EDITORIAL COMMENT

The Obligation to Register Treaties and International Agreements with the United Nations

Under Article 102(1) of the United Nations Charter, it will be recalled, "[*e*]*very* treaty and *every* international agreement entered into by any Member . . . *shall* as soon as possible be registered with the Secretariat and published by it."[1] This provision, according to a report made to the Society some 20 years ago, "automatically brings in, for publication in the *United Nations Treaty Series*, most of the agreements made since the beginning of the United Nations. . . ."[2] Would that this optimistic assertion had proved true! In the course of recent efforts to collect for publication all the lump-sum settlements concluded between the end of World War II and January 1, 1971, this writer found to his surprise and dismay that only 56 of 126 such agreements, well under 50 percent, had been registered with, and subsequently published by, the United Nations.[3]

Behind Article 102(1) and its predecessor, Article 18 of the Covenant of the League of Nations,[4] lies "the principle of open diplomacy and the avoidance of secret pacts."[5] Failure to register not only undercuts this principle, first advocated by President Wilson in 1918,[6] but also ignores an equally important policy consideration, namely, the recording of contemporary trends in substantive international law. Hudson's description of the pre-Covenant state of affairs retains a good deal of validity today:

> Scholars found it difficult to keep abreast of the development of conventional international law, and even specialists in particular fields did not have readily accessible the treaties which specially related to their work.
>
> The serious consequences of this were that the world's treaty law came to lack unity . . . and the conventional side of international

[1] U.N. Charter, Art. 102, par. 1 (emphasis added).

[2] Eagleton, "The Handling of Treaties by the Secretariat of the United Nations," Report of the Committee to Study Legal Problems of the United Nations, 1951 Proceedings, American Society of International Law 139.

[3] See Authors' Introduction to 2 R. Lillich and B. Weston, International Claims: Their Settlement by Lump Sum Agreements (to be published by the Syracuse University Press during 1972 in the Procedural Aspects of International Law Series). Some states, of course, may contend that lump-sum settlements, which often contain a high content of commercial and economic matters, are not subject to the registration requirement. Most states have registered at least one such settlement, however, indicating that general practice regards them as treaties for purposes of Art. 102.

[4] League of Nations Covenant, Art. 18. While very similar to Art. 102(1), this article contains a final sentence not included in its successor: "No such treaty or international engagement shall be binding until so registered."

[5] Brandon, "Analysis of the Terms 'Treaty' and 'International Agreement' for Purposes of Registration under Article 102 of the United Nations Charter," 47 A.J.I.L. 49, 69 (1953).

[6] Hudson, "The Registration and Publication of Treaties," 19 A.J.I.L. 273 (1925).

law came to be disregarded or neglected by writers and scholars and jurists.[7]. . .

One only can speculate, reading the above, whether the International Court of Justice's approach to the *Barcelona Traction Case*[8] would have been the same if the Court and counsel had had easy access to the 70 lump-sum agreements not yet published in the *United Nations Treaty Series*, almost all of which authorize, or have been construed to authorize, shareholder claims.[9]

Why the various states ignore their obligation to register treaties is hard to fathom. Lack of concern and carelessness perhaps are the major reasons. Another one frequently advanced is the alleged confidential character of certain agreements. It is common knowledge, for instance, that Cuba concluded a tentative settlement with Spain in May, 1967, yet the parties regard the agreement as "a classified document. . . ."[10] Why? Does Franco's Spain not wish to acknowledge that it does business with Castro's Cuba? Does the Revolutionary Government of Cuba wish to conceal from the Western world, especially the United States, that it is willing to settle nationalization claims? Surely the fact that the French-Cuban Claims Agreement of March 16, 1967, has been published in three sources,[11] albeit unhappily not in the *United Nations Treaty Series*, makes the non-publication of its Spanish counterpart appear somewhat whimsical.

Equally hard to fathom is how to encourage states to comply with Article 102(1). Unlike Article 18 of the Covenant, which required registration before treaties became binding,[12] the only sanction contained in the Charter is the one found in Article 102(2). A party to a non-registered treaty, according to this provision, may not invoke it before any organ of the United Nations, surely a "milder sanction" indeed for what arguably is a breach of the Charter.[13] Moreover, while "[p]ersistent failure may be construed as an offense against Article 2(2) and, theoretically, may entail expulsion, under Article 6,"[14] such action obviously would be disproportionate to the gravity of the obligation breached. For this reason, it never has been seriously considered as a sanction against non-complying states.

The upshot of the matter for the hapless international lawyer, whether academic, government or practicing, is not particularly promising. True, Article 80 of the Vienna Convention on the Law of Treaties reaffirms and extends the principle of registration by providing that "[t]reaties

[7] *Ibid.* at 288.

[8] Barcelona Traction, Light & Power Co., Ltd. Case, [1970] I.C.J. Rep. 3; 64 A.J.I.L. 653 (1970); 9 Int. Legal Materials 227 (1970).

[9] See Lillich, "The Rigidity of Barcelona," 65 A.J.I.L. 522 (1971). See also round table discussion in 65 A.J.I.L. (September) 333 (1971).

[10] Letter from Sr. Pedro Bermejo, First Secretary, Spanish Embassy, to the author, March 4, 1971.

[11] [1967] J.O. 9761; [1968] R.G.D.I.P. 299; 45 Journal du Droit International 172 (1968).

[12] See note 4 above.

[13] N. Bentwich and A. Martin, A Commentary on the Charter of the United Nations 178 (1950).

[14] *Ibid.*

shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication," [15] but whether this provision will be any more honored by states parties than Article 102(1) remains to be seen. Hence countries like the United States, with an enviable registration record,[16] and scholarly organizations such as the Society, with its continuing interest in international law documentation,[17] must press strenuously for the prompt registration of *every* treaty if the goal of comprehensive coverage by the *United Nations Treaty Series* is to be achieved.

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[15] U.N. Doc. A/CONF. 39/27 at 42 (1969), reprinted in 63 A.J.I.L. 875, 901 (1969).

[16] Of the nine lump-sum settlements concluded by the United Sates since World War II, only the most recent, the United States–Canadian Agreement of Nov. 18, 1968, [1968] U.S.T. 7863, T.I.A.S., No. 6624, has not been published in the U.N. Treaty Series.

[17] See, *e.g.*, Report of the Committee on Publications of the Department of State and the United Nations, 64 A.J.I.L. (September) 293 (1970).