only one-third of the states in an international organization plus one more state could prevent the adoption of a rule rebutting the presumption. Hence, a minority would be able to insist on retention of the "every state" formula.

12.02 The difficulties are obvious of distinguishing general multilateral treaties - to which an "every state" formula might apply - from multilateral treaties among a restricted member of states.

Instructions

It is anticipated that, in the discussion on this article, the Eastern European representatives will seek to introduce a presumption that, in the absence of a specific provision to the contrary, "all States" may accede.

The Canadian delegation should support the anticipated western opposition to this proposal on the usual grounds that it would require a depositary to make a political judgment on whether a body purporting to accede is a State and that it is for the negotiating states to decide for themselves in each case who may accede to the treaty.

At the Paris meeting the representative of the Federal Republic of Germany made a particular plea for western solidarity in opposing the "all States" formula.

Article 13

Exchange or deposit of instruments of ratification, acceptance, approval or accession

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

(a) their exchange between the contracting States;

(b) their deposit with the depositary; or

(c) their notification to the contracting States or to the depositary, if so agreed.

Commentary

13.01 Improvements might be made in the wording of Article 13 to make it correspond with existing international practice. To ensure that the date upon which an international treaty obligation becomes applicable to a state is exactly the same date as the date upon which the state's internal enabling legislation takes effect, it is a common practice for a state to deposit a ratification, accession or the like on one date to be effective on a later date. The wording of Article 13 would seem to preclude the use of this technique of "effective date" unless there is a treaty provision permitting this form. As the wording stands, States parties to a treaty which makes no provision for the matter may need to take exceptional care to ensure that the time of performing any of the enumerated actions corresponds exactly with the time at which an internal proclamation, order-in-council, or the like becomes effective. The possibility of difficulties arising respecting the effective date of a double taxation or similar convention are apparent.

Instructions

As the Canadian commentary points out, a State may occasionally, for administrative reasons, stipulate in its instrument of ratification or accession that its adherence to the treaty will be effective on a date other than the date of deposit. To take this practice into account, the article should be amended to read: Unless the treaty or instrument otherwise provides.....

If the delegation is unable to secure this amendment, it may accept the Article in its present form.

Article 14

Consent relating to a part of a treaty and choice of differing provisions

1. Without prejudice to the provisions of articles 16 to 20, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made plain to which of the provisions the consent relates.

Instructions

This article is acceptable in its present form.

Article 15

Obligation of a State not to frustrate the object of a treaty prior to its entry into force

A State is obliged to refrain from acts tending to frustrate the object of a proposed treaty when:

(a) it has agreed to enter into negotiations for the conclusion of the treaty, while these negotiations are in progress;

(b) it has signed the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;

(c) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Commentary

15.01 Even for an existing treaty, it may be extremely difficult to reach agreement upon the treaty's "object". It is even more difficult to establish the object of a proposed treaty, hence the difficulties of characterizing an act of a negotiating state as one frustrating the object of the proposed treaty.

15.02 The Article is also unclear on the position of a state which attempts, before the treaty enters into force, to withdraw its consent to be bound. Thus Article 15 must be considered along with Article 51. Perhaps the issue is even more complicated where a treaty is to enter into force a fixed time after the deposit of a certain number of ratifications. Will any attempt to withdraw a ratification which is one of the minimum number of ratifications pending the entry into force of the treaty be of necessity an act tending to frustrate the object of the treaty?

Instructions

The delegation should support the general western position that:

(a) paragraph (a) of this Article should be deleted because a State should not incur legal obligations simply by entering negotiations and in any event is it frequently impossible, from a practical point of view, to determine at the negotiating stage the object of the proposed treaty; and

(b) paragraph (c) be amended to permit a state which has expressed its consent to be bound to withdraw that consent at any time prior to the entry into force of the treaty.

Section 2 - Reservations to multilateral treaties

Article 16

Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty authorizes specified reservations which do not include the reservation in question; or

(c) in cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty.

Commentary

See commentary following Article 17.

Instructions

See instructions following commentary on Article 17.

Article 17

Acceptance of and objection to reservations

1. A reservation expressly or impliedly authorized by the treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization, the reservation requires the acceptance of the competent organ of that organization, unless the treaty otherwise provides.

4. In cases not falling under the preceding paragraphs of this article:

   (a) acceptance by another contracting State of the reservation constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force;

   (b) an objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State;

   (c) an act expressing the State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Commentary (Articles 16 and 17)

16-17.01 Does the term "object and purpose" in paragraph (c) of Article 16 and in paragraph 2 of Article 17 mean anything different from the term "object" in Article 15? If not, the usage should be standardized.

16-17.02 Articles 16 and 17 require clarification. Article 16 is phrased permissively and a prohibition is inferred against the types of reservations for which permission is not given. Rewording the article to prohibit certain classes of reservations would be an improvement.

16-17.03 The clause, "when signing, ratifying, accepting, approving or acceding", may or may not be taken as a restriction upon the times at which a reservation can be made; if it is an enumeration, it is incomplete. For example, a reservation may be made in a declaration of territorial extension of a treaty.

16-17.04 The effect of Article 16, paragraph (a) is that in the case of a treaty prohibiting certain reservations, reservations not within the prohibited categories are authorized. The effect of Article 16, paragraph (b) is that in the case of a treaty authorizing certain reservations, reservations not within the authorized categories are prohibited. What is the position in the case of a treaty prohibiting certain reservations and authorizing certain other reservations? Will a reservation neither within the prohibited nor the authorized categories be accepted or rejected?

16-17.05 As the Canadian comment of 26 November 1963 indicated, the introductory words of paragraph (c) of Article 16 should be made more explicit. Presumably, the words "In cases where the treaty contains no provision regarding reservations" refer to provisions prohibiting or authorizing reservations. A treaty may contain merely a provision respecting the procedure for formulating or registering reservations, for example. Should the presence of a clause of a purely procedural nature regarding reservations prevent paragraph (c) of Article 16 from being invoked against a reservation? Paragraph (c) would be improved by rewording the clause to read, "In cases not falling within (a) or (b) above, the reservation is incompatible with the object and purpose of the treaty".

16-17.06 The overall effect of Articles 16 and 17 will be to increase the frequency of reservations to multilateral treaties. Formerly, there was strong authority favouring the doctrine that the express or tacit consent of all the contracting parties was a prerequisite and the Genocide Case was thought to be exceptional. Canada, however, took a position in the United Nations in favour of a majority rather than a unanimity rule (See Canada and the United Nations 1951-52, p. 131). The draft articles go beyond this. As McNair notes, (McNair, The Law of Treaties, pp. 168-9) a state ought not to be prevented from becoming a party to a multilateral treaty because of a minor reservation in no way impairing the value of the instrument. Yet the practical effect of permitting states to file reservations, with no established procedure for determining whether they are of a minor nature - whether they are compatible with the object and purpose of the treaty - will create something akin to a presumption of validity of any reservation. Although another contracting state may, by objection, preclude the entry into force of the treaty as between the objecting and reserving States, the general tendency toward administrative inertia will lead to the acceptance of reservations generally. This will be particularly the case with newer countries, which may find difficulty in assessing the effect of a reservation and then objecting to it within a twelve month period.

16-17.07 The wording of paragraph 2 of Article 17 presents an uneasy compromise between three views:

(1) Unanimous consent is required for a reservation to a treaty to which a limited number of states are parties;

(2) Unanimous consent is required for a reservation when the reasonable expectation of the parties was that no reservations would be made; and

(3) whether unanimous consent is required depends on the intention of the parties.

16-17.08 If reservations are to be forbidden from treaties because the parties reasonably expected the obligations of other parties to be without reservation - because "the application of the treaty in its entirety between all of the parties is an essential condition of the consent of each one to be bound by the treaty" - why should this ground for forbidding reservations only apply to treaties with a limited number of parties?

16-17.09 If there is some good reason for treating plurilateral treaties differently from multilateral treaties, surely the assessment of the number of states involved should be based on the number of parties or even the number of contracting states and not on the number of negotiating states. The true effect of Article 17, paragraph 2 is to create a special category of treaty for settlements among the major powers to which the rest of the community of states are later invited to accede. One may assume that a major part of the support for the new approach to reservation comes from the newly independent states. This support presumably is based on their fear that without the power to make reservations, the new states must join existing international arrangements only on terms already established by the former colonial powers. Reservations give the new states some leverage respecting existing multilateral arrangements. If this is in fact the reasoning of the newer states, paragraph 2 can be represented as quite inconsistent with their interests. To put it crudely, the effect of paragraph 2 is that the smaller the number of states who negotiated the treaty, the greater the legal basis for forbidding reservations by states which later accede. Surely this is absurd and the smaller the number of negotiating states, the greater the necessity for permitting reservations. Thus, paragraph 2 should be reworded by changing the term "negotiating states" to "parties".

16-17.10 The term "the limited number of the negotiating states" in paragraph 2 suffers from the same vagueness which led to the deletion of terms such as "plurilateral" from previous drafts.

16-17.11 As noted above, a system which implies consent from failure to object within a period of time favours states with developed or efficient administrative procedures. This could be an effective argument against retaining paragraph 5 of Article 17.

16-17.12 As the Canadian comment of 26 November 1963 pointed out, there is an ambiguity concerning the ground upon which an objection can be taken to a reservation. Can an objection be made only on the grounds enumerated in Article 16 or can an objection be made at will without reasons given?

Instructions (Articles 16 and 17)

These articles raise two basic problems in their present form:

(a) whether an incompatible reservation becomes effective upon acceptance by one other contracting State. Article 16(c) prohibits incompatible reservations, but Article 17(4)(c) provides that a consent to be bound made subject to a reservation is effective as soon as the reservation is accepted by at least one other contracting State.

(b) the legal effect of an objection to a reservation. May a State object to any reservation and, by objecting, prevent (if it wishes) treaty relations arising between itself and the reserving State, or may a State object to incompatible reservations only?

With respect to the first question, no consensus emerged at either the London or Paris meetings. The U.S. plans to submit an amendment to these articles which would combine the two into a single article and which would preclude incompatible reservations. Some in the W.E.O. group believe that the test of compatibility is too subjective and therefore impractical. They consequently prefer to admit all reservations not expressly prohibited. Others, however, feel a need for some curb to prevent irresponsible reservations. There would appear to be merit on both sides and the delegation may support any proposal that reconciles the conflicting interests of, on the one hand, broad adherence to multilateral conventions and, on the other, the desirability of preventing irresponsible reservations. In any event the delegation should press for a resolution of the apparent ambiguous and conflicting effect of Articles 16(c) and 17(4)(c).

On the second question, the legal effect of reservations, the delegation should vote in favour of a text which would clarify the right of a State to object to any reservation and thereby, if it wishes, prevent the treaty from entering into force between itself and the reserving State.

Article 18

Procedure regarding reservations

1. A reservation, an express acceptance of a reservation, and an objection to a reservation must be formulated in writing and communicated to the other States entitled to become parties to the treaty.

2. If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An objection to the reservation made previously to its confirmation does not itself require confirmation.

Commentary

18.01 The system envisaged by Article 18 is administratively unworkable. A state making a reservation, accepting a reservation, or objecting to a reservation must communicate in writing not merely with all parties or with all contracting states or even with all negotiating states, but with all states "entitled to become parties". It must communicate with all states entitled to become parties regardless of whether they can conceivably be affected by the reservation in question. It must communicate, if the traditional U.N. formula concerning participation in multilateral treaties continues to be the norm, with a very large number of potential parties. If the "all states" formula is adopted, the number is even greater. Moreover, a state making a reservation, acceptance or objection must resolve all the thorny issues of who is or who is not entitled to become a party to a particular treaty in order to decide who are the potential parties. Article 19 gives legal effect only to reservations made in accordance with this cumbersome procedure.

18.02 What is the status of an objection to a reservation when the objection has not been communicated to all the potential parties within a one-year period after learning of the reservation? Is the objection a nullity? On the analogy of Article 19, it may, like a reservation not conforming with Article 18, lack legal effect.

18.03 Surely this is undesirable. To cast upon any state - and particularly upon the administrative organization of a new state - the burden of communicating with virtually every other state in the world every time it wishes to make a reservation, accept a reservation, or object to a reservation is quite unrealistic.

18.04 Paragraph 2 of Article 18 is vague. Must the formal confirmation by the reserving State be communicated to every potential party? Or is it sufficient to notify the depositary?

Instructions

The Canadian delegation should seek modification of this article to provide that notice of the reservation, acceptance or objection need be made to negotiating States and contracting States only and need not be made to all States entitled to become parties, which would be administratively unworkable. The delegation may also propose that in the case of a treaty for which a depositary is named, notification to the depositary of a reservation, an acceptance or an objection shall constitute notification to all States required to be notified under Article 17(5) and Article 18. This would require a modification to Article 73(c).

If the modification referred to in the first sentence of the preceding paragraph is not accepted, the delegation should vote against paragraph 1 if a separate vote is taken on the paragraph and abstain in the vote on the article as a whole.

Article 19

Legal effects of reservations

1. A reservation established with regard to another party in accordance with articles 16, 17 and 18:

   (a) modifies for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation; and

   (b) modifies those provisions to the same extent for such other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State objecting to a reservation agrees to consider the treaty in force between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Commentary

19.01 Whether Article 19 is acceptable depends upon the scope to be given to the previous articles and particularly paragraph (c) of Article 16. There are obvious examples in disarmament treaties and the like of impossibility of modifying the provisions vis-à-vis a reserving state without breaching obligations vis-à-vis another non-reserving party. Provided reservations which have this effect are interpreted as incompatible with the object and purpose of the treaty, the problem will not arise.

Instructions

This article is acceptable in its present form.

Article 20

Withdrawal of reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative only when notice of it has been received by the other contracting States.

Commentary

20.01 It is difficult to see why, if reservations, acceptances of reservations, and objections to reservations must be communicated to other States entitled to become parties, withdrawals of reservations need be communicated only to contracting States. If the purpose of these communications is to enable a potential party to know what obligations it will be assuming vis-à-vis existing parties, a State entitled to become a party but not yet a contracting State will need to be advised of withdrawals of reservations.

Instructions

The approach to notification of withdrawal of reservations taken by this Article should be consistent with the approach to notification of the reservations themselves taken by Article 18. The delegation should therefore take the position that paragraph 2 of this Article should require notification of withdrawal of reservations to the same categories of states (contracting states, negotiating states or all states entitled to become parties to the treaty) as are entitled under Article 18 to receive notice of the reservation.

Subject to the foregoing, this Article is acceptable.

Section 3 - Entry into force of treaties

Article 21

Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

3. When the consent of a State to be bound is established after a treaty has come into force, the treaty enters into force for that State on the date when its consent was established unless the treaty otherwise provides.

Commentary

21.01 There is an ambiguity in paragraph 3 of Article 21. When a state has filed an accession on a particular date and has stated that the accession will be effective on a later date, is the date of filing the accession or the effective date the "date when its consent was established"? This ambiguity might be avoided by substituting the term "becomes effective" for the term "was established".

21.02 At any event, the present wording of paragraph 3 is ungrammatical, since it shifts tenses. If the "when" phrase is to remain substantially unaltered, it should read "when its consent is established".

Instructions

This Article is not wholly acceptable in its present form.

The ambiguity referred to in the Canadian commentary is essentially the same problem as that referred to in the commentary and instructions on Article 13, i.e. the effect of an instrument of ratification or accession which states that it is to take effect on a date other than the date of deposit of the instrument. The delegation should therefore propose the amendment suggested in paragraph 21.01 of the Canadian commentary. If the amendment is not accepted, the delegation should abstain on the vote on the Article.

Article 22

Entry into force provisionally

1. A treaty may enter into force provisionally if:

   (a) the treaty itself prescribes that it shall enter into force provisionally pending ratification, acceptance, approval or accession by the contracting States; or

   (b) the negotiating States have in some other manner so agreed.

2. The same rule applies to the entry into force provisionally of part of a treaty.

Instructions

This Article was the focal point of discussion within the ILC of of a special provision dealing with the termination of treaties which have entered into force provisionally. Such a discussion is more appropriate to Article 51 on termination. Should the discussion arise in relation to this Article, however, the delegation should be guided by the instructions concerning Article 51.

This Article is acceptable in its present form provided the Articles contain a special provision dealing with termination of treaties provisionally in force.

PART III: OBSERVANCE: APPLICATION AND INTERPRETATION OF TREATIES

Section 1 - Observance of treaties

Article 23

Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Instructions

This Article, as a general formulation of the principle pacta sunt servanda, is acceptable in its present form.

Section 2 - Application of treaties

Article 24

Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Commentary

24.01 International law is not clear on the retroactive effect, if any, to be given to certain types of treaties. Extradition treaties are an example. In the absence of a specific provision in the treaty it is uncertain whether a person may be extradited for an offence committed before the entry into force of the treaty. For this reason it is desirable that draftsmen be encouraged to deal specifically with the subject of retroactivity when drawing treaties. In cases where retroactivity is not specifically dealt with, a residuary presumption against retroactivity appears desirable.

Instructions

This Article, though it deals with retroactivity of treaties to which this Convention applies, will probably also be the occasion for discussion of the possible retroactivity of this Convention itself, which is properly a subject for the final clauses.

On the question of retroactivity generally the delegation should support the general western view of a presumption against retroactivity. In this connection efforts should be made to clarify the effect of the words "or any situation which ceased to exist". The U.S. will propose deletion of these words. The delegation may support the U.S. proposal if it appears from the discussion of this Article that the words in question are being given a meaning which would imply a general presumption of retroactivity.

On the question of the retroactivity of this Convention, the delegation should take the initial position that the Convention consists of (a) rules which codify present law and which therefore apply to existing treaties independently of this Convention; and (b) rules which constitute progressive development and which should therefore, being new rules, not be applied to treaties concluded prior to the entry into force of this Convention. Consequently this Convention should be given no retroactive effect. If it appears from discussion that this position cannot be maintained, the delegation may support a proposal for a fixed cut-off date. The U.S. will propose that this date be the date of entry into force of the U.N. Charter (October 24, 1945).

Article 25

Application of treaties to territory

Unless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party.

Commentary

25.01 The extra-territoriality issue raised by the United States comment on article 57 of the 1964 draft, the predecessor of this article, is significant. That is, unless Article 25 is modified or broadly interpreted, it appears to create a presumption against application of the treaty within areas of extra-territorial jurisdiction of the parties. Perhaps the issue might be met by substituting the words "extends to the full scope of the jurisdiction of each state". This reformulation, however, may raise more problems than it solves by leading to a discussion over the scope of the jurisdiction of states.

Instructions

British officials informed the London meeting that this Article was acceptable to it in its present form and asked that others not seek to amend the article. The delegation should consult closely with the British delegation concerning this Article. If, as a result of amendments, the Article becomes unacceptable to Britain, the delegation may support a joint British-U.S. effort to delete the Article.

Article 26

Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as inconsistent with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 56, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

   (a) as between States parties to both treaties the same rule applies as in paragraph 3;

   (b) as between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty governs their mutual rights and obligations;

   (c) as between a State party to both treaties and a State party only to the later treaty, the later treaty governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 37, or to any question of the termination or suspension of the operation of a treaty under article 57 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

Commentary

26.01 The problems described in the report of the Secretary to the Canadian delegation to the 1967 Stockholm Conference on Intellectual Property indicate that Article 26 is an oversimplification of the issue of application of successive treaties. The secretary points out that within the Berne Union, two countries participate at the level of the Berlin text (1908), twelve including Canada at the Rome level (1928), and the remainder at the Brussels level (1948). As well, some countries have joined only with reservations under the 1886 or 1896 Acts. Is there any

treaty link between a party signing only the 1928 text and one signing only the 1948 text? If so, is a State which signed at the Brussels level obliged to extend the more substantial protection of the Brussels Act to States which signed at the Rome level, or only to extend the lesser obligations at the Rome level to Rome parties. The issue is of considerable practical importance to Canada, since it determines what protection Canada is entitled to claim from Brussels members and what protection Canada is obliged to extend to Berlin members.

26.02 In some cases, problems such as those of the successive levels of the Berne Union may be met by rules of an international organization under Article 4. Note, however, that Article 4 would not permit the matter to be met by such rules unless the treaties in question were constituent instruments of the international organization or adopted within the organization.

Instructions

The practice of international organizations (possibly the Berne and Paris Unions, though there appears to be some doubt on the point) may be at variance with the provisions of this article. The Article is therefore acceptable provided Article 4 is extended to include the practice as well as the rules of international organizations.

Section 3 - Interpretation of treaties

Article 27

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

   (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

   (a) any subsequent agreement between the parties regarding the interpretation of the treaty;

   (b) any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation;

   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Commentary

See Commentary following Article 28.

Instructions

See Instructions following Article 28.

Article 28

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 27, or to determine the meaning when the interpretation according to article 27:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Commentary

27-28.01 These draft articles on interpretation have been vigorously attacked by Professor Myres S. McDougall of Yale Law School: (McDougall, "The International Law Commission's Draft Articles upon Interpretation: Textuality Redivivus" (1967), 61 A.J.I.L. 992). He has attacked what he believes to be an excessive emphasis upon the text, and has demanded that the rule of interpretation permit "a comprehensive, contextual examination of all the potentially significant features of the process of agreement, undertaken without the blinders of advance restrictive heirarchies or weightings" to determine "the genuine shared expectations of the parties".

27-28.02 It would be mistaken for the Canadian delegation to assume that McDougall's views represent official U.S. Government policy. In a private meeting of the American Society of International Law Study Group on the I.L.C. Draft Articles, McDougall put forward much the same view. He stated that he wanted the emphasis on the expectations of the parties rather than on the primacy of the text and particularly wanted the use of evidence of subsequent conduct of the parties. His statements were met head-on by Charles Beavans, head of the State Department's Treaty Section, who argued that the present draft has the advantage of fixing States with responsibility for what they write. He praised the articles as emphasizing proper drafting of treaties. In a later meeting of the Study Group, the same argument was repeated, with Beavans insisting that, to avoid disputes, it is important to require draftsmen to use language carefully.

27-28.03 On the other hand, McDougall's views may have some effect. McDougall threatened to appear before the U.S. Senate and oppose the ratification of a resulting convention based on what he believed erroneous views. Moreover, through his extensive network of Asian, African and South American graduates and students, McDougall's views may carry more weight among the newer states than those of some others.

27-28.04 From Canada's point of view, there is much to be said for retaining the present emphasis of the interpretation articles. The vague and general approach advocated by McDougall presupposes parties of relatively equal strength settling differences of interpretation before an independent and

competent tribunal. That is, McDougall's approach gives a strong judge considerable discretion. The bulk of Canadian disputes over treaty interpretation probably will be disputes with the United States, France and other major powers. Both on the ground that the United States is by a substantial margin Canada's leading treaty partner, and vice-versa, and on the ground of the relative importance of the subjects of Canadian-American treaties, many of the most important disputes probably will be Canadian-American disputes. A technique of interpretation which multiplies the materials which can be introduced in resolving a dispute favours the State with a massive apparatus for gathering and even for manufacturing materials. U.S. treaty archives are well organized; Canadian archives are not. U.S. power to produce an outpouring of academic polemicists is great; Canadian power is not. The U.S. is willing to spend unreasonably large sums on arbitration proceedings; Canada should not be, and perhaps after assessing the costs of the Gut Dam arbitration, will not be.

27-28.05 In fact, the present draft already permits a greater use of more sources of interpretation than are readily available to the Canadian or other relatively small foreign offices. In particular, Article 28 makes it clear that travaux préparatoires should be used. For Canada and even more so for the newer states, the difficulties of securing access to the travaux are great. Many of the treaties which Canada may be interested in interpreting are treaties succeeded to from Great Britain. The travaux lie buried in British government files.

27-28.06 There is a possibility of pressure toward a "compromise" between the existing draft articles and McDougall's views. This would take the form of merging articles 27 and 28 and merely listing the possible sources of interpretation on an equal footing, without creating any heirarchy of means of interpretation. This "compromise" in fact amounts to the adoption of McDougall's views that the text is only one of the elements to be considered in interpreting a treaty.

Instructions

The basic issue raised by these Articles is whether travaux préparatoires are to be elevated from the position of a subsidiary means of interpretation (the present text of Article 28) to a means of interpretation on a par with the elements referred to in Article 27. The United States is expected to propose an amendment to this effect.

Experience and in particular Canadian experience with the U.S., has shown that so-called travaux préparatoires can be incomplete, unilateral, self-serving and misleading. In certain cases they may be, and in fact have been, used to support an "interpretation" of an agreement completely contrary to the text of the agreement. Unlimited recourse to these unilateral and self-serving documents would place Canada at a significant disadvantage in its treaty relations with the U.S. and other powers with greater administrative resources. In any bilateral treaty relationship, it will place the smaller power at a disadvantage to the larger. The delegation should

therefore oppose any effort to place the travaux préparatoires on the same level as the elements referred to in Article 27 for the interpretation of treaties. The delegation should similarly resist any effort to substitute the intention or "shared expectation" of the parties for the text of the agreement as the objective element being interpreted.

Article 29

Interpretation of treaties in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 1, when a comparison of the texts discloses a difference of meaning which the application of articles 27 and 28 does not remove, a meaning which as far as possible reconciles the texts shall be adopted.

Commentary

29.01 Article 29 seems consistent with present Canadian treaty practice as described by Gotlieb: (Gotlieb, "The Method of Canadian Treaty-Making" pp. 212-15). Paragraph 3 of Article 25 might be amended to emphasize the principal language of negotiation where there are divergences between two or more authentic texts. However, the Canadian delegation would be unwise to propose itself such an amendment.

29.02 There is a possibility that an attempt will be made to exclude from the draft articles all reference to languages. This was the view of Charles Beavans, head of the State Department treaty section, at the private meetings of the ASIL Study Group on the Draft Articles.

29.03 Paragraph 1 of Article 29 could be shortened by substituting for the words "that in case of divergence, a particular text shall prevail", the word "otherwise".

Instructions

This Article is of particular significance for Canada in view of the recently adopted practice of concluding all bilateral treaties in both English and French. The present text of this Article appears acceptable.

Section 4 - Treaties and third States

Article 30

General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

Commentary

30.01 The Articles dealing with rights of third states are among the most dangerous for Canada. More particularly, Canada should expect pressure to incorporate a doctrine transforming treaties into so-called "objective regimes" or servitudes owned by the world at large. During the meetings of the A.S.I.L. Study Group on the Draft Articles, there was considerable pressure - much of it from Professor McDougall - to modify the articles on third states to incorporate an exception for objective regimes. In particular, McDougall alleged that international regimes have been created respecting international waterways. He argued that there is a tendency to impose burdens or confer benefits without the consent of a state. In substance, what this doctrine amounts to is the perpetuation of United States rights or claims on boundary waters by alleging the conferring of vested rights on third parties. More particularly, it amounts to an assertion that the rights of navigation through the St. Lawrence Seaway need not continue to rest upon Canadian consent by treaty but may become transformed into an "international regime" or permanent servitude. Indeed, McDougall cited the St. Lawrence as a specific example of an objective regime.

30.02 It is arguable that the objective regime doctrine is part of a general attempt to transform treaty obligations into international servitudes. The potential impact upon Canada's ability to restrict foreign fishing rights in Canadian territorial waters is very great. Another example of this tendency in a different area is the classification in volume 2 of Whiteman's Digest of the Canada-U.S. Agreements on the Alaska Highway under the heading of "Servitudes" (Whiteman vol. 2, p. 1173 at 1190-1). The basic Canadian attitude should be to resist any draft articles which would transform treaty rights into property or territorial rights, particularly if these treaty rights are thereby transformed into rights of third states.

30.03 In spite of the disclaimer in Article 69, the provisions concerning third parties are of considerable importance to the law of state succession. Indeed, the most obvious example of a treaty intended to confer rights upon a third party is the devolution agreement between a newly independent state and the former colonial power. Provided that the devolution agreement has been signed following independence, the third state may argue that its former treaty rights, reasserted by the devolution agreement, were intended not to be subject to modification without its, the third state's, consent. Its consent to accept the rights will have been presumed (according to Article 32) so long as it has not indicated the contrary. When, however, the new state

seeks to rely upon one of the pre-independence treaties - that is, when the new state attempts to assert that the devolution agreement has conferred obligations as well as rights upon the third state - the new state must show that the third state expressly accepted the obligations: (Article 31). There would appear to be merit in adopting the same approach, either that acceptance is implied or that it must be express, with respect to both rights and obligations.

30.04 The draft articles fail to face up to their true nature: the transformation of treaty rights into objective rights akin to property rights. Thus, the subsequent articles on invalidity, termination and suspension of treaties speak of "parties" to a treaty. Although the definition of "party" in paragraph 1(g) of Article 2 may be broad enough to encompass third parties, the invalidity, termination and suspension articles fail totally to deal with the problems of attaching a third party right or obligation to a treaty. Indeed the one article dealing with the issue, Article 33, may have the effect of so limiting the revocation or modification of obligations or rights of third states that the third states are left in a stronger position than the parties themselves.

Instructions

See instructions following Article 33.

Article 31

Treaties providing for obligations for third States

An obligation arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be a means of establishing the obligation and the third State has expressly accepted that obligation.

Commentary

31.01 The doctrine of this Article, that there can be an obligation which is an obligation arising from a treaty but which is an obligation of a State not a party to the treaty, is very dubious. Indeed, the article and the commentary may be inconsistent. The article can be reconciled with the view that a collateral agreement has arisen through the "third state's" acceptance of an obligation. The final sentence of paragraph (1) of the commentary clearly cannot be reconciled with that view. The quotations in the commentary, from the Free Zones case, fail to support the commentary.

Instructions

See instructions following Article 33.

Article 32

Treaties providing for rights for third States

1. A right arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to accord that right either to the State in question, or to a group of States to which it belongs, or to all States, and the State assents thereto. Its assent shall be presumed so long as the contrary is not indicated.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Commentary

32.01 The difficulty with Article 32 seems to arise largely from the ambiguity of the word "right". Thus, if Canada and the United States agree that the St. Lawrence Seaway shall be open to the shipping of all nations, the question whether Canada and the U.S. have thereby conferred a "right" of passage on all other states turns on the meaning one choses to give the word "right". This ambiguity of the word "right" enables those who wish to strengthen the position of third states to contend that this "right" of passage is a right in the most extreme sense of that term and that the third state can compel the original signatories to continue the right so long as the third party chooses.

32.02 In the law of contract, there have been two basic theories - the shared intention of the parties approach, which stresses the notion of a mutual exchange of obligations, and the reasonable expectations of the parties approach, which seeks to give a party that which is reasonable in the circumstances. Article 32 goes beyond either theory. It does not demand any quid pro quo or even a meeting of the minds for the bargain in question. Nor does it ask whether it is reasonable for the third party to expect the parties to continue conferring the right upon him. Instead, it assimilates certain treaties to pledges of charitable donations or rather to the deeding of property for charitable uses.

32.03 Canada's experience with Newfoundland fisheries should be ample warning to avoid treaty obligations where the preponderance of the rights are with one party, the obligations with the other. The system of third party rights which Article 32 envisages must lead to the multiplication of lopsided relationships between parties to treaties and third party beneficiaries.

Instructions

See instructions following Article 33.

Article 33

Revocation or modification of obligations or rights of third States

1. When an obligation has arisen for a third State in conformity with article 31, the obligation may be revoked or modified only with the mutual consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 32, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Commentary

33.01 The splitting of Article 61 of the 1964 draft into the two distinct paragraphs of the present Article 33 is a great improvement. Under the former article, the consent of the third state was required for the revocation or amendment of either its obligations or its rights. Under paragraph 1 of Article 33, the general rule is that the parties and the third state must agree to the revocation or modification of an obligation, but under paragraph 2 of Article 33, the parties alone may revoke or modify the third state's rights under the treaty, unless the right was intended to be revokable or subject to modification only with the third state's consent.

33.02 If one thinks of a treaty as imposing obligations alone on a third state, or conferring rights alone on a third state, Article 33 seems logical. However, if one thinks of a treaty which both imposes obligations and grants equivalent rights to the third state, the distinction in Article 33 between rights and duties becomes less tenable. Take again the example of a devolution agreement between State A, the newly independent state, and State B, the former colonial power, providing for the continuing between State A and third states of the treaties between State B and the third states. Why should the treaty obligations which the devolution agreement seeks to impose upon the third states require for their modification the mutual consent of State A, State B and the third states? The effect of paragraph 1, as applied to devolution agreements, is that the former colonial power continues to have a voice in the new state's treaty relationships. Equally, why should the treaty rights which the devolution agreement seeks to grant to the third states be capable of modification by States A and B without the consent of the third states unless the third states can prove A and B intended to require the third states' consents.

33.03 To summarize, the implications of Article 33 for treaties which try to impose both rights and duties on third states have not been sufficiently examined. The relationship of the article to the topic of state succession cannot be overlooked.

Instructions (Articles 30, 31, 32 and 33)

There was some doubt expressed at the London meeting about the usefulness of these Articles. Their desirability in principle was accepted at Paris, but the point was made that the provision for express or implied acceptance by the third state should be the same for both rights and obligations. In view of the potential hazards referred to in the Canadian commentary, the preferable course would appear to be to require express acceptance by the third state of both rights and obligations. The delegation should support any effort in this direction but, failing a successful amendment in this sense, may support the articles in their present form in view of the importance which the newer states are understood to attach to them. If it should appear at the conference that these Articles do not enjoy the support of the newer states, the delegation may concur in any proposal to delete the articles.

The delegation should take particular care to oppose any amendment or interpretation of these Articles which would support the concepts of objective regimes or servitudes referred to in paragraphs 30.01 and 30.02 of the Canadian commentary. Should these issues be raised in the form of amendments to the present draft articles, the delegation should seek further instructions from the Department.

Article 34

Rules in a treaty becoming binding through international custom

Nothing in articles 30 to 33 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law.

Commentary

34.01 Canada has taken a position on the 1958 Geneva Convention on the Continental Shelf which supports the need for Article 34. A letter from the Under-Secretary of State for External Affairs, reprinted by Gotlieb in his "Canadian Practice in International Law, 1964" (1965 Can. Y.B. of I.L. 315 at 325), states

> .....The Convention cannot bind any country not a party to it. However, it is generally considered that the Convention formulates and develops rules which are applicable in international law generally. ....

34.02 There is a possibility that the question will be raised whether criteria could not be set out for the transformation of agreements into international law. At a meeting of the private ASIL Study Group referred to previously, Professor Myres McDougall urged that such criteria be added to such an article. Since, however, Article 34 is only a disclaimer, the circumstances under which customary law may arise hardly need be set out in the article. Indeed, debate on such a basic issue as the nature of customary law could distract the attention of the Conference from the substantive articles.

Instructions

This Article is acceptable in its present form.

PART IV: AMENDMENT AND MODIFICATION OF TREATIES

Article 35

General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such agreement except in so far as the treaty may otherwise provide.

Commentary

See Article 37.

Instructions

See Article 37.

Article 36

Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to every party each one of which shall have the right to take part in:

   (a) the decision as to the action to be taken in regard to such proposal;

   (b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; and article 26, paragraph 4 (b) applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

   (a) be considered as a party to the treaty as amended; and

   (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Commentary

See Article 37.

Instructions

See Article 37.

Article 37

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

   (a) the possibility of such a modification is provided for by the treaty; or

   (b) the modification in question:

      (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

      (ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole; and

      (iii) is not prohibited by the treaty.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modifications to the treaty for which it provides.

Commentary (Articles 35-36-37)

35-36-37.01 On first reading, the draft articles on the amendment and modification of treaties appear to create important rights for parties to multilateral treaties. A party to a multilateral treaty must be notified of a proposal to amend the treaty between all parties. A party has a right to participate in the decision on what is to be done with such a proposal. A party has a right to participate in the negotiation or conclusion of any amending agreement. A party - and even a state entitled to become a party to the original treaty - is entitled to become a party to the amended treaty. A party to the original treaty can decide to accept the amending treaty or can insist on the continuance of the treaty in its original form, as between itself and a State which has accepted the amendment.

35-36-37.02 However, the rights of such a State party to the original agreement are very considerably qualified. First, such rights only exist "unless the treaty otherwise provides". (Article 36, para. 1). Second, such rights only relate to the amendment of a multilateral treaty "as between all the parties". If the proposed change is only as between some of the parties, it is not an "amendment" under Article 36, but a "modification" under Article 37. If the proposed change is not an amendment, but a modification, a party does not have a right to be notified of a proposal to make the change, nor a right to take part in deciding what is to be done with the proposal, nor a right to take part in the negotiation or conclusion of the modifying agreement, but only a right to be notified of the modifying parties' intention to change the treaty inter se and of the changes proposed.

35-36-37.03 This distinction between amendment and modification of a treaty is so significant that it is important that the distinction be clearly made and easily applied. Unfortunately, this is not the case. The basic distinction made is one between proposals to amend the treaty between all parties and proposals to amend the treaty between some parties only. A modifying agreement, to qualify under Article 37, must also be one (unless the treaty provides otherwise) which (1) does not affect the rights or obligations of parties to the original treaty who are not parties to the modifying treaty, and (2) is not incompatible with the object and purposes of the original treaty.

35-36-37.04 Unless effective and impartial adjudication is provided elsewhere in the draft articles, the distinction is one which appears open to abuse. The question whether the rights and obligations of non-modifying states are affected by a modification is left to the subjective judgment of each State concerned. The question whether the modification is compatible with the object and purpose of the treaty as a whole is even more debatable.

35-36-37.05 The effect of the draft articles may even be to reduce possible participation in multilateral treaties. If parties who want changes made frame the changing agreement with a provision for accession by all states parties to the original treaty, clearly they are thereby establishing that the changing treaty is an <u>amending</u> and not a <u>modifying</u> agreement. If instead they confine strictly the possible participation in the later agreement, they establish their case that the later agreement is only a <u>modifying</u> and not an <u>amending</u> agreement.

35-36-37.06 Article 35 seems to serve no useful purpose and could be omitted. The first sentence is a vague generalization which must be read subject to the qualifications in the following articles. The second sentence would seem to follow almost automatically from the fact that the amending agreement is itself a treaty. One conceivable effect of this sentence is that Part II of the draft articles can be avoided for an amending treaty by a provision within the original treaty ("except in so far as the treaty may otherwise provide.") even though some of the articles in Part II do not include provision for contracting-out generally. A second conceivable effect of the sentence is the implication that Part II applies to an amending agreement, but does not apply to a modifying agreement. Surely neither of these results was sufficiently considered by the draftsman.

35-36-37.07 What of a proposal to amend a clause of a treaty dealing with the right to participate in that treaty? Surely paragraph 3 of Article 36 cannot apply to a treaty to which such an amendment has been made.

<u>Instructions</u> (Articles 35-36-37)

The delegation may raise in W.E.O. group discussion of these articles the points made in paragraphs 35-36-37.03 and 35-36-37.04 of the Canadian commentary concerning the dangers of possible abusive application of the distinction between amendment and modification. If it appears from the discussion that other members of the group share the

concern expressed in the Canadian commentary over possible abuse, the delegation may raise the matter in Committee, at least to the extent of indicating that these articles disclose yet another area where a need exists for independent adjudication. The delegation should also seek clarification of the effect of Article 35 (particularly the second sentence thereof) discussed in paragraph 35-36-37.05 of the Canadian commentary.

If the articles are retained in their present form, however, the delegation may accept them.

Article 38

Modification of treaties by subsequent practice

A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.

Commentary

38.01 Article 38 uses the term "modified" in a different sense from the usage in Article 37. The "modification" under Article 38 can be as between all the parties; the "modification" under Article 37 must be as between only some of the parties. Although paragraph (3) of the commentary to Articles 35 and 36 explains that the term "amendment" is reserved for formal amendment with respect to all the parties, the usage of "modification" in two different senses is confusing.

38.02 Can a State's failure to assert a right under a treaty constitute "subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions"? If so, Article 38 may be of questionable value. There are often occasions when a State overlooks, for political reasons, what it regards as a comparatively minor violation of its treaty rights. If by doing so it is forfeiting those treaty rights, the state will need to be more rigid in assertion of those rights. This is a doubtful benefit of Article 38.

Instructions

Objection to this article has been voiced on two grounds; first, that amendment by practice would be contrary to the provisions of the internal law of certain states concerning treaty-making; and second, that an article of this kind would lead to rigidity in state practice for fear of conduct leading to amendment.

The delegation may support a move to delete this article. If the article cannot be deleted, attention should be drawn to the objection referred to in paragraph 38.01 of the Canadian commentary concerning the inconsistent use of the word "modified". The appropriate word would appear to be "amended".

Again in the event the article cannot be deleted, the delegation should seek to have the article formulated in a way which raises a presumption against amendment, e.g. "A treaty may not be amended by subsequent practice unless it is established that the parties expressly intended the practice to have that effect.".

PART V

General Instructions Concerning Part V

In addition to the question of independent adjudication of disputes, which is dealt with in the Introduction to these instructions, in the instructions concerning Article 62 and in the instructions on the final clauses, Part V raises a number of other questions of a general nature. One is the distinction between void and voidable treaties. There was considerable discussion within the I.L.C. on whether treaties should be considered void ab initio or voidable only and this question is dealt with in the instructions on Article 41. However there is the separate issue of the method of determining the invalidity of a treaty, whether the ground for invalidity be one which renders the treaty void or voidable. The W.E.O. group agreed at Paris that all claims of invalidity, however they may be described in the articles, must be subject to the disputes procedures contained in the Articles. The Canadian delegation should co-ordinate its position on this issue within the W.E.O. group.

Another and equally important question raised is whether Part V should be exhaustive of the grounds for invalidity and termination. The Canadian commentary points out the advantages, which are substantial, of having exhaustive articles on termination, which in turn permits a provision such as Article 39 to be included in the articles. This exhaustiveness can be attained, however, only if the substantive grounds for invalidity and termination contained in Part V are defined in an acceptable way. On this point as well the delegation should co-ordinate its position with the W.E.O. group.

The U.S. raised at Paris the possibility of including a general limitation period of ten years in Part V, with an overriding limitation period of one year in respect of certain articles such as Article 45 on error. This proposal appears to have some merit and, if it obtains the general support of the W.E.O. group, may be supported by the delegation in the Committee of the Whole.

The delegation should also co-ordinate its position with the W.E.O. group concerning the Articles setting out the substantive grounds for termination and invalidity.

PART V: INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Section 1 - General provisions

Article 39

Validity and continuance in force of treaties

1. The validity of a treaty may be impeached only through the application of the present articles. A treaty the invalidity of which is established under the present articles is void.

2. A treaty may be terminated or denounced or withdrawn from by a party only as a result of the application of the terms of the treaty or of the present articles. The same rule applies to suspension of the operation of a treaty.

Commentary

39.01 Article 39 is a useful statement which should be maintained. Its significance has been discussed by Briggs, who was chairman of the I.L.C. Drafting Committee during the session in which the draft articles were finally adopted: (Briggs, "Procedures for Establishing the Invalidity or Termination of Treaties under the International Law Commission's 1966 Draft Articles on the Law of Treaties" (1967), 61 A.J.I.L. 976, esp. at 978-9.) Briggs points out that the effect of Article 39 is to ensure that the validity of treaties may be impeached only by the application of the draft articles and more particularly, only through application of the procedural provisions of Article 62. Assuming that Article 62 can be modified to achieve a reasonable procedure for settlement of disputes, Article 39 will be a significant achievement.

Instructions

As mentioned above, the acceptability of the exhaustive feature of this Article will depend upon the acceptable formulation of the substantive Articles in Part V.

Article 40

Obligations under other rules of international law

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

Instructions

This Article is acceptable in its present form.

Article 41

Separability of treaty provisions

1. A right of a party provided for in a treaty to denounce, withdraw from or suspend the operation of the treaty may only be exercised with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present articles may only be invoked with respect to the whole treaty except as provided in the following paragraphs or in article 57.

3. If the ground relates to particular clauses alone, it may only be invoked with respect to those clauses where:

   (a) the said clauses are separable from the remainder of the treaty with regard to their application; and

   (b) acceptance of those clauses was not an essential basis of the consent of the other party or parties to the treaty as a whole.

4. Subject to paragraph 3, in cases falling under articles 46 and 47 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or to the particular clauses alone.

5. In cases falling under articles 48, 49 and 50, no separation of the provisions of the treaty is permitted.

Commentary

41.01 The effect of Article 41 is to limit the use of the notion of "separability of treaty provisions". In general, invalidation, denunciation, termination, withdrawal from, or suspension of a treaty must apply to the whole treaty. To invalidate, denounce, terminate, withdraw from, or suspend a treaty only in part, one must establish:

   (1) a provision in the treaty or a collateral agreement permitting separability (paragraph 1); or

   (2) a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty which satisfies the detailed requirements of paragraph 3.

Coercion or conflict with a peremptory now totally invalidates a treaty. The State which relies upon these grounds of invalidity under Articles 48, 49 or 50 cannot seek to invalidate only the tainted part of the treaty; the whole treaty must go.

41.02 Particularly as applied to suspension of the operation of a treaty, Article 41 seems unduly rigid. A good example of the type of situation to which it would seem to apply is the application of Jay's Treaty (Treaty of Amity, Commerce and Navigation of 19 November 1794) in the period immediately following its conclusion. Great Britain took the position that she had the right to suspend that part of the treaty relating to the Indian country and posts until the United States fulfilled its obligations under other parts of the treaty: (See Public Archives of Canada, Manuscript Group 11, "Q" Series, vol. 68, p. 162 and vol. 70, p. 118). The effect of draft article 41 would probably have been to force a suspension of the treaty as a whole or to force Britain to accept less than what she regarded as full performance of the American obligations. Thus, paragraph 2 might be amended by the deletion of the words, "or suspending".

41.03 Subparagraph (b) of paragraph 3 probably will prove very difficult to apply. The subparagraph rests upon a determination of the motives of a State in regard to particular clauses of a treaty. To take an example, how can one establish whether any one of the clauses of the draft articles is an essential basis of a State's willingness to accept the draft articles as a whole? Or to take another example, how could one determine whether the fisheries clauses of the Treaty of Washington were an essential part of the treaty in British eyes? In the absence of an effective means of third party adjudication of conflicting claims, one may expect an assertion by any party that virtually any clause of a treaty was regarded by it as essential.

41.04 Paragraph 5 of Article 41 is said by the commentary to have been intended to emphasize the freedom of a coerced State to disregard the coercion in deciding upon its future treaty relations with the State which had coerced it. In fact, it achieves no such object, but restricts the freedom of a coerced state. If a treaty is generally satisfactory, but contains a single provision included under coercion, the coerced state must either disregard the coercion and accept the whole treaty or raise the coercion and lose the whole treaty. If paragraph 5 were really intended to promote the interests of coerced States, one would have thought this could be achieved by giving a coerced State an option of asserting that coercion rendered the whole treaty void, or of asserting that the coercion related to a severable part of the treaty.

41.05 Similar consideration apply to the conflict of a treaty provision with a peremptory norm. Presumably, one party or another to a treaty will normally be the one who alleges a conflict between a treaty provision and a jus cogens norm. The effect of paragraph 5 of Article 41 again is to place such a party in the dilemma of either accepting the treaty with the defective provision, or losing all benefits under the treaty. It is easy to anticipate that there will be peace treaties or boundary settlements where the loss of the treaty as a whole will outweigh living with a specific clause of dubious legality.

Instructions

This Article raises the question whether certain grounds of invalidity should make a treaty void ab initio in its entirety, or voidable only at the option of the offended State. Only when the question as to whether the treaty should be void or voidable is resolved can the question of separability raised by paragraph 4 of this Article be dealt with.

In discussion on this Article, the delegation should take the position that there is no apparent justification, legally or morally, for permitting separability in respect of treaties induced through fraud or corruption, but precluding separability in respect of treaties induced through coercion by treating such agreements as void. It is argued that coercion is particularly heinous. With this we agree but it does not follow that acts accomplished through coercion must or should be considered as "without legal effect". It would appear more in keeping with the equities of the situation to deal with coercion by placing the coerced state in the most favourable position possible vis-à-vis the guilty State. This can best be accomplished by permitting the coerced state the greatest number of choices; to retain the treaty as a whole, to retain it only in part or to reject it entirely. However, by considering treaties obtained through coercion as void, rather than voidable, and in consequence omitting reference to Articles 48 and 49 from paragraph 4, the Article deprives the coerced State of the first two of these three choices. It appears incongruous to indulge one's moral outrage over the prospect of coercion at the expense of the interests and rights of the coerced State.

If, however, in spite of this exposition the newer states continue to believe that it is in their interests to consider that Articles 48 and 49 should result in treaties being void, and thereby exclude the possibility of separability, the delegation may accept this Article in its present form.

Article 42

Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 43 to 47 inclusive or articles 57 to 59 inclusive if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty, as the case may be, is valid or remains in force or continues in operation; or

(b) it must by reason of its conduct be considered as having acquiesced, as the case may be, in the validity of the treaty or in its maintenance in force or in operation.

Commentary

42.01 It is difficult to see why a state whose representative has been coerced into a treaty cannot expressly agree (in an agreement not subject to such coercion) that the treaty shall continue in operation. Equally, it is difficult to see why a state which has itself been coerced by threat or use of force cannot, when such coercion no longer exists, agree with its former oppressor that the treaty produced by coercion shall nonetheless remain in force. To put it another way, the object of Article 42 would seem to be to require states with grounds for asserting the invalidity of treaties to assert such grounds promptly. Article 42 thus embodies the concept of "laches". Why should not a state which believes it has a right to assert invalidity on the ground of coercion be required to assert such a ground promptly? If it should, then Article 42 might well be changed to include Articles 48 and 49 as well as Articles 43 to 47 and 57 to 59.

Instructions

The U.S. proposes to inscribe its general 10-year limitation period in the form of a paragraph 2 to this Article. See the general instructions on Part V.

The observations in the instructions on Article 41 apply equally to the omission of reference to Articles 48 and 49 from this Article. As in the case of Article 41, the delegation may accept this omission if the new states remain unconvinced of the validity of the point of view set out in the instructions to Article 41.

Section 2 - Invalidity of treaties

Article 43

Provisions of internal law regarding competence to conclude a treaty

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

Commentary

43.01 Without further elaboration of the meaning of the term "manifest", it is difficult to anticipate how this draft article might apply. If Quebec purported to sign a treaty with France respecting satellite communications, would Quebec's violation of Canada's internal law be manifest? If the federal government purported to sign a treaty with the United States respecting securities regulation, and the Supreme Court later declared securities regulation to be exclusively a matter of property and civil rights, could Canada contend that the danger of such a Supreme Court decision was obvious to the U.S. negotiators and hence Canada's violation of internal law was "manifest"? To put it another way, does "manifest" mean that the internal law was clear in forbidding such a treaty, or does it only mean that the possibility or even probability of a violation of internal law was obvious to the negotiators?

43.02 Note that Article 43 speaks only of competence to conclude treaties and not of competence to implement treaties. Thus, it may be that Canada can never rely upon Article 43, because her problem, until recently at least, has been one of disputed jurisdiction to implement and not of disputed jurisdiction to conclude treaties.

Instructions

This Article has implications for the constitutional situation within Canada, to the extent that it subordinates internal law in matters of treaty making. A situation may well arise in which Canada would wish to be free to invoke the provisions of Canadian constitutional law to invalidate a treaty purportedly entered into by Quebec.

Consequently, Canada could not support the view of the W.E.O. group expressed at the Paris meeting, that the phrase "unless that violation of its internal law was manifest" should be deleted and the delegation should therefore vote to retain that phrase in the article.

The provision concerning manifest violation of internal law may not, however, afford of itself sufficient protection for the Canadian position. It is arguable that, because Canada's constitution is unwritten

and, in the view of some, unclear on the matter of treaty making, the view that provinces have treaty-making powers could not be considered a manifest violation of Canadian law. If Article 5 is retained in substantially the same form as the I.L.C. draft, therefore, the delegation should consult with other delegations which share Canadian concern on the federal States issue with a view to proposing an amendment to Article 43 which would make it subject to Article 5, to enable a federal State to raise the provisions of constitutional law concerning treaty making by political subdivisions whether or not those constitutional provisions could be said to be manifest.

Article 44

Specific restrictions on authority to express the consent of the State

If the authority of a representative to express the consent of his State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating a consent expressed by him unless the restriction was brought to the knowledge of the other negotiating States prior to his expressing such consent.

Commentary

44.01 This Article would be improved if it were made clear that the incapacity of a representative cannot be raised at all by the other party to the treaty.

Instructions

In addition to the point raised in the Canadian commentary, the delegation should seek clarification on two further points; first, that the restrictions contemplated by the Article 44 relate to the formal full powers of the representative and not his negotiating instructions and, second, whether notification of a limitation of authority to a Conference Secretariat constitutes notification to all negotiating States.

Article 45

Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error, or if the circumstances were such as to put that State on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 74 then applies.

Commentary

45.01 Like many other articles of the draft, Article 45 would be acceptable if there was adequate provision for adjudication of disputes. Without such a provision, the Article creates dangers. In the case of a commercial treaty, can one state contend that the magnitude of its concessions was not appreciated at the time of the negotiation, and that an essential basis of its consent was the assumption that the concessions could be made without risk to its domestic industry? Could Canada claim that when it signed the double taxation agreement with the Netherlands, it did not know of the scope of the Shell Oil Company's base company operations from Canada and that had it known, it would not have consented to the treaty? This extreme use of Article 45 stems from the ambiguity of the term "a fact or a situation" in paragraph 1. Attempts to prove that facts or situations were assumed by a State to exist at any time clearly invite speculation concerning subjective matters almost impossible to settle.

45.02 How does one determine the "assumptions" or other conditions of mind of a State?

Instructions

The U.S. is expected to propose amendments to this article designed to make the criteria for error more objective. While the delegation may accept the Article in its present form, it should support any amendments which tend to lessen the degree of subjectivity involved in determining whether error invalidates consent.

Article 46

Fraud

A State which has been induced to conclude a treaty by the fraudulent conduct of another negotiating State may invoke the fraud as invalidating its consent to be bound by the treaty.

Commentary

46.01 Since allegations by one State that another has resorted to fraud are likely to be rare, Article 46 probably will be of little significance.

Instructions

This Article is acceptable in its present form. This is one of the Articles to which the U.S. will seek to attach a one-year limitation period. See general instructions on Part V.

Article 47

Corruption of a representative of the State

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

Instructions

It was suggested at Paris that this Article be deleted, largely on the ground that it was unseemly for an international convention to consider the possibility of corruption of a diplomat. While the Article is acceptable, the delegation may acquiesce in any general move to delete it. If the Article is accepted, it would appear desirable that it contain a one-year limitation period.

Article 48

Coercion of a representative of the State

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him personally shall be without any legal effect.

Commentary

48.01 The moralizing tone of Articles 48 and 49 and of the commentaries upon those articles should not blind one to the substance of those articles. Although the use of the term "shall be without any legal effect" appears to attach greater opprobrium to coercion than to other causes of invalidity, the effect of that drafting is detrimental rather than beneficial to the state whose representative has been coerced. Thus, under Article 47, if a State's representative has been corrupted, the State is permitted to decide whether to invoke such corruption as a justification for repudiating the treaty or to accept the treaty. But under Article 48, if a State's representative has been coerced, the State is not given any option to accept or reject the treaty; the expression of consent by the representative is without legal effect and the purported treaty is a nullity incapable of being ratified.

48.02 Depending upon how strict an interpretation is given to the expression "without any legal effect" it is possible to envisage situations where a new government of the coercing state may even want to invoke Article 48. Thus, a corrupt government of State A may coerce the representatives of neighbouring State B to make a treaty for the benefit of the members of that corrupt government. Should the corrupt government be overthrown, the new government of State A might well wish to repudiate the treaty. Since the coerced consent from State B's representative was without legal effect, presumably the treaty could be treated as a nullity by the new government of State A.

Instructions

In view of the possible consequences referred to in the Canadian commentary of the formula "without any legal effect", the delegation may support an amendment to delete the phrase and substitute a provision that "If the expression.....personally, the State may invoke such coercion as invalidating its consent to be bound by the treaty." It would appear desirable to attach a one-year limitation period to this Article.

Article 49

Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations.

Commentary

49.01 As in the case of Article 48, the I.L.C.'s antipathy to force has produced an article of doubtful benefit to the victim of the force. Unlike other causes of invalidity, which give a State the option of repudiating or affirming the treaty, their cause renders the treaty a nullity. Since it is entirely possible that the balance of advantages under a treaty may alter with time, the effect of Article 48 may be to enable an oppressor to evade obligations by asserting his own fault.

Instructions

The difficulty of identifying "the principles of the Charter of the United Nations", the inability of the U.N. to agree on a definition of aggression and the tendency of certain States to include economic coercion and "unequal treaties" within the scope of this Article raise considerable apprehension about the way in which this Article may be applied. The delegation should consult closely with the W.E.O. group in an effort to find a formula for this Article which will satisfy the legitimate concerns of the newer States without inviting the abuses referred to above.

Article 50

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

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Commentary

50.01 The defects of Articles 50 and 61 have been commented upon so extensively that little further comment seems desirable. An excellent summary appears in Schwelb, "Some Aspects of International Jus Cogens as Formulated by the International Law Commission" (1967) 61 A.J.I.L. 946. The delegation should also attempt to obtain a copy of the "Papers and Proceedings on the Concept of Jus Cogens in International Law" of the Lagonissi Conference, referred to by Schwelb in footnote 5, on pp. 947-8.

50.02 Paragraph (6) of the commentary to Article 50 overlooks one aspect of the problem of the retroactivity of a jus cogens rule. Although it may be true that the emergence of a new rule of jus cogens is not to have retroactive effects on the validity of a treaty, that does not avoid the contention that a particular rule of jus cogens is not a new rule, but has always existed and hence that treaties formerly thought valid are in fact void because of conflict with the rule. Thus, if Article 50 is accepted, it will have a retroactive effect in that a State wishing to avoid an apparently valid treaty obligation will be able to argue that the treaty when made violated a rule of jus cogens. To avoid any argument that Article 50 will operate retroactively, the article would require amendment to read, "A treaty made after the date of these articles is void, etc.".

Instructions (Articles 50 and 61)

The Canadian statement in the Sixth Committee at the most recent U.N.G.A. accepted in principle the concept of jus cogens but stressed the importance, for its proper application, of securing a satisfactory means of identifying norms of jus cogens. Discussions in London and Paris served to point out that the question of identifying norms of jus cogens is a problem separate from the matter of independent adjudication of disputes, and the objection to jus cogens may not be met by a satisfactory disputes provision. The British and French question the very existence of norms of jus cogens and would delete the articles. No consensus emerged at Paris, however, and the delegation will have to consult closely with the W.E.O. group in formulating, if possible, an agreed western approach to this Article.

In the absence of an agreed western approach, the delegation may support the inclusion in the Convention of articles on jus cogens but should seek to have the effect of conflict with a jus cogens norm modified to the extent that the treaty should not be void in its entirety but only to the extent that it conflicts with the jus cogens norm (c.f. U.N. Charter Art. 103). The delegation should also seek clarification of the criteria for determining the existence of a norm of jus cogens. The criteria should tend to keep to a mimimum the rules which may be considered as jus cogens and should avoid the possibility of extending the concept of jus cogens to, for example, General Assembly resolutions.

Section 3 - Termination and suspension of the operation of treaties

Article 51

Termination of or withdrawal from a treaty by consent of the parties

A treaty may be terminated or a party may withdraw from a treaty:

(a) in conformity with a provision of the treaty allowing such termination or withdrawal; or

(b) at any time by consent of all the parties.

Commentary

51.01 Articles 51 and 54 could be combined to read:

> A treaty may be terminated or suspended or a party may withdraw from a treaty:
>
> (a) In conformity with a provision of the treaty allowing such termination, suspension or withdrawal; or
>
> (b) At any time by consent of all the parties.

Articles 51 on termination or withdrawal and 54 on suspension are virtually identical.

Instructions

This Article is acceptable in its present form, as far as it goes. It is desirable, however, for the Convention to contain an Article which deals with the termination of treaties which have entered into force provisionally. Indeed if the exhaustive approach of Article 39 remains, it is indispensable that the Convention deal with the termination of treaties provisionally in force.

There are two possible approaches to the question. One is an Article along the following lines:

> "Unless the treaty otherwise expressly provides or the parties have otherwise expressly agreed, a party to a treaty which has entered into force provisionally may terminate or withdraw from that treaty at any time, within one year of the provisional entry into force of the treaty, upon notification to the other party or

parties that it has been unable to accomplish the necessary constitutional or other procedure to enable it to accept the definitive entry into force of the treaty."

The word "expressly" is included so that the inclusion in the treaty of a routine termination clause will not serve to prevent the operation of this Article.

While this form of Article would appear to reflect accurately the situation in which treaties enter into force provisionally, it is open to the objection that it would give only one or some parties (those with internal treaty implementing requirements to fulfill) the right of termination. It would not give this right to all parties and thus it would place some parties at an advantage vis-à-vis others. For this reason, the following formula may be more acceptable:

"Unless the treaty otherwise expressly provides or the parties have otherwise expressly agreed, a party to a treaty which has entered into force provisionally may, upon notice to the other party or parties, terminate or withdraw from the treaty at any time within one year of the provisional entry into force of the treaty, provided that the treaty has not entered into force definitively."

The delegation may accept amendments to these proposed Articles, but should press for the inclusion in the Convention of an Article which deals expressly with the special circumstances of a treaty provisionally in force.

Article 52

Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force.

Commentary

52.01 Although Article 69 indicates that the present articles are without prejudice to any question that may arise from a succession of States, consideration should be given to including in the articles on treaties rather than those on state succession a rule respecting whether successor states count as parties toward the number necessary for a treaty's entry into force.

Instructions

This Article is acceptable as drafted, though the delegation may refer, in discussion of this Article, to the point raised in paragraph 52.01 of the Canadian commentary.

Article 53

Denunciation of a treaty containing no provision regarding termination

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1 of this article.

Commentary

53.01 The relevance of Article 53 to the issue of rebus sic stantibus in Article 59 is obvious. Although the commentary to Article 53 suggests that a right of termination is made dependent on the intention of the parties, the effect of placing the onus of proving an intention to permit denunciation may be that Article 53 has the effect that, unless rebus sic stantibus is invoked, treaties without termination clauses are perpetual. This statement is much more extreme than the practice of states justifies.

53.02 More particularly, Article 53 would seem to preclude almost any implied right of termination. McNair contends at p. 513 that an implied term permitting a party to denounce a treaty is entirely different from the effect of changed circumstances on the duration of a treaty. McNair cites practice which, although varied, supports an implied right of denunciation of commercial treaties without termination clauses on reasonable notice (pp. 502-5). He also contends that there are political treaties, such as treaties of alliance which, although not containing specific time limits or other provisions for their termination, were not intended to be perpetual. He argues that such treaties contain an implied power to denounce for good cause and upon reasonable notice.

53.03 Article 53 also overlooks the effect of desuetude and lapse of time. There are a very great many treaties of Great Britain which have never been expressly terminated, but which are nonetheless regarded as having lapsed, e.g. the Treaty of Extradition with Russia, which when in force applied to Canada. Unless the draft articles on treaties permit the contention that such treaties can lapse by desuetude, Canada and other Commonwealth countries may find themselves plagued with the invoking of ancient British treaties.

Instructions

While this Article is acceptable in relation to treaties concluded after the entry into force of this Convention, it is an Article which cannot be permitted, through retroactive effect of this Convention,

to apply to treaties concluded prior to the entry into force of this Convention. It is not, as the Canadian commentary points out, a simple codification of existing law and its retroactive effect could have undesirable consequences for States parties to treaties which, because they were not drafted with this provision in mind, contain no termination Article.

Article 54

Suspension of the operation of a treaty by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(a) in conformity with a provision of the treaty allowing such suspension;

(b) at any time by consent of all the parties.

Commentary

54.01 As noted above in the comment on Article 51, Articles 51 and 54 might well be combined, since they are virtually identical.

54.02 Otherwise, Article 54 appears satisfactory.

Instructions

This Article is acceptable as drafted.

Article 55

Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only

When a multilateral treaty contains no provision regarding the suspension of its operation, two or more parties may conclude an agreement to suspend the operation of provisions of the treaty temporarily and as between themselves alone if such suspension:

(a) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; and

(b) is not incompatible with the effective execution as between the parties as a whole of the object and purpose of the treaty.

Commentary

55.01 Article 55, respecting suspension of a multilateral treaty between certain parties, is similar in many respects to Article 37, respecting modification of a multilateral treaty between certain parties. However, the drafting of Article 55 might be improved by following more closely the wording of Article 37.

55.02 The introductory clause of Article 55 might, on the model of Article 37, be more effectively stated as a third requirement for the valid conclusion of a suspending agreement. The grammar of much of the article might also be improved. Thus, Article 55 might read:

> Two or more parties may conclude an agreement to suspend the operation of provisions of the treaty temporarily and as between themselves alone if such suspension:
>
> (a) Does not affect the enjoyment by other parties of their rights under the treaty or the performance of their obligations;
>
> (b) Is not incompatible with the effective execution of the object and purpose of the treaty as a whole; and
>
> (c) Is not prohibited by the treaty.

55.03 This formulation also has the advantage over the existing draft of Article 55 of making it clear that it is not the mere presence of any provision respecting suspension which prevents a later agreement to suspend between some parties, but rather it is the presence of a provision forbidding such a later agreement.

55.04 It is difficult to see the value of retaining the word "temporarily" in Article 55. If the suspension if genuine, it must be temporary. Otherwise, it would be a termination. Does the word "temporarily" indicate that the agreement to suspend must recite that the suspension is to be "temporary"? If so, it seems an unnecessary formalism.

55.05 As in Article 37, the term "object and purpose" may be extremely difficult to apply. Unless independent and adequate adjudication is provided, there may be irreconcilable differences of opinion not only as to what "object and purpose" a treaty had, but as to whether a particular suspension is incompatible.

55.06 Surely the shift from the term "treaty as a whole" in Article 37 to the term "parties as a whole" in Article 55 is a drafting error and the two were meant to be uniform.

Instructions

The delegation may discuss with other western delegations the drafting changes suggested in the Canadian commentary and propose them if they appear sound and likely to attract support. However, the substance of the Article in its present form is acceptable.

Article 56

Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a further treaty relating to the same subject-matter and:

   (a) it appears from the treaty or is otherwise established that the parties intended that the matter should thenceforth be governed by the later treaty, or

   (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the treaty or is otherwise established that such was the intention of the parties when concluding the later treaty.

Commentary

56.01 Article 56 is couched in terms of termination of a treaty as a whole. In practice, the suspension of particular provisions of a treaty because of incompatibility with a later treaty seems likely to occur more often. Article 41 concerning separability seems inapplicable to this type of partial incompatibility. In particular, the condition laid down in paragraph 3(b) of Article 41 may cause problems. The relevant clause of the early treaty may very well have been "an essential basis of the consent of the other party.....to the treaty as a whole", yet should terminate because of incompatibility with the later treaty provision. To some extent, this problem might be met by adding the words "in whole or in part" to the word "terminated" in paragraph 1 of Article 56 and amending subparagraph (b) of that article to read:

> (b) The provisions of the later treaty are so far incompatible with those of the earlier one that not all of the provisions of the two treaties are capable of being applied at the same time.

Instructions

The delegation may raise with western delegations the question of severability referred to in the Canadian commentary; however, should other friendly delegations not consider the problem worth pursuing, the Article is acceptable in its present form.

Article 57

Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

   (a) the other parties by unanimous agreement to suspend the operation of the treaty or to terminate it either:

      (i) in the relations between themselves and the defaulting State, or

      (ii) as between all the parties;

   (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

   (c) any other party to suspend the operation of the treaty with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of the present article, consists in:

   (a) a repudiation of the treaty not sanctioned by the present articles; or

   (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

Commentary

57.01 The most obvious comment on Article 57 is that it is filled with ambiguous or general terms which, in the absence of an impartial adjudication procedure, are likely to produce controversy. Thus, is paragraph 3 an exhaustive definition of a "material" breach? What distinguishes from other parties a party "specially affected" by a breach? What kinds of treaties are "of such a character that a material breach....radically changes the position of every party...."? How does one

determine whether a party's position has been "radically" changed or merely changed to some lesser extent? What acts constitute a "repudiation" of a treaty? What is the "object and purpose" of a treaty? What provisions of a treaty are "essential to the accomplishment" of the object and purpose? Without adequate machinery for adjudicating differences, Article 57 leaves considerable scope for subjective judgments on all these issues.

57.02 The words "Any other party" in subparagraph (c) of paragraph 2 are ambiguous. Presumably, the term is intended to relate back to the introductory words of paragraph 2, and "Any other party" is any party other than the party committing the material breach. However, the term may instead be taken as referring back to the party described in the immediately preceding subparagraph, subparagraph (b). If this were the interpretation, then "any other party" would mean any party other than a party specially affected. Surely this was not intended, or else one has the anomalous result that the rights of a party specially affected are fewer than those of other parties. This ambiguity would be avoided by substituting for the term "Any other party" in subparagraph (c), the term "Any party other than the party committing the breach".

57.03 A right of suspension vis-à-vis the defaulting state is a totally inadequate remedy in many cases for a party specially affected. Thus, the party specially affected by the breach may be incapable of suspending operation of the treaty vis-à-vis the defaulting state without violating the specially affected party's obligations to other parties. To give an example, State A may have agreed to abstain from fishing in a particular area in exchange for other undertakings from States B, C and D. If State B breaches its undertakings, State A cannot resume fishing in the area without violating the rights of the innocent parties, C and D. State A may be the only state affected by State B's breach and hence the case may be outside subparagraph (c) of paragraph 2. The only effective remedy for State A in these circumstances might be a right to withhold performance of some obligation entirely dehors the particular treaty. What is needed for the specially affected party is a right to withhold the performance of an equivalent obligation to the party in breach of the treaty.

57.04 In fact, the article as drafted lacks the notion of proportion in the response permitted to an affected state. In effect, Article 57 permits a species of reprisal, but fails to impose the traditional requirement of the Naulilaa arbitration that the measure adopted must be proportionate to the provocation received. Thus Article 57 provides for a remedy of termination or of suspension "in whole or in part", yet fails to indicate whether this choice is in the absolute discretion of the offended state.

57.05 As the commentary indicates, subparagraph (c) was added to deal with the problem of disarmament treaties. Yet, it is difficult to see that suspension of the treaty will be an adequate remedy in all cases. Assuming that the term "suspension" means a temporary putting aside of the treaty, then "termination" rather than "suspension" may be a more adequate remedy in some instances.

57.06 In subparagraph (c) of paragraph 2, there may be some ambiguity as to the antecedent of the possessive pronoun "its" in the expression "its obligations under the treaty". On purely grammatical grounds, the pronoun would seem to refer back to the immediately preceding person - "every party". Thus, the breach in question is one which radically changes the position of every party with respect to the performance of every party's obligations under the treaty. Yet an argument could be made that the pronoun instead refers back to the term "one party". On that basis, the breach in question is one which radically changes the position of every party with respect to the performance of the defaulting State's obligations under the treaty. The latter interpretation seems more consistent with the purpose of the subparagraph than the former one. Accordingly, the article would be improved by substituting the words "the defaulting State's" for "its" in the last part of subparagraph (c). Alternately, the word "its" could be omitted altogether.

Instructions

In general the position of the delegation on this Article should be closely co-ordinated with other members of the W.E.O. group.

The Canadian commentary points out the particular need for independent adjudication in the application of this Article. It also refers to some drafting questions which the delegation may raise in the discussion of this article, either in the western group or in general discussion.

The U.S. is expected to propose an amendment to the Article to introduce the element of proportionality of response. The delegation may support an amendment in this sense.

Article 58

Supervening impossibility of performance

A party may invoke an impossibility of performing a treaty as a ground for terminating it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

Commentary

58.01 The scope of Article 58's definition of impossibility of performance seems too narrow. Obviously, there may be other causes of impossibility of performance than the disappearance or destruction of an object. Although one should try to avoid the resort to claims that performance is impossible in circumstances where it is only awkward or difficult, the article must not be so narrowly drafted that it fails to meet genuine cases of impossibility. Rather than attempting to define the particular cases in which a genuine claim could be made, the article might be stated more concisely. For example, the first sentence might state: "A party may invoke as a ground for the termination of a treaty the impossibility of executing the treaty.".

Instructions

The point referred to in the Canadian commentary should be raised by the delegation within the W.E.O. Group. It should be pursued in the Committee of the Whole if members of the W.E.O. group agree that the scope of the Article as drafted is too narrow.

The U.S. will propose an amendment to this Article tending to remove the apparent conflict between the concepts of permanent and temporary impossibility.

The position of the delegation on this Article should be co-ordinated with other members of the W.E.O. group.

Article 59

Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

   (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

   (b) the effect of the change is radically to transform the scope of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked:

   (a) as a ground for terminating or withdrawing from a treaty establishing a boundary;

   (b) if the fundamental change is the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other parties to the treaty.

Commentary

59.01 Assuming that there should be a right of termination based on fundamental change in circumstances, the limitations stated in Article 59 seem broadly satisfactory. There are many parts of Article 59 which lend themselves to subjective interpretations. For example, what bases are essential? What changes have the effect of radically transforming the scope of obligations? Yet, Article 59 does represent as reasonable a compromise as one may hope to achieve, given the pressures of the newer states toward broad rebus sic stantibus doctrines.

59.02 However, Article 59 may be too narrow in providing that a fundamental change in circumstances can only produce termination or withdrawal from the treaty as a whole. Certainly, it is clear that there can never be separability in relation to termination because of changed circumstances. A party which sought to contend that a particular provision was separable would find itself on the horns of a dilemma: to satisfy paragraph 3(b) of Article 41, it would need to show that the clause was not an essential basis for the other party's consent to the treaty as a whole; yet to satisfy paragraph 1(a) of Article 59, it must show that the circumstances to which the clause relates were an essential basis for the parties' consent to be bound.

59.03 The effects of non-separability in relation to a fundamental change of circumstances may be most obvious for boundary treaties. Paragraph 2(a) of Article 59 provides that a fundamental change in circumstances may not be invoked as a ground for terminating a treaty establishing a boundary. Yet many treaties which provide for boundaries contain other provisions having nothing to do with the boundaries. Are such provisions to be perpetual merely because the treaty also deals with a boundary question? Thus, it might surely be in Canada's interest to argue that the fisheries provisions of the old treaties were capable of being terminated where new fishing techniques had radically changed the relations of the parties. Yet if the fisheries clauses formed part of a treaty which framed a general territorial settlement between the European powers in the 1700's, would they be immutable?

59.04 Professor Lissitzyn has argued convincingly that neither existing practice nor a desire to improve the law justifies restricting the effect of a fundamental change in circumstances to termination or withdrawal. He has pointed out that the proper effect of changed circumstances may be suspension or limitation of performance: (Lissitzyn, "Treaties and Changed Circumstances (Rebus Sic Stantibus)" (1967), 61 A.J.I.L. 895, esp. at 911).

59.05 Professor Lissitzyn has also stressed the obscurity of the term "not foreseen by parties" in paragraph 1. Not only is the term "foreseen" ambiguous, but if the provision is read literally, the juxtaposition of two negatives seems to mean that a change which was foreseen may be invoked. Professor Lissitzyn rightly has supported the reintroduction of an earlier draft's terminology, excluding changes in circumstances "which the parties have foreseen and for the consequences of which they have made provision in the treaty itself."

Instructions

The London and Paris meetings expressed general approval of the substantive content of this Article. Changes of a drafting nature to meet the point referred to in the first paragraph of the Canadian commentary are to be proposed by the U.S.

The U.S. is also expected to propose a substantive amendment in the form of a new sub-paragraph in paragraph two providing that the doctrine of rebus may not be invoked where termination "would seriously impair the rights or interests of another party". It is difficult to imagine a circumstance where a State, by invoking rebus, would not "seriously impair" the rights or interests of another party. In fact the treaty rights of the other party are not merely seriously impaired, they are annihilated. The delegation should seek clarification of the effect which this amendment is intended to have. If its effect would be to deprive the Article of any practical significance the amendment is unlikely to command much support in the Conference and need not be supported by the delegation.

The delegation should raise in the W.E.O. group the question of including in the Article the concept, described in the Canadian commentary, of suspension of the operation of a treaty as a consequence of changed

circumstances. If the proposal receives a generally favourable reception, the delegation may pursue it in the Committee of the Whole. The delegation may also raise in the W.E.O. group the application of the principle of separability to this Article. In general the delegation should consult closely with other members of the W.E.O. group on this Article.

Article 60

Severance of diplomatic relations

The severance of diplomatic relations between parties to a treaty does not in itself affect the legal relations established between them by the treaty.

Commentary

60.01 Article 39 provides that termination must be based on the treaty's own terms or on the present articles. This being so, it is difficult to see the necessity for specifically excluding severance of diplomatic relations as a basis for termination. If nothing is said by the articles about a basis for termination and if the treaty says nothing about that basis, then there is no such basis. Hence, Article 60 is surplusage.

60.02 The references to severance of diplomatic relations are particularly mystifying in the absence of any reference to war as a cause for termination. Even if one discards the possibility of future wars, it is still essential to have a clear rule respecting the effect of past wars on past treaties. More particularly, the effect of wars must be analysed by every new state which wishes to determine the existing treaty obligations of its former colonial power so as to have a basis for deciding on state succession. This is not itself a question of state succession and hence, saved by Article 69, but a necessarily incidental question which arises in framing the treaty list of any colonial power which has ever participated in a war.

Instructions

Although the Article may be unnecessary, as pointed out in the Canadian commentary, its provisions are not harmful and the Article may therefore be accepted in its present form.

Article 61

Emergence of a new Peremptory norm of general international law

If a new peremptory norm of general international law of the kind referred to in article 50 is established, any existing treaty which is in conflict with that norm becomes void and terminates.

Commentary

61.01 Article 61 of course stands or falls with Article 50. If Article 50 is unworkable without an effective adjudication procedure, then *a fortiori*, Article 61 must be. Indeed, the subjectivity of judgments about the emergence of a new peremptory norm is likely to be greater than that of judgments about the existence of an existing peremptory norm.

Instructions

See instructions on Article 50.

Section 4 - Procedure

Article 62

Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which claims that a treaty is invalid or which alleges a ground for terminating, withdrawing from or suspending the operation of a treaty under the provisions of the present articles must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the grounds therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 63 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 42, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Commentary

62.01 As has been obvious in considering several other articles, the absence of effective means of adjudicating disputes may render apparently satisfactory provisions unsatisfactory. Clearly, Article 62 in its present form fails to provide any effective means for adjudicating disputes.

62.02 If one is to marshall support for a compulsory arbitration provision, it must be drafted in a way which will secure that support. One significant change would be to precede the whole of Article 62 (or its equivalent) with the words "Unless the treaty provides for an alternate means of final settlement of disputes". The preservation of a right of the parties to choose their own means of settlement - provided it is final - and to contract out of the International Court's jurisdiction may allay the fears of some States. Paragraph 4 of the existing draft is too general to achieve this objective; indeed, it seems to require fulfillment both of the requirements of any existing agreement respecting settlement of disputes and of the

requirements of Article 62. To put it another way, paragraph 4 preserves any higher requirements of an existing dispute settlement agreement; it does not enable the lower standards of an existing (or subsequent) dispute settlement agreement to displace those in Article 62.

Instructions

As pointed out in the introduction to these instructions, the obtaining of a satisfactory settlements dispute is a major political objective of the western group at this Conference.

The essential elements of a satisfactory disputes provision are:

1. It must provide for independent, i.e. third party, adjudication or arbitration.

2. Submission of a dispute to adjudication or arbitration at the request of any party to the dispute must be obligatory.

3. The decision of the adjudication or arbitration must be binding upon the parties.

4. The disputes provision must apply at least to the provisions of Part V.

Additional desiderata, though not essential, are:

(a) that the disputes article accord some role, even if only advisory, to the International Court of Justice;

(b) that it provide a summary procedure for determining the rights and duties of the parties to the treaty while the dispute is under adjudication; and

(c) that reservations in respect of the disputes article be prohibited.

The Paris and London meetings were unanimous in the view that the present disputes procedure is unsatisfactory. They also agreed that an optional protocol was not an acceptable solution. Participants at those meetings were unable, however, to formulate a procedure which they felt would be acceptable to the African and Asian countries.

If the western group is to achieve its objective in this issue, it is absolutely essential that the group remain united on the point that a satisfactory disputes provision is a sine qua non of western adherence to the convention, and that other delegations be convinced of the firmness of western views on this issue. It is not possible to anticipate at this time the settlements provision which will be adopted within the W.E.O.

group for submission to the Conference, but the delegation should do everything possible to maintain the solidarity of the western group over this issue and, in particular, co-ordinate its position closely with the U.S., British and French delegations.

Should the difference of views on this general question become so acute that there is a danger of the Conference breaking up, the delegation should seek instructions.

Article 63

Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 62 shall be carried out through an instrument communicated to the other parties.

2. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

Commentary

63.01 Like the procedure respecting reservations in Article 18, the procedure in Article 63 appears administratively unworkable in the case of major multilateral treaties. Article 63 obliges a State asserting invalidity of a treaty or terminating or withdrawing from a treaty or suspending a treaty to communicate with all other parties to the treaty. Presumably the effect of Article 39 is that the failure to obey this requirement of Article 63 renders an act declaring invalid, terminating or etc. a nullity. Thus, the act can not be regarded as effective until communications are made to all other parties.

63.02 Moreover, paragraph 2 of Article 63 forces a State making such an Act to have all copies signed by Head of State, Head of Government or Minister for Foreign Affairs or alternately to prepare full powers to the representative communicating the Act.

63.03 The likelihood of a new State's being able to effectively comply with the burden of this administrative formality is slim. Even for a developed country, the administrative difficulties are great in determining the precise time at which the last one of the communications was made to other parties. Yet, that time is the effective time of the termination, suspension or etc. regarding the treaty.

63.04 Certainly there seems to be little justification for imposing the procedural requirements of Article 63 upon acts of termination made in accordance with a provision of the treaty. If a treaty states that termination may be made by communicating with the depositary, why should Article 63 require further communications directly with all the other parties. Yet that would seem to be the effect of the words "pursuant to the provisions of the treaty" in Article 63. These words should be struck out and Article 63 should be preceded with the general phrase, "Unless the treaty provides otherwise,".

63.05 Note that the Article 73 fails to meet the administrative problem created by this article and Article 18. See further the comment on Article 73.

Instructions

The delegation may raise with the western group and in committee, if it appears appropriate, the two questions referred to in the commentary. On the question of notification in the case of multilateral treaties the Article does not specify the means of communication. Clarification should be sought that notification in such cases may be carried out through the depositary. The procedure provided for in this Article should be subject to any provisions in the treaty rather than vice versa, as the present text provides.

Article 64

Revocation of notifications and instruments provided for in articles 62 and 63

A notification or instrument provided for in articles 62 and 63 may be revoked at any time before it takes effect.

Commentary

64.01 Must a revocation of a notification or instrument be communicated to the same parties in the same manner as the notification or instrument itself? What procedure, if any, is required for revocation of a notification or instrument?

Instructions

The delegation may seek clarification of the procedures to be followed in revoking instruments of termination etc. However the Article is acceptable in its present form.

Section 5 - Consequences of the invalidity, termination or suspension of the operation of a treaty

Article 65

Consequences of the invalidity of a treaty

1. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

   (a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed.

   (b) acts performed in good faith before the nullity was invoked are not rendered unlawful by reason only of the nullity of the treaty.

3. In cases falling under articles 46, 47, 48 or 49, paragraph 2 does not apply with respect to the party to which the fraud, coercion or corrupt act is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Commentary

65.01 Paragraph 1 of Article 65 appears to be unnecessary. The paragraph does not achieve the objective which the commentary ascribes to it - making it clear that a void treaty is void ab initio and not merely from the date when the ground on which it is void is invoked. On this point, paragraph 1 is ambiguous. In fact, it is made as clear as is necessary in earlier articles and commentaries that a void treaty is exactly that and not merely a voidable treaty.

65.02 Paragraph 2 of Article 65 deals with what are essentially questions of state responsibility which perhaps should be omitted from the draft - since they are within the exclusion in Article 69. Indeed, paragraph 2 may amount to a limitation on what may ultimately emerge as the rule of state responsibility for misrepresentations.

65.03 The effect of paragraph 3 of Article 65 is obscure - and may be the opposite of what was intended. Paragraph 3 presumably was meant to be punitive; a party guilty of fraud, coercion or corruption cannot request restoration of the situation preceding the treaty which his misconduct has made a nullity. Yet it is difficult to see why subparagraph (b) of paragraph 2 should not apply even with respect to the wrongdoer. Does paragraph 3 mean that acts performed in good faith before the

nullity was invoked are rendered unlawful by reason of the nullity of the treaty for fraud, coercion or corruption? Moreover, paragraph 3's language, "with respect to the party" may be interpreted not merely as "on behalf of the party", but as "against the party". Surely that was not intended.

Instructions

The operation of this article must be subject to the provision for adjudicating of disputes. A state must not be able to claim that a treaty is void and that, because it has no legal effect, the disputes provisions need not be followed to effect its termination (cf. general instructions concerning Part V).

The Canadian delegation should raise with the W.E.O. group the points made in the commentary and should consult closely with other members of the W.E.O. group on the position to be adopted in respect of this article.

Article 66

Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

   (a) releases the parties from any obligation further to perform the treaty:

   (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Commentary

66.01 Although on its face, Article 66 appears straightforward, sub-paragraph (b) of paragraph 1 may strengthen the concept of "objective regimes" created by treaties. This is particularly the case if the word "situation" is interpreted broadly. Assume, for example, that a Canada-U.S. treaty has granted the U.S. a right of navigation in a Canadian river. If rigidly applied, Article 66 would lead to the conclusion that a valid termination of the treaty by Canada would not affect the right of navigation, because either the right, or the situation in which certain goods are normally transported by that route, was created by the operation of the treaty prior to its termination. This would particularly be the case if one contended that the treaty rights had become translated into servitudes or an "objective regime" for the river.

66.02 Hence, it would be preferable to reword (b) to read:

> (b) Does not require a party to restore the position that would have existed if acts had not been performed under the treaty prior to its termination.

Instructions

The delegation should raise, in informal discussions with some other delegations, the question of the application of this article raised in paragraph 66.01 of the Canadian commentary. If discussion confirms the view that the article is capable of the interpretation referred to in paragraph 66.01, the delegation should seek support for an amendment designed to avoid the rigid interpretation of the phrase "legal situation". This amendment may take the form proposed in paragraph 66.02 or any other form which meets the possible interpretation of "legal situation".

Article 67

Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law

1. In the case of a treaty void under article 50 the parties shall:

   (a) eliminate as far as possible the consequences of any act done in reliance on any provision which conflicts with the peremptory norm of general international law; and

   (b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 61, the termination of the treaty:

   (a) releases the parties from any obligation further to perform the treaty;

   (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Commentary

67.01 Subparagraph (b) of paragraph 2 of Article 67 has the same vague drafting as subparagraph (b) of paragraph 1 of Article 66. A change in drafting similar to that proposed above for Article 66 should be introduced for this Article as well.

67.02 Otherwise, assuming Articles 50 and 61 are acceptable, Article 67 seems acceptable.

Instructions

This Article is integrally related with Articles 50 and 61 on jus cogens and the position of the delegation will depend largely on whether Articles 50 and 61 are deleted or amended. The delegation should coordinate its position on the Article within the W.E.O. group. However, if Articles 50 and 61 are retained in substantially their present form there would appear to be no objection in principle to this Article in substantially its present form.

Article 68

Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present articles:

   (a) relieves the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of suspension;

   (b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to render the resumption of the operation of the treaty impossible.

Commentary

68.01 The scope of paragraph 2 of Article 68 is debatable. This shows again the necessity for an effective adjudication procedure for resolving disputes respecting the application of these articles.

Instructions

This Article is acceptable in its present form.

PART VI: MISCELLANEOUS PROVISIONS

Article 69

Cases of State succession and State responsibility

The provisions of the present articles are without prejudice to any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State.

Commentary

69.01 Since Article 69 and 70 relate to the general scope of the application of the present articles, they would be better placed in Part I of the articles.

69.02 Although the reservation of problems of state succession and of state responsibility is important, it is wrong to overlook the potential effect of the present articles on both areas. Thus, it is clear that the provisions of the articles respecting third party rights and duties are of great importance if they are to be used in interpreting devolution agreements. Again, Article 5 will have a very substantial effect on not only issues of state responsibility, but recognition.

Instructions

This Article is acceptable in its present form.

Article 70

Case of an aggressor State

The present articles are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

Commentary

70.01 Whether Article 70 is necessary is questionable. Presumably, it is intended to prevent an aggressor from later relying on Article 48 and contending that a peace settlement has been forced upon his representatives by coercion. Certainly, Article 70 can have no relation to Article 49 since the coercive force referred to must have been employed in violation of the Charter.

70.02 Although the value of Article 70 is doubtful, there seems to be no obvious potential harm in retaining the Article.

Instructions

At the Paris meeting many representatives argued for the deletion of this Article because of the difficulty of defining aggression and the vagueness of the clause "measures taken in conformity with the Charter". However the principle of the Article appears acceptable and, unless other major members of the W.E.O. group are so strongly opposed to the Article that Canadian acceptance would be undesirable from the viewpoint of relations within the group, the delegation may accept this Article.

PART VII: DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

Article 71

Depositaries of treaties

1. The depositary of a treaty, which may be a State or an international organization, shall be designated by the negotiating States in the treaty or in some other manner.

2. The functions of a depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance.

Commentary

71.01 The concept of the role of depositary in Articles 71 to 73 is of great importance. As noted previously, the procedures in Articles 18 and 63 are administratively unworkable if they require direct communications between a state and a large number of other parties or States entitled to become parties. This is particularly the case if notifications or the like are ineffectual unless and until communicated to all other parties or to all other states entitled to become parties; it becomes almost impossible to determine the time at which a notification has become effective under this system.

71.02 Hence, if one rejects the concept of constructive notice by the filing of the notification with a depositary and rather interprets the role of the depositary merely as a species of conduit pipe or post office, the administrative difficulties are not met. Indeed, since the delivery of the notifications is out of the notifying party's hands and is in the care of the depositary, the notifying party can have no idea at any particular time about the progress which its notification has made in reaching all the States which it is obliged to notify. Thus the notifying party - which obviously will be one of the parties most directly concerned - cannot know the moment at which its notification has become effective. This may present serious problems in ensuring that its internal law corresponds to its treaty obligations at any particular time.

71.03 On the other hand, if one adopts the opposite concept of a depositary and holds that the depositary stands in the shoes of the individual states, it is difficult to protect the depositary from the necessity of making judgments on the legal effects of instruments containing reservations or objections to reservations and deposited with the depositary.

71.04 The full effect of these differing views of the depositary's role is discussed by Ambassador Shabtai Rosenne: ("The Depositary of International Treaties" (1967), 61 A.J.I.L. 923). Here it is sufficient to note that the articles as drafted require further consideration and that the administrative problems have not yet been met.

Instructions

The points raised in the Canadian commentary on this Article should be considered in relation to Article 73.

Article 71 is acceptable as presently drafted.

Article 72

Functions of depositaries

1. The functions of a depositary, unless the treaty otherwise provides, comprise in particular:

   (a) keeping the custody of the original text of the treaty, if entrusted to it;

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

   (c) receiving any signatures to the treaty and any instruments and notifications relating to it;

   (d) examining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present articles and, if need be, bringing the matter to the attention of the State in question;

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

   (f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, accession, acceptance or approval required for the entry into force of the treaty have been received or deposited;

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

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the other States entitled to become parties to the treaty, or, where appropriate, of the competent organ of the organization concerned.

Commentary

72.01 Rosenne suggests that the words "in particular" in the introductory phrase of paragraph 1 of Article 72 emphasize that the catalogue of depositary functions in Article 72 is not exhaustive: (Op. cit., at 937). With respect, this meaning is not the normal meaning of the words "in particular". Indeed, the full phrase is "comprise in particular" which suggests an exhaustive listing to follow. If words are needed to indicate that the list is not exhaustive, it would be better drafting to substitute for the words "comprise in particular" the word "include".

72.02 Requirements that a depositary undertake any act in relation to States "entitled to become parties" force the depositary to determine who are such states. Depending upon the wording of the accession clause of the treaty, this may force the depositary to make judgments on whether a particular entity, e.g. East Germany, is a State, and on the treaty-making capacity of States members of a federal union, for example. Subparagraphs (b), (e), and (f) of paragraph 1 of Article 72 all require the depositary to determine who are the states entitled to become parties.

Instructions

It would appear desirable to clarify, in this article, the duties of a depositary in dealing with instruments of ratification or accession containing a reservation. The delegation should therefore seek to have incorporated in this article the principles set out by the General Assembly governing the conduct of the Secretary General as depositary. The UNGA resolution on this subject is set out in the I.L.C. commentary on Articles 16 and 17 (para. 6) and provides that it is for the States concerned, and not the depositary, to determine the legal consequences of a reservation or an objection to a reservation.

Article 73

Notifications and communications

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

(a) if there is no depositary, be transmitted directly to the States for which it is intended; or if there is a depositary, to the latter;

(b) be considered as having been made by the State in question only upon its receipt by the State 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 for which it was intended only upon the latter State's having been informed by the depositary in accordance with article 72, paragraph 1(e).

Commentary

73.01 The Commentary on Article 71 is relevant to Article 73.

73.02 Article 73 is the most important provision respecting the nature of the depositary's role. The article attempts to reconcile the competing views of the depositary's function by providing that the notification is made by the ratifying state when received by the depositary (paragraph (b)) but is not received by the States to be notified until those States have been informed by the depositary (paragraph (c)). In fact this compromise fails to meet the problems of two basic types of notifications - those under Article 18 and those under Article 63. Article 18 requires that a reservation be "communicated" to the other states. Article 63 speaks of an instrument "communicated to the other parties". As previously noted, both Articles 18 and 63 are vague as to the effect of noncommunication. However, Article 19 only gives legal effect to reservations "in accordance with articles 16, 17 and 18" and Article 39 requires that notices of invalidity, termination, etc. conform with the present articles. Hence one must infer that unless reservations and notifications are communicated, the requirements of Articles 18 or 63 have not been met and the reservations or notifications are defective. If this is so, then it is not helpful to provide that the reservation or notification has been made by advice to the depositary, if the communication is not completed until the depositary has notified each and every state in the group entitled to be notified. Thus, the problem of of time of communication still remains in spite of paragraph (b) of Article 73.

73.03 To avoid the administrative problems, one must accept the doctrine of constructive notice. Delivery to the depositary is delivery to the parties. The danger of accepting constructive notice of course is that a State for a

time may be placed under legal obligations of which it is unaware. Perhaps this danger could be met by providing some type of time-lag. Notice to the depositary could be deemed notice to the parties one month after delivery of notice to the depositary. Certainly the administrative danger of the present draft seems to outweigh the alternate dangers of constructive notice.

Instructions

The problem of the time difference between the making and the receiving of notice, referred to in the Canadian commentary, would appear to be a very practical one and may be raised by the delegation in discussion of this Article for the purpose of clarifying the effect of the Article.

However the present draft represents a compromise, negotiated with difficulty in the I.L.C., designed to avoid possible harm to States from being affected by notice they have not actually received and, as well, to avoid placing an impossible administrative burden upon depositaries. The delegation need not, therefore, press for inclusion of the doctrine of constructive notice in the Article, though it may accept any amendment to this effect which has general support.

Article 74

Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the contracting States are agreed that it contains an error, the error shall, unless they otherwise decide, 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 a separate 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:

   (a) shall notify the contracting States of the error and of the proposal to correct it if no objection is raised within a specified time limit;

   (b) if on the expiry of the time limit no objection has been raised, shall make and initial the correction in the text and shall execute a procès-verbal of the rectification of the text, and communicate a copy of it to the contracting States;

   (c) if an objection has been raised to the proposed correction, shall communicate the objection to the other contracting States.

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 contracting States agree should be corrected.

4. (a) The corrected text replaces the defective text ab initio, unless the contracting States otherwise decide.

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

5. 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 to the contracting States.

Instructions

This Article is acceptable in its present form.

Article 75

Registration and publication of treaties

Treaties entered into by parties to the present articles shall as soon as possible be registered with the Secretariat of the United Nations. Their registration and publication shall be governed by the regulations adopted by the General Assembly of the United Nations.

Commentary

75.01 Unlike Article 102 of the Charter, and the analogous provision of Article 18 of the League of Nations Covenant, this draft article imposes no penalty for failure to register a treaty with the Secretariat.

75.02 Note that Article 102 of the charter applies to Member States (though it has in practice been followed by non-members), and that the present Article 75 applies to a different group - parties to the present articles.

75.03 There is an ambiguity in Article 75. Does it apply to any treaty to which a party to the present articles is also a party? Or does it apply only to treaties with all parties being parties to the present articles? To put the problem another way, is a party to the present articles bound by Article 75 to register treaties made with States not parties to the present articles? To clarify this, the first sentence of Article 75 could perhaps be redrafted to read:

> Every party to the present article, shall as soon as possible register with the Secretariat of the United Nations any treaty to which it becomes a party which has not previously been registered with the Secretariat.

Instructions

The delegation may raise, in discussion of this Article, the point raised in the Canadian commentary and, if it appears suitable, may propose the amendment in paragraph 75.03. The Article is acceptable, however, in its present form.

Instructions

Final Articles

It is not possible to deal with all the possible issues which may arise in connection with the final articles until the contents of the articles are known. The following observations, however, are for the guidance of the delegation concerning matters which are expected to arise under this heading.

Entry into force

There was a consensus at the Paris meeting that, because of the law-making character of the Convention and the importance of the subject matter, a large number of ratifications should be required for the entry into force of the Convention. The delegation may support this general policy and should co-ordinate its position on this point with other members of the W.E.O. group.

Retroactivity

See instructions on Article 24.

Right of Accession

The delegation may support the usual western position against opening the Convention to accession by "all States". Instructions should be sought should the western position alter on this question.

Reservations

The question of reservations concerning the adjudication provisions of the convention is particularly important.

If western efforts to have a compulsory third-party adjudication provision incorporated in the articles are unsuccessful, the delegation may support a general effort of the W.E.O. group to prohibit reservations with respect to that article. Should such efforts by the W.E.O. group to prohibit reservations not be successful, the Canadian delegation may nonetheless accept the permissability of reservations to a compulsory adjudication clause.

If reservations to the disputes article are to be permitted, or if the procedure of an optional protocol on disputes is adopted, then the delegation may support a general effort of the W.E.O. group to permit adhering States to specify when adhering that they accept the application of Part V only in respect of those States which have accepted the provisions for compulsory settlement of disputes.