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ABBREVIATIONS

AC	-	Appeal Cases
ACHPR	-	African Charter on Human and Peoples' Rights
ACHR	-	American Convention on Human Rights
AIR	-	All India Reports
AJIL	-	American Journal of International Law
All ER	-	All England Reports
Brooklyn JIL	-	Brooklyn Journal of International Law
CFR	-	Code of Federal Regulations
Cmnd	-	Command Papers (UK)
ECHR	-	European Convention on Human Rights
Eur.Ct.HR	-	European Court of Human Rights
EXCOM	-	Executive Committee of the UN High Commissioner for Refugees
FEER	-	Far Eastern Economic Review
GAOR	-	General Assembly Official Records
H.C.	-	House of Commons
H.L.	-	House of Lords
HRQ	-	Human Rights Quarterly
IALR	-	Iranian Assets Litigation Reporter
ICCPR	-	International Covenant on Civil and Political Rights
ICJ Rep.	-	International Court of Justice, Reports of Judgements, Advisory Opinions and Orders
ICLQ	-	International and Comparative Law Quarterly
IHT	-	International Herald Tribune
IJECL	-	International Journal of Estuarine and Coastal Law
IJRL	-	International Journal of Refugee Law
ILM	-	International Legal Materials
ILR	-	International Law Reports
Int'l. Org.	-	International Organization
IRAC	-	Indochina Resource Action Centre
Iran-U.S. CTR	-	Iran-U.S. Claims Tribunal Reports
JDI	-	Journal de Droit International
JENRL	-	Journal of Energy and Natural Resources Law
J.Space L.	-	Journal of Space Law
LegCoProc	-	Legislative Council Proceedings (Hongkong)
MLJ	-	Malayan Law Journal
MLR	-	Mealey's Litigation Reporter (Iranian Claims)
ODIL	-	Ocean Development and International Law
Phil.LJ	-	Philippine Law Journal
Phil.YIL	-	Philippine Yearbook of International Law
PLD (19..) S.C.	-	Pakistan Law Digest (19..) Supreme Court
QBD	-	Queen's Bench Division
RdC	-	Recueil des Cours de L'Académie de Droit International de la Hage / Collection of Cources of the Hague Academy of International Law
SCMP	-	South China Morning Post
SCRA	-	Supreme Court Reports Annotated (Phil.)
SLR	-	Singapore Law Reports

Stan JIL	-	Stanford Journal of International Law
Stat.	-	Statutes at Large (US)
UDHR	-	Universal Declaration of Human Rights
UKTS	-	Treaty Series (UK)
UNCED	-	United Nations Conference on Environment and Development
UNHCR	-	United Nations High Commissioner for Refugees
UNTS	-	United Nations Treaty Series
U.S.	-	United States Reports
U.S.C.	-	United States Code
VaJIL	-	Virginia Journal of International Law
Vanderbilt JTL	-	Vanderbilt Journal of Transnational Law
WCED	-	World Commission on Environment and Development
WLR	-	Weekly Law Reports (UK)
YBECHR	-	Yearbook of the European Convention on Human Rights
YCA	-	Yearbook Commercial Arbitration
ZaöRV	-	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

ARTICLES

THE INTERNATIONAL COURT OF JUSTICE AND INTERNATIONAL ENVIRONMENTAL LAW *

E. Valencia-Ospina **

To speak on international environmental law and the International Court of Justice might seem a rather daunting task because the Court has never had to decide on environmental issues except in the *Nuclear Tests* cases (*I.C.J. Reports 1974*, pp. 253 and 457) and tangentially in the *Fisheries Jurisdiction* cases (*I.C.J. Reports* 1975, pp. 3 and 175) and some continental shelf delimitation cases. Thus my task today is not to analyse the Court's current environmental jurisprudence but rather to assess the Court's potential role in the future development of international environmental law. I am encouraged in this regard by the significant advances that have been made to date in the development of international legal norms. These derive from the *Trail Smelter Arbitration* (16 April 1938, 3 U.N.R.I.A.A. 1931 (1949)), the *Nuclear Tests* cases and certain other international judicial decisions and arbitrations, from various global and regional conventions including the United Nations Convention on the Law of the Sea and from pronouncements of the United Nations, particularly the 1972 United Nations Declaration on the Human Environment.

While the rules governing international environmental law are still in their embryonic stages and are often cast in vague general terms, the number and frequency of international conventions and treaties reflect a clear desire on the part of the world community to control the threat to the global environment caused by pollution.

I would like at the outset to make two observations of general import. First, the international judge is no substitute for States in the "legislative" function they assume within the international legal order, directly through multilateral conventions and treaties or indirectly, by setting up

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*. Address given at the thirty-first session of the Asian-African Legal Consultative Committee at Islamabad, January 1992.

**. Registrar of the International Court of Justice.

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specialized organs, such as the International Law Commission of the United Nations, entrusted with the preparatory work for the conventional codification and development of international law. Second, it must be stressed that the large majority of cases of transfrontier pollution would be best settled by conventional regimes of easy application enabling individuals who are victims to obtain prompt satisfaction from municipal courts. It is also within the framework of such conventional regimes that it will be possible to implement specific rules relating to the preservation of the environment, and to exchange information.

As against this, the Court, as the foremost international judicial organ, seems ideally suited to interpret treaties and conventions that are the product of the legislative functions of States, and to act as a Court of last resort where local remedies and diplomatic exchanges have failed. One fact that cannot be denied is that pollution is international in character. This characteristic of pollution not only rests upon a physical reality — of which transfrontier pollution provides the clearest possible illustration — but also on a juridical one; international law is susceptible of dealing, for example, with problems of maritime pollution in which the sources of pollution of the coasts of a State X may be a vessel flying the flag of State Y and commissioned on behalf of a company of a third nationality, Z. The case of the *Amoco Cadiz* starts to illustrate the intricacy of the problems of international law that may arise. The complexity of the legal issues involved demonstrates the need for recourse to a judicial organ specializing in international law.

In the first part of this speech, I will outline some of the difficulties that will face litigants who seek to invoke the Court's jurisdiction in an international environmental dispute.

In the second part I will examine the structure and jurisdiction of the Court with particular emphasis on powers of the Court that are of potential application to international environmental disputes.

The final part of this speech will outline a number of environmental legal issues upon which clarification by the Court would be useful.

I. Difficulties facing the Court's future role in environmental decision-making

Several obstacles exist, in the current regime of international environmental law, to use of the Court to adjudicate environmental issues. A close examination of these obstacles reveals that they are not insurmountable.

First, restrictive rules of standing limit the scope of environmental problems for which the Court could provide solutions. The Court is normally inaccessible to non-State claimants. To combat this standing diffi-

culty, States must elevate the private injury suffered to the international level. States have already done so in numerous instances. For example, the United States and Canada did so in the 1935 Treaty upon which the jurisdiction of the arbitration panel in the *Trail Smelter* case was founded.

Even more difficult is the problem of bringing a claim on behalf of shared interests, such as the protection of the ocean from marine pollution, when injuries to individual interests of the claimant State cannot be shown. Support has been growing for the *actio popularis* doctrine under which the complaining State might be considered as vindicating the rights of the entire international community. In the *Barcelona Traction* case (*I.C.J. Reports 1970,* pp. 3, 32), the Court recognized the existence of a certain category of rights of such importance that "all States can be held to have a legal interest in their protection; they are obligations *erga omnes*". Recognition by States of the *actio popularis* doctrine in the field of environmental law would reflect a fundamental change in the way States have traditionally perceived the international legal order. But one only needs to become fully aware that the problems of environmental law increasingly relate to international spaces placed outside the individual sovereignty of States (high seas, Antarctica, extra-atmospheric space) and correlatively, to certain spaces exclusively under territorial sovereignty (e.g., the Amazonian forest) to understand the need for a departure from traditional rules of standing.

Second, States have failed to agree on levels of pollution that will trigger a State's responsibility to the international community. The problem is that international environmental law involves policy and social considerations that often pull in diametrically opposite directions. Thus, economic development pits itself against environmental preservation and State sovereignty against the common heritage of mankind. The greater the cultural, social and economic differences between parties to a dispute, the more they will differ and hence the more difficult it will be to settle or avoid the dispute. This is clearly seen in the different approaches that developed and developing nations take to environmental protection. Many developing States view with suspicion environmental standards suggested by developed States on the grounds that implementation of the suggested standards would slow down their economic development and give a competitive advantage to the developed States.

The tension between temporal goals of profit maximization and the need to preserve the environment for future generations has thus made consensus on the meaning of the term pollution difficult to achieve.

The lack of consensus is underscored by the rarity of recourse to "eco-standards" in the relevant treaties and conventional provisions; they frequently include nothing more than an obligation to refrain from polluting,

formulated in general terms. If there is to be effective enforcement of environmental international law, States must go beyond general declarations and adopt standards against which a State's polluting activity can be measured. The ecostandards provided for in many EEC regulations and directives illustrate some of the possibilities. There is also the need for States to agree upon who should bear the cost of compliance with ecostandards, a subject which will be extensively discussed at the United Nations Conference on the Environment and Development in Rio de Janeiro in June.

There is a growing lobby in support of the establishment of an international mechanism empowered to monitor and enforce the provisions of environmental treaties. Analogous powers are vested in the European Commission under EEC law. Conceivably, the Court could be empowered to play a role in connection with the decisions of such a mechanism, as does the European Court from decisions from the European Commission on environmental law.

Third, States have traditionally been reluctant to submit international environmental disputes to judicial bodies because the scarcity of jurisprudence in the area makes the outcome difficult to predict. Depending which side of the dispute they are on, States fear that a court would take a liberal, legislative approach or alternatively that it would feel constrained by formal rules of international environmental law, or more accurately the lack of such rules, to adopt a conservative approach. This traditional mistrust is reflected in provisions for dispute settlements in many environmental treaties which make arbitral or judicial adjudication dependent on common agreement to bind the parties to a dispute — so that, if one of the parties is opposed 2 to legal adjudication, this will suffice to exclude it. This runs counter to the recommendations put forward by the World Commission on Environment and Development ("the Brundtland Report") to UNEP in 1987, when it proposed as its legal principle No. 22, that "if mutual agreement on a solution or other dispute settlement arrangement is not reached within eighteen months",

> ". . .the dispute shall be submitted to conciliation and, if unresolved, thereafter to arbitration or judicial settlement at the request of any of the concerned States". (UN Doc. A/42/47, p. 342).

The theory that the lack of a developed corpus of international environmental law makes recourse to judicial decision-making hazardous is not borne out in practice. In the *Trail Smelter* Arbitration, the Arbitration Panel held that a State has an obligation to prevent domestic activities from harming the environment in other countries to any significant degree. Although the decision has been criticized as merely restating a

principle embodied in the applicable treaty, the Arbitration Panel stated for the first time a general principle that has formed the bedrock of almost all subsequent treaties relating to international environmental law. Moreover, to mitigate any conservative nature of the formal rules of international environmental law the *ex aequo et bono* provision of Article 38 of the Statute of the Court can be used, by agreement, to ensure that equity considerations are taken into account. Instead of turning away from legalistic solutions to environmental problems, it is important to encourage further clarification of legal standards through treaty-making and the explicit recognition of legal considerations in reaching negotiated settlements of environmental disputes.

The decision of the Trail Smelter Tribunal indicates the potential effectiveness of international tribunals. Not only did the Tribunal articulate a series of effects standards through its determination of the interests legally injured by fumes from the Canadian Smelter, but it also established emission standards for the plant to prevent further damages and set up a monitoring regime based on measurements of air quality in the effected region to ensure compliance. Equally, participation by the Court in environmental disputes would not only assist in *ad hoc* standard-setting in situations which involve treaty interpretation and other legal issues but would also lead to the development of a body of environmental law which, it would be hoped, would reduce the duplication of time and effort implied by an increased reliance on *ad hoc* tribunals.

A fourth complaint for which there is no obvious answer, is that judicial processes tend to become lengthy and problems require much faster solutions. To argue that negotiation often reflects the same problem is an inadequate defense. But the Court has recently adopted procedures designed to achieve more speedy settlements of disputes. Furthermore, in cases where there is a need for speedy action, the Court can order interim measures to maintain the status quo pending resolution of the entire dispute.

Finally, there are those who argue that the underlying questions in many environmental disputes are of such a technical nature that judges trained only in the law may have difficulty in understanding them. If the judges had no opportunity to obtain the services of experts in the relevant field this indeed would be a serious problem. But the procedures of the Court, to which I will return in more detail shortly, can be used to secure this assistance. For example, "assessors" nominated by the international organization specializing in the problem under consideration can serve as non-voting members of the deliberative body.

None of the problems identified above are insuperable if States recognize the long-term advantages in a clarification of the rules of State

responsibility that only adjudicating institutes can provide. Dispute settlement provisions in the 1982 Law of the Sea Convention illustrate some of the possibilities. The Convention provides for certain forms of binding third-party settlements: the Court, an arbitral tribunal, a special arbitral tribunal, and an on-going Law of the Sea Tribunal with a separate Sea-Bed Disputes Chamber. When a dispute arises the States designate one of the desired procedures. If a State to a dispute fails to agree or fails to designate its preferred method of adjudication, the dispute is settled by a tribunal.

II. Powers of the International Court of Justice

I turn now to certain powers of the Court, often overlooked, that are potentially useful to the settlement of international environmental disputes.

Under its Statute, the Court enjoys contentious, advisory and incidental jurisdiction.

A. The contentious jurisdiction of the Court depends upon the consent of the parties. Consent can be given *ad hoc*, in respect of a specific dispute or in advance of any dispute by several means including a formal declaration or treaty provision. The Court has the power to form chambers of three or more judges to deal with categories of contentious cases or with a single contentious case. This power was exercised for the first time in the *Gulf of Maine* case. In 1985-1986, the Court considered the possible formation of a chamber to deal with environmental disputes. It took the view that it was not necessary to set up a standing special chamber, but emphasized that it might be willing to respond positively to a request for an *ad hoc* chamber to deal with an environmental dispute.

B. The advisory jurisdiction of the Court is open solely to principal United Nations organs and to international organizations authorized by the General Assembly. States who have an interest in the subject matter of the dispute may be called upon to furnish information. Although no international organization with a environmental portfolio has yet a right to directly invoke the advisory jurisdiction of the Court, it is not inconceivable that such an organization might apply to the General Assembly for authorization. While advisory opinions of the Court are recommendatory only, they assist in the identification and development of rules relating to international environmental law.

C. The Court's incidental jurisdiction includes powers of potential application to environmental disputes between States.

(i) The Court can grant intervenor status in contentious proceedings to States under Article 62. This is of interest in light of the ecologi-

cal inter-relationships between States and the emerging concepts of an international community interest in the protection of the environment. A State also has a right under Article 63 to intervene when the construction of a convention to which it is a party is at issue.

(ii) The Court has the power, under Article 50 to request an individual body, bureau, commission or other organization to carry out an inquiry or give an expert opinion. This right, though rarely invoked, was exercised in the *Corfu Channel* case and holds potential for factually and technically complex environmental disputes.

(iii) The Court has the power, referred to earlier, under Articles 9 and 30 to appoint assessors of special technical or legal competence to sit with the Court and participate in the deliberations but not to vote.

(iv) Finally, under Article 40 (1), the Court has the power to indicate interim measures of protection to preserve the rights of parties if the circumstances so require it. Interim measures are generally warranted where there is a risk of an irreparable harm to a State's existing rights that is not compensable by reparation or restitution.

III. Why should environmental disputes be submitted to the International Court of Justice?

It is important for every field of international law — particularly if it is still embryonic or going through a period of profound change to count on a "reference" organ whatever its kind. As the primary international judicial organ, the Court occupies a privileged position in relation to the interpretation of international law. Several treaties in which the international community entrusts the Court with the final decision-making power reflect this privileged status, e.g., *Genocide Convention* (1951) or the definition of the continental shelf on the Law of the Sea (several judgments). Moreover, a certain number of bilateral and multilateral instruments, wholly or partly devoted to preservation of the environment, provide that, albeit sometimes with significant reservations, the Court shall have jurisdiction to settle disputes relating to their interpretation or application. Article 11 of the Vienna Convention for the Protection of the Ozone Layer of 22 March 1985 is one example.

The idea that the Court is in a privileged position with respect to the interpretation of international law has arisen from the social need of the international community for such interpretation. Although the decisions of the Court bind only the parties to a particular dispute, the interest that

has been taken in a decision is less that of ascertaining the particular result in a given case than of discovering the reasoning and rules the Court applied in reaching the result. The Court's jurisprudence therefore serves as a reference to a given aspect of the international legal order, relating to both rules of substance and to the rules specific to the functioning of that order. By providing that reference the Court as a permanent judicial institution basing its activities upon a constant jurisprudence from well established rules of procedure, is ultimately well placed to meet the expectations of States, international organizations and other protagonists on the international scene.

There are a number of examples of subjects on which clarification of international law would be useful:

(i) The Nature of International Responsibility of States under Environmental Law:

One particularly controversial point is whether responsibility incurred by a State under environmental law, constitutes responsibility for a wrongful or illicit act. That kind of issue is well known in internal regional legal orders. It involves concepts of liability, either small or large and the place occupied by the obligation of "due diligence". In international law it also forms part of a new concept which has been the subject of a great deal of discussion: the concept of "international crime".

In this respect, the International Court of Justice could contribute to the resolution of certain specific problems arising from the implementation of an obligation to make reparation independently from the establishment of a wrongful act. Indeed, as we have seen, in the field of environmental law, the existing conventional regimes often avoid tackling the question of the extent to which injury due to pollution falls within the strict framework of international responsibility. Another question currently taking shape is that of the consequences of an "international crime". The International Law Commission has in Article 19 of the provisionally adopted Part I of its draft articles on State Responsibility provided that the following conduct amounts to an international crime:

> "A serious breach of an international obligation of central importance for the safeguarding and preservation of the human environment such as those prohibiting massive pollution of the atmospheres or of the seas." (*YILQ, 1980, Vol. II, Part 2,* p. 32.)

Were such a provision to be conventionally enacted or be regarded as embodying customary international law, it is clear that the Court would be in a position to apply, under appropriate circumstances, the number of criteria set out in the text. It would, to say the least, be shocking if a State

deemed to have occasioned a "mass pollution of the atmosphere or of the seas" could escape from the responsibility which it had incurred. *A fortiori,* this is an eloquent example of the way in which environmental problems may attain such proportions that it scarcely seems reasonable to exclude them from the application of the *lex lata.*

(ii) The Links between International Environmental Law and other Fields in International Law:

The recent war in the Gulf might provide a sad illustration of this point, with regard to convergence between rules aimed at preserving the environment and those that relate to the conduct of hostilities. I now refer to two other related fields, namely, international trade and human rights.

A number of activities connected with international trade pose a threat to the global environment. These activities include the transport of raw materials and the waste matter — including toxic or dangerous waste — that is generated by the exploitation or transportation of those raw materials. A large number of industrial accidents that have marked the recent history of damage to the environment relate to these same activities. Considerable efforts have already been undertaken, for example, in the normative rule-making of the International Maritime Organization, particularly with regard to the maritime transportation of hydrocarbons.

There is a clear and legal relationship between human rights and environmental law. It can readily be grasped that a degraded environment threatens an individual's health and his fundamental needs — or even his life. Over and above, the well being of future generations is at stake. It goes without saying that the link between human rights and environmental protection should be established — as was, moreover, done in 1972 by the Declaration of Stockholm on the Human Environment.

The International Court of Justice was formed in response to the needs of the international community. The foremost need of the international community at this time is to preserve the integrity of the present environment for the benefit of future generations. To respond to this need, States should shed their traditional unwillingness to commit their written aspirations to the warm glare of judicial scrutiny. They could do so by providing for recourse to the Court in the event of a dispute in the interpretation of environmental treaties or conventions that they have signed and ratified. Beyond this, States may have to rethink traditional notions of State responsibility to allow individual interests to be represented at the international level and to ensure that common areas such as oceans and air space are protected. Ultimately, it is to be hoped, States will create an international body to monitor and enforce environmental

standards. The Court could play a role in connection with the decisions of such a body, as it has already been envisaged in the Declaration of The Hague on the Environment of 11 March 1989.

ENVIRONMENT v. DEVELOPMENT REVISITED: CONTRIBUTIONS OF INDIA'S JUDICIARY TO THE CONFLICT RESOLUTION

Rahmatullah Khan*

1. INTRODUCTION

On 7 November 1990, the Supreme Court of India issued a significant Order (Writ Petition No 12819 of 1985, mimeograph copy) dismissing a petition filed under Article 32 of the Constitution by the *Tehri Bandh Virodh Sangarsh Samiti* [Tehri Dam Opposition Committee] and others. Petitioners had requested the Court to issue a restraint order to the Government of India preventing it from constructing a huge hydro-power project and a dam on the river Tehri on the ground that the dam posed a serious threat to the life, ecology and environment of the entire northern India as the site of the dam was prone to earthquakes. It was argued that expert testimony indicated that the pattern and consistency of earthquakes in the region were likely to have left a 200 to 300 kilometres length of fracture along the convergence boundary roughly covering the region from Dehradun on the west to the India-Nepal border in the east. Petitioners had good expert testimony on their side.

The project had been considered by the Environmental Appraisal Committee (EAC) of the Ministry of Environment and Forests which unanimously rejected it on the ground that its geological and seismic setting posed grave hazards, and the accompanying ecological and social consequences were unacceptable. Petitioners also highlighted the rather belated note of dissent submitted by Professor V. K. GAUR to the subsequent clearance given to the project by a High Level Committee of

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Experts (HLCE) appointed by the Committee of Secretaries. GAUR expressed misgivings about the EAC's competence to judge the safety aspects of the project. The legal contention of the petitioners was that the Government of India had not "applied its mind" to the safety aspect of the project.

The Government of India, on the other hand, maintained that it had considered all aspects of the project, taking the safety aspect into account in the worst case scenario, and that the recommendations of the International Congress of Large Dams on the seismic design of dams had been fully implemented. Reliance was placed, expectedly, on the conclusions of the HLCE which had testified that the seismic potential of the dam-site had been adequately taken into account in the project design. The Government pleadings also noted that it had taken steps to meet Professor GAUR's objections to the proposed dam by soliciting the advice of a renowned expert, Professor JAI KRISHNA, as suggested by Professor GAUR, and that only on the former's recommendation had the Government cleared the project.

The Court confessed that it did "not possess the requisite expertise to render any final opinion on the rival contentions of the experts"; that the design of the dam, the seismic potential and the steps taken to ensure safety were, in the Court's view, "highly intricate questions relating to science and technology": therefore the Court confined itself to an investigation and adjudication of the question "as to whether the Government was conscious of the inherent danger as pointed out by the petitioners and applied its mind to the safety of the dam." The Court was satisfied that the Government had "fully considered every aspect of the project including its safety" which was of "prime importance to the general public" and "did not find any good reason to issue a direction restraining the respondents from proceeding ahead with the implementation of the project." The petition thus failed and was dismissed with no order as to costs.

In addition to the site-specific problem of constructing a large dam in a seismic zone, the Tehri dam attracted a lively discussion on the very desirability of building big dams. An intense agitation against the dam gathered momentum, culminating into the fast-unto-death by a leading environmentalist (SUNDERLAL BAHUGUNA), which was given up at the personal intervention of an equally-committed then Environment Minister (MANEKA GANDHI). The safety factor, despite reassurances of the scientists, continues to haunt the concerned environmentalists, but the main motivation for opposing the Tehri (and other large dams, like the Narmada Valley project, against which a virtual crusade is underway by another environmental activist, BABA AMTE) revolved around the prospect of displacement and consequent destruction of the life-style of huge numbers

of people, principally tribals, living on lands that will be submerged by the large reservoirs of water. The myriad social and political issues do not figure in the above decision of the Supreme Court of India. The problem was dismissed on a technicality – whether or not the Government had applied its mind to the safety factor. And the agitation is back on the streets or sites of the large dams.

The case presents the dilemmas of the decision-makers, be it an administrator or a judge, around what is popularly captioned as development v. environment. One hesitates to resurrect this debate twenty years after Stockholm and after Founex. The debate is ended; the issue resolved: remove the confrontationist conjunction, i.e. versus; it is environment *and* development or, better still, sustainable development. The case discussed above, however, exposes the limits of the terminological solutions. It lays bare the ground realities in all their poignancies.

The technological feasibilities and economic advantages of constructing big dams are issues on which there is difference of scientific opinion. Lawyers – and judges – are hardly equipped to resolve the problem. Nevertheless, they help in finding rational solutions, by employing standard techniques of judicial control of administrative discretion. The *Tehri Bandh* case is a classic example. We have more on this later. This article, however, is not about judicial control of administrative discretion; it is about the role of the judiciary in harmonizing the nation's development goals and its environmental imperatives, as it is played out in India. We will present the constitutional-legislative scenario first for a better perception of the contribution of India's judiciary.

2. LEGAL FRAMEWORK

2.1 **Constitutional Provisions**

Although the word "environment" does not figure in the Constitution of India, several provisions in that prolific document deal with almost all the components that constitute environment, i.e., water, air, land, forest, wildlife and so on. The heightened awareness of environment after the Stockholm Conference, in which the then Prime Minister, Mrs. INDIRA GANDHI, participated, led the Government of India to incorporate a direct provision on environment in the Constitution. By the 42nd Amendment, Article 40-A was added, which read: "The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country."

The provisions were inserted in Part IV of the Constitution, which part, although non-justiciable, is fundamental to the governance of the country and the State has been enjoined to legislatively implement these directives. Article 37 of the Constitution of India reads:

> 'The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.'

It is evident that the provision is jurisprudentially imperfect, as individuals are denied *locus standi* to protect their right to environment, for the second provision added to the Constitution by the same Amendment spoke of duties of the citizens, rather than rights. Article 51-A states:

> 'It shall be the duty of every citizen of India to protect and to improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures.'

The imperfect right embodied in the above provision has been converted into a judicially enforceable right by an imaginative and environmentally attuned higher judiciary of India, which is a different story.

Resuming our constitutional narrative, there are many other provisions in the Constitution which deal with environment, such as Article 47 which provides that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. Similarly, Article 48 deals with the organization of agriculture and animal husbandry on modern and scientific lines, and Article 49 requires the State to protect every monument or place or object or article of historic interest from spoliation, disfigurement, destruction, removal, disposal or export. An earlier Article (that is 39) containing six clauses obligates the State to secure for its people certain basic social and economic rights, e.g., adequate means of livelihood, safeguarding the health and strength of workers, protection of children and youth against exploitation, equal pay for equal work for both men and women, and so on. The right of the individual to live with "human dignity" and the obligation of the State to ensure "social and economic justice" has posed problems of considerable magnitude to the State, which is discussed under the head "Environment and Development". Continuing our narrative on the constitutional scheme, one more feature that needs to be noted is the Centre-State division of powers.

The legislative and administrative competence of the Union and the States is drawn up in three Lists called the Union List or List I; State List or List II; and the Concurrent list or List III. The Union Parliament is vested with the exclusive power to make laws over matters enumerated

in the State List. On the other hand, both the Parliament of India and the legislature of any State are competent to make laws with respect to any of the matters enumerated in the Concurrent List. It should be noted that the Indian Parliament has primacy over the State legislature in the field of law-making. By virtue of Article 246, legislation passed by the Indian Parliament concerning matters in the Union and Concurrent Lists are paramount. The Parliament has also been empowered under Article 246 to pass legislation with respect to any matter for any part of the territory of India not included in a State, in spite of the fact that such a matter might have been a part of the State List. Moreover, Article 248, as well as entry 97 of the Union List, vest these residuary powers of legislation in the Union Parliament. The Constitution also provides instances when Parliament can directly legislate in regard to matters falling within the State List. The first instance is found in Article 352 which empowers the Parliament to legislate for two or more States by consent. The Water (Prevention and Control of Pollution) Act, 1974, was passed by the Parliament with the consent of the States.

There is another set of provisions in the Constitution which permits the Union Parliament to make laws even if a matter pertains to the State List. The Union Parliament has been authorized to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at an international conference, association or other body. The supplementary authorization provided in certain entries in the Union List together with Article 253, has the effect of almost shifting legislative competence in regard to matters provided there from the State to the Union List. Many of the important decisions concerning environmental matters are likely to be made at the international level, and will most likely fall within the State Legislature's competence. Hence, the above provision can be invoked by the Centre to give effect to international decisions. In that way, Article 253 and the related entries have great potentiality in terms of future action. The Parliament enacted the Air (Prevention and Control of Pollution) Act, 1981, by virtue of Article 253 (read with entry 13 of List I) of the Constitution. The preamble to the Act states categorically that it was enacted to implement the decisions reached at the 1972 Stockholm Conference insofar as they related to preservation of the quality of air and control of air pollution.

2.2 Environmental Lex Specialis

The specific laws adopted in the post-Stockholm period consist of the Water (Prevention and Control of Pollution) Act and Rules, the Air (Pre-

vention and Control of Pollution) Act and Rules, and the Environment Act and Rules, including their various amendments.[1]

2.3 Water Pollution

The problem of water pollution is sought to be tackled in India by two major Acts: one, the Water (Prevention and Control of Pollution) Act, 1984 (hereafter, the Water Act); and two, the Water Pollution and Prevention Cess Act (the Cess Act). The Water Act seeks to prevent and control water pollution by laying down guidelines and by the establishment of Boards for the purpose. Pollution is defined in sec. 2(E) and, broadly stated, it means such contamination and alteration to the properties of water or such discharge of sewage or trade effluent into water as is likely to create a nuisance, or render such water harmful or injurious to public health.

Chapter 2 of the Water Act provides for the constitution of a Central Board and State Boards for exercising the powers conferred and performing the function assigned to them. Chapter 4 deals with the powers and functions of the Board. Section 17 deals with the functions of a State Board. They include the inspection of the trade effluents and works and plants for the treatment of the trade effluents, and reviewing the plans, specifications and other data relating to treatment plants, and the system for disposal of trade effluent or other works in connection with the grant of consent under the Act, laying down of standards of trade effluents and the quality for receiving waters resulting from the discharge of such effluents, laying down of treatment of trade effluent to be discharged into a stream, and the making, varying, and revoking of orders for the prevention or abatement of discharges.

Chapter 5 contains the key provisions for preventing and controlling water pollution. Section 20 in this chapter empowers the State Board to

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1. The Water (Prevention and Control of Pollution) Act, 1974, as amended by the Amendment Act of 1978,
The Water (Prevention and Control of Pollution) Amendment Act 1988,
The Water (Prevention and Control of Pollution) Rules, 1975,
The Water (Prevention and Control of Pollution) Second Amendment Rules, 1976,
The Water (Prevention and Control of Pollution) Amendment Rules, 1989,
The Water (Prevention and Control of Pollution) Cess Act, 1977,
The Water (Prevention and Control of Pollution) Cess Rules, 1978 Corrigendum,
The Water (Prevention and Control of Pollution) Act, 1987,
The Water (Prevention and Control of Pollution) Amendment Act, 1987,
The Water (Prevention and Control of Pollution) Rules, 1982,
The Water (Prevention and Control of Pollution) (Union Territories) Rules, 1983,
The Water (Prevention and Control of Pollution) (Union Territories) Amendment Rules, 1988 Corrigendum,
The Environment (Protection) Act, 1986,
The Environment (Protection) Act, 1986,
The Environment (Protection) Amendment Rules, 1987 Corrigendum,
The Environment (Protection) Third Amendment Rules, 1987.

collect information and data about the flow of water in streams by itself; and also gives directions to persons and establishments consuming water to furnish data. Under section 27, the Board can get samples of the effluents and get them analyzed; and under section 22, a copy of the reports of the analysis is to be furnished to the occupier of the factory or premises concerned, and another copy is to be retained for the purpose of use in legal proceedings that may be initiated against him. Section 23 empowers any person authorized by the Board to enter any place for performing the functions entrusted to him; he can inspect the place and meet non-compliance with notices, orders or directions of the Board. Plans, records, documents and material objects can be examined if the commission of an offence is suspected.

Section 24 states that no person shall knowingly cause or permit any poisonous emission or polluting matter (determined in accordance with the standards laid down by the Board) to enter any stream or well; or discharge into the stream any other matter likely to impede the flow of water. Section 25(1) provides that no person shall, without the previous consent of the Board, bring into use any new or altered outlet for discharge of trade effluent, or begin to make any new discharge. The consent can be obtained by making an application to the Board under sub-section 2. After making an inquiry under sub-section 4, the Board can give its consent, subject to conditions as to the point of its discharge, construction and use of the outlet, and the nature, composition and rate of discharge of the trade effluent. Even when an outlet is brought into use, if the new discharge is made without obtaining consent, the Board can by notice impose such conditions under sub-section 5. Section 26 extends the provisions of section 25 to "existing discharges".

Under section 27 the Board can review the position from time to time. Section 28 and 29 deal with appeals and revisions. Section 30 empowers the Board to carry out the works in regard to conditions imposed by it, where the occupier commits default. When the Board apprehends that the water in a stream is likely to get polluted by reason of any matter therein it can apply to a Magistrate, under section 33, to restrain the person responsible from doing what is apprehended; and the court can pass appropriate orders, including an order to the person concerned to desist from making such discharge. Sections 41 to 46 deal with offences and penalties. Violations of a Magistrate's order issued under section 33 can be punished with imprisonment up to three months and with a fine. Contraventions of sections 24, 25 and 26 will lead to imprisonment for not less than six months and provision is also made for enhanced penalty for continuing offences. In case of a second conviction, the offender's name can

also be published in newspapers. Section 58 bars the jurisdiction of civil courts and section 60 gives overriding effect to the provisions of the Act.

The Cess Act is designed to give financial muscle to the Central and State Boards in order for them to carry out their functions properly. Section 3 provides a levy and collection of a cess for the purpose of preventing pollution. The levy is to be calculated on the basis of water consumed and at rates not exceeding those specified in schedule 2. Section 4 provides for installing meters for measuring consumption of water. Section 5 requires every person liable for payment of cess to furnish returns to the prescribed authority. The authority is to made assessments under section 6 on the basis of particulars furnished in the returns. Section 7 provides for grant of rebate to those consumers who install plants for treatment of trade effluents. Section 10 provides for collection of interest in cases of delayed payment of the cess, and section 11 for imposition of penalty. Section 12 authorizes the recovery of dues by resort to revenue recovery proceedings. Section 17(1) confers power on the Central Government to make rules for carrying out the purposes of the Act, and subsection (2) enumerates matters on which provision would be made in the rules. In pursuance to section 17, rules have been framed by the Government which are designated as the Water (Prevention and Control of Pollution) Cess Rules, 1978. Rule 2(B), for instance, prescribes that in relation to the State, the assessing authority shall be the member-secretary of the State Board. Rule 4 provides for submission of returns of consumers every month in form 1. Rule 6 deals with the grant of rebate; Rule 7 with the expiry dates; Rule with the composition of the valid authority; and under Rule 15 industries are specified in schedule 1 of the Act falling within the ambit of the Act.

2.4 **Air Pollution**

At the United Nations Conference on the Human Environment held in Stockholm in June 1972, in which India participated, decisions were taken to take appropriate steps for the preservation of the natural resources of the earth which, among other things, included the preservation of the quality of air and control of air pollution. The Government of India decided to implement those decisions in so far as they related to the preservation of the quality of air and control of air pollution in the Air (Prevention and Control of Pollution) Act, 1981. The Act was enacted under Article 253 of the Constitution to implement the decisions taken at the Stockholm Conference.

Under the Act, the Central Pollution Control Board and State Pollution Control Boards, set up under Articles 3 and 4 respectively, have the following powers:

Under Article 16(2), the *Central Board* may

(a) advise the Central Government on any matter concerning the improvement of the quality of air and the prevention, control or abatement of air pollution;
(b) plan and cause to be executed a nation-wide programme for the prevention, control or abatement of air pollution;
(c) coordinate the activities of the State Boards and resolve disputes among them;
(d) provide technical assistance and guidance to the State Boards, carry out and sponsor investigations and research relating to problems of air pollution and prevention, control or abatement of air pollution;
(e) plan and organize the training of persons engaged or to be engaged in programmes for the prevention, control or abatement of air pollution in such terms and conditions as the Central Board may specify;
(f) organize through mass media a comprehensive programme regarding the prevention, control or abatement of air pollution;
(g) collect, compile and publish technical and statistical data relating to air pollution and the measures devised for its effective prevention, control or abatement and prepare manuals, codes or guides relating to prevention, control or abatement of air pollution;
(h) lay down standards for the quality of the air;
(i) collect and disseminate information in respect of matters relating to air pollution.

Similarly, under Article 17, the *State Board* shall have the power to:

(a) plan a comprehensive programme for the prevention, control or abatement of air pollution and to secure the execution thereof;
(b) advise the State Government on any matter concerning the prevention, control or abatement of air pollution;
(c) inspect, at all reasonable times, any control equipment, industrial plant or manufacturing process and to give, by order, such directions to such persons as it may consider necessary to take steps for the prevention, control or abatement of air pollution;
(d) inspect air pollution control areas at such intervals as it may think necessary, assess the quality of air therein and take steps for the prevention, control or abatement of air pollution in such areas;
(e) lay down, in consultation with the Central Board and having regard to the standards for the quality of air laid down by the Cen-

tral Board, standards for emission of air pollutants into the atmosphere from industrial plants and automobiles or for the discharge of any air pollutant into the atmosphere from any other source whatsoever not being a ship or an aircraft.

Under Article 19(3), "[i]f the State Government, after consultation with the State Board, is of opinion *that the use of any fuel*, other than an approved fuel, in any air pollution control area or part thereof, may cause or is likely to cause air pollution, it may, by notification in the official Gazette, prohibit the use of such fuel in such area or part thereof with effect from such date as may be specified in the notification" (*emphasis added*). Article 19(4) states that the State Government may, after consultation with the State Board, by notification in the Official Gazette, direct that with effect from such date, as may be specified therein, no appliance, other than an approved appliance, shall be used in the premised situation in an air pollution control area. Under Article 19(5), if the State Government, after consultation with the State Board, is of opinion that the burning of any material, in any air pollution control area or part thereof, may cause or is likely to cause air pollution, it may, by notification in the official Gazette, prohibit the burning of such material in such area or part thereof.

Article 21 stipulates that no person shall, without the previous consent of the State Board, establish or operate any industrial plant in an air pollution control area. Also, under Article 22, no person operating any industrial plant in any air pollution control area shall discharge or cause or permit to be discharged the emission of any air pollutant in excess of the standards laid down by the State Board. By virtue of Article 37, whoever fails to comply with the provisions of section 21 or section 22 or directions issued under section 31A shall, in respect of each failure, be punishable with imprisonment for a term which shall not be less that one year and six months but which may extend to six years and with fine, and in case the failure continues, with additional fine which may extend to five thousand rupees for every day during which such failure continues after the conviction for the first such failure. If the failure referred to in sub-section (1) continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which shall not be less than two years, but which may extend to seven years and with fine (Article 37(2)).

Where an offence under this Act has been committed by any Department of Government, the Head of the Department shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly (Article 41). Provided that nothing contained in this section shall render such Head of the Department liable to any punish-

ment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

2.5 **The Environment (Protection) Act, 1986**

Perhaps realizing the deficiencies of adopting legislation in sectors, and obviously to fill the gaps left out in the aforesaid legislations, the Government of India passed the Environment (Protection) Act on 23 May 1986. The preamble to this Environment Act (as it will be referred to hereafter) identifies the decisions taken at Stockholm as the inspiration and source of authority. As such, it applies to the whole of India.

By virtue of the Environment Act, the Central Government assumes the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution. In particular, the powers claimed include coordinating the actions of State Governments, planning and executing nation-wide programmes, laying down emission and effluent standards, restricting operation of industries in some areas, ensuring safety procedures, and so on. The Central Government can constitute an authority or appoint officers to carry out the purposes of this Act. It can give directions, make rules, and establish procedures in furtherance of the objectives of this Act.

The Environment Act authorizes the Central Government to regulate handling of hazardous substances. The Act empowers the designated officers to inspect factories, take samples of emissions and effluents, have an analysis made in established or designated laboratories, and punish offenders. The punishment under this Act is quite severe: a prison term up to five years and fine of about a hundred thousand rupees; continuous violations attracting additional five thousand rupees a day and the prison term extendable to seven years in case of persistent contraventions beyond one year. The Environment Act contains a curious provision [section 24(2)] under which if an offence is punishable under this Act as well as any other Act (the Water Act, for instance) the offender "shall be liable to be punished under the other Act and not under this Act". This provision enables the offender to choose a lesser punishment, as the penalty provisions of the other Acts (e.g., the Water Act) are, as seen above, not as stiff as those of the Environment Act.

2.6 **The Wild Life (Protection) Act, 1972**

The rapid decline of India's wild animals and birds, one of the richest and most varied in the world, has been a cause of grave concern. Hence the legislation seeks to:

(a) constitute a Wild Life Advisory Board for each State;
(b) regulate hunting of wild animals and birds;
(c) lay down procedures for declaring areas as sanctuaries, national parks, etc.;
(d) regulate possession, acquisition or transfer of, or trade in, wild animals, animal articles and trophies and taxidermy thereof;
(e) provide penalties for the contravention of the Act.

Under Article 18 of the Act (chapter IV), the State Government may, by notification, declare any area to be a sanctuary if it considers that such area is of adequate ecological, faunal, floral, geomorphological, natural or zoological significance, for the purpose of protecting, propagating or developing wild life or its environment. Under Article 35, whenever it appears to the State Government that an area, whether within a sanctuary or not, is, by reason of its ecological, faunal, floral, geomorphological or zoological association or importance, needed to be constituted as a national park for the purpose of protecting, propagating or developing wild life therein or its environment, it may by notification declare its intention to constitute such area as a national park. Under Article 51, any person who contravenes any of the provisions of this Act shall, on conviction, be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to two thousand rupees, or with both.

2.7 **The Indian Forest Conservation Act, 1980**

With a view to checking further deforestation, an Ordinance was promulgated, but in 1980 a regular Act replaced the Ordinance. The Forest Conservation Act, 1980, was passed by the Parliament to provide for conservation of forests and for matters connected therewith or ancillary thereto. According to the statement of objects of the said Act deforestation caused ecological imbalances and led to environmental deterioration. It recognized that deforestation had been taking place on a large scale in the country, which had caused widespread concern.

This Act deals with *reserved, protected,* and *village forests* in pursuance to the national Forest Policy of 1952. The 1980 Act was formulated on six paramount needs of the country, *inter alia*, the need for checking:

(a) the denudation in mountainous regions, on which depends the perennial water supply of the river system whose basins constitute the fertile core of the country;
(b) the erosion causing havoc to the space along the treeless banks of the great rivers leading to ravine formation and on vast stretches of undulating waste-lands depriving the adjoining fields of their fertility;
(c) the need for establishing tree-cover, whenever possible, for the amelioration of physical and climatic conditions, promoting the general well-being of the people.

In the case of all forests, the forest officer has very wide-ranging powers to stop paths and water courses, to prevent/restrict entry, etc. He can prohibit (section 26) clearing of forests, setting fire to a forest or kindling of any fire which endangers a forest, removing any forest produce. This provision is especially detrimental to the tribals who live on forest produce.

However, under section 27, the State Government can declare an area a reserved forest or dereserve the same. This has been a subject of debate, which will be discussed later (3.3).

2.8 **The Motor Vehicles Act, 1988**

The statement of objects and reasons of the 1988 Act notes that various committees, like the National Transport Policy Committee, the National Police Commissioner, the Road Safety Committee, the Low-Powered Two Wheelers Committee, and the Law Commission have recommended the updating, simplification and rationalisation of the earlier 1939 Law. Some of the more important modifications of the 1988 law take care, *inter alia*, of

- the need for encouraging and the adoption of higher technology in the automotive sector, and
- demonstrating concern for road safety standards, pollution-control measures, standards for transportation of hazardous and explosive materials.

Section 109 requires every motor vehicle to be so constructed and maintained as to be at all times under the effective control of the person driving the vehicle. Section 110 authorizes the Central Government to make rules relating to construction and maintenance of vehicles in the matters of:

(g) the emission of smoke, visible vapours, sparks, ashes, grit or oil;
(h) the reduction of noise emitted by or caused by vehicles;

(i) provision for transportation of goods of dangerous or hazardous nature to human life;
(j) standards for emission of air pollutants.

The Central Motor Vehicle Rules, 1988, have been formulated to lay down detailed provisions in this regard. Rules 112, 113, 114 deal with smoke, vapour, ashes, grit and oil. Rule 112 stipulates that exhaust gases should escape only on the right rear of the vehicles. The exhaust pipe should be at least 35mm from the fuel line connecting the fuel tank and engine. Rule 115 provides for the level of carbon monoxide and smoke emission by vehicles. Rule 119 provides for the type of horns to be used in vehicles and kind/level of noise that can be produced. Under Rule 120, every vehicle should be fitted with silencers to reduce noise. Rule 129 specifies that every owner of vehicle transporting any dangerous or hazardous goods shall display the appropriate label of the class of goods he is transporting. The size and positioning of the label is specified in Rule 130. Under Rule 133, the driver of a vehicle transporting dangerous or hazardous goods is required to take all due precautions. Table III of the Rules lists the hazardous and toxic substances.

The above Indian *lex specialis* on environment has generated quite a bit of debate and has led to a good deal of litigation. In the process India's judiciary has had to deal with a new branch of law on the basis of an often deficient legislation. It overcame the problem by resurrecting old Common Law concepts, like nuisance, and by applying the Tort law rules on liability, etc.. More problematic were some substantive and processual issues, such as (i) "judicial control of administrative action", (ii) "standing" and (iii) evaluation of "expert testimony". The toughest task that India's judiciary was called upon to perform related to (iv) the resolution of claims to development posited as conflicting with a healthful environment. The next part discusses the first and fourth substantive issues at length.

3. JUDICIAL CONTROL OF ADMINISTRATIVE DISCRETION

Courts of India have demonstrated considerable courage in grappling complex environmental issues brought to their attention. In more than one case, courts were confronted with the problem of judging the legal propriety of administrative action. The standard argument was that the impugned administrative decision did not take into consideration the ecological imperative. The court in such cases employed the time-tested instrumentality of judicial control of administrative action, that is, that the administrative action should be fair, just and proper, and that the

authority concerned should apply its mind to all the aspects of the problem including the environmental aspect, and that the decision should not be arbitrary. In *Sachidanand Panday* v. *State of West Bengal*,[2] the Government of West Bengal was accused of showing lack of awareness of the problem of environment in making an allotment of land for the construction of a five-star hotel at the expense of the zoological garden.

The said zoo was situated in about 40 acres. The area proposed to be given for hotel construction was already in use by the zoo for fodder cultivation, burial ground for dead animals, an animal hospital, operation theatre, quarantine area, segregation wards, post-mortem room, a nursery for zoo animals and a horticulture section. Petitioners contended that the construction of a multi-storied building in the near vicinity of the zoo would be highly detrimental to the animals of the zoo, its ecological balance, and would adversely affect the bird migration which was one of the greatest attractions of the zoo.

The Court posited the ecological challenge in terms of administrative action as follows:

> "If the Government is alive to the various considerations requiring thought and deliberation and has arrived at a conscious decision after taking them into account, it may not be for this Court to interfere in the absence of *mala fides*. On the other hand, if relevant considerations are not borne in mind and irrelevant considerations influenced the decision, the Court may interfere in order to prevent a likelihood of prejudice to the public" (p. 305).

Noting the law laid down in Articles 84-A and 51-A(g) of the Constitution, the Court stated that although it was the responsibility of the policy-making authority to devise the ways and means of implementing these Directive Principles, the Court had a duty to ensure that appropriate considerations were borne in mind and irrelevancies excluded. In appropriate cases, the Court stated, it could issue necessary directions. The Court added a very important caveat:

> "However the Court will not attempt to nicely balance relevant considerations. When the question involves the nice balancing of relevant considerations, the Court may feel justified in resigning itself to acceptance of the decision of concerned authority" (p. 305).

In the present case, the Court did not have to weigh the environmental variable as against other variables. For one thing, there was no destruction of ecology, but only a replacement of the facilities (animal hospital, burial ground, fodder cultivation, and so on). The beneficiary of the land-allotment, the *Taj* Group of Hotels, had assured the West Bengal Govern-

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2. (1987) 2 Supreme Court Cases 295.

ment that the services and facilities would be reconstructed on the premises of the Zoological Garden, which assurance was incorporated in the deed of lease. In order for the Court to make a determination that the impugned decision was not arbitrary, all that the Court had to do was to ensure that the inconveniences involved in the execution of the decision were taken cognizance of and that alternative arrangements had been made, which was abundantly made clear in this case.

The Court noted that the decision of the Government was taken openly, that it had ensured the improvement of the existing facilities which were "in shockingly unkept conditions" and that the old hospital "housed in a semi-dilapidated building" was replaced with a "modern zoo hospital". The Court also noted with satisfaction that the *Taj* Group of Hotels had waived their right to claim reimbursement of the money spent towards the cost of new constructions, which was Rs. 30 lakhs. The administrative decision was thus unimpeachable.

The question as to whether the Government was alive to the ecological considerations also posed no particular problem for the Court. The Court took note of the fact that the decision preceded two years of deliberation, that the Chief Minister had some correspondence with the Prime Minister, who had expressed fears that the construction of a high-rise building would hamper the trajectory of the migrating birds, and so on. The assurance on this score given by the West Bengal Chief Minister to the Prime Minister of India, together with the one given by J.R.D. TATA of the *Taj* Group of Hotels, convinced the Court that the ecological aspect was adequately gone into. The Court noted that there were taller buildings in the vicinity which had not hampered the flight of the birds, that the proposed facility was a garden hotel which would improve the ecology and environment of the land concerned. It also felt reassured by the expert opinion endorsing the hotel management's reassurance.

SACHIDANAND PANDEY thus did not pose to the Court any unenviable or insuperable problem of balancing the ecological element against any other element or elements. The cost to ecology was non-existent; in fact, the environment stood to gain in terms of improvement of the facilities. In other cases, the cost could be high, as the Court soon found out.

Not every conflict between environment and development is susceptible to an easy solution. In the SACHIDANAND PANDEY case animals in captivity could easily be moved from one site to another without great damage. The builder of the five-star hotel – if that activity could be subsumed under development – as well as the Government were all too willing to provide for the animals an alternative site with improved facilities. Here was a case where environment and development could be easily harmo-

nized. But things could get tough; as is the case with the Konarak sanctuary.

The *Oberoi* Group of Hotels wanted to construct a five-star hotel by the side of this *mecca* of tourists in search of oriental erotica. Wanting to provide sylvan surroundings for the proposed facility, the *Oberoi* Group applied for a large chunk of the nearby sanctuary populated by the buck, deer and other animals. The 70-acre sanctuary with rich casuarina, touching the beach with a unique ecosystem was declared as a protected forest in 1978 under the Orissa Forest Act. In 1984, the same stretch of forest was included in the notification declaring the much larger Balakhunda-Konarak wildlife sanctuary.

In 1987, the Orissa Government issued an order withdrawing the 1978 notification. The Konarak area was dereserved and the Oberoi Group application was approved. The requirement under the Forest Conservation Act of 1980 of obtaining the Ministry of Environment and Forest's permission for dereservation of reserved forests and the necessity of a recommendation of the chief wildlife warden and the principal conservator of forests was given the go-by. In fact, the then Minister of Environment and Forest, Z.R. ANSARI, and the chief wildlife warden and the principal conservator of forests, according to a leading commentator on environment, CLAUDE ALVARES,[3] strongly protested against the Orissa Government's move, but in vain. The case, ignoring innuendos about financial improprieties and kick-backs, presents a classic case of environment and development in which development receives an undue priority.

In *M.C. Mehta* v. *Union of India*[4], the petitioner requested appropriate action against some 75 tanneries located on the banks of the river Ganga at Jajmau near Kanpur. The tanneries discharged trade effluents causing damage to the life of the people who used the water of the river Ganga and also to the aquatic life in the river. The effluents in question were ten times as strong as domestic sewage. As the committee constituted by the Directorate General of Technical Development (Government of India) testified, the waste water discharge by the tanneries "contains putrescible organic and toxic inorganic materials which, when discharged as such, would deplete the dissolved oxygen content of the receiving water courses resulting in the death of all aquatic life and emanating foul odour".[5] The committee also stated that the untreated effluents polluted ground water resources and their discharge into public sewers resulted in the choking of the sewers.

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3. See, "Sanctuary in Peril", *The Illustrated Weekly of India*, 16 September 1990, pp. 46-47.
4. AIR 1988 SC 1037.
5. Ibid, p. 1042.

The Court noted expert testimony to the effect that 60 tanneries in Jajmau produced 12,000 hides and discharged five million litres of waste water per day. It also recorded another expert opinion commissioned by the Department of Environment more or less endorsing the said data. On the basis of such expert opinion, the Court came to the conclusion that the Ganga was grossly polluted, specially near the towns situated on its banks.

Interestingly, there was no dispute about either the volume or deleterious quality of the effluents of the tanneries. The only defence put up by 47 industries, out of the 75 impugned, was couched in the classical environment v. development terminology. Counsel for the tanneries argued that the tanneries generated employment and that the enormous cost of the treatment of installing treatment plants would inhibit their normal functioning and growth. The Hindustan Chamber of Commerce, of which 43 respondents were members, brought to the notice of the Court that 6 of the tanneries had already set up primary treatment plants, that 14 of them were about to construct such plants. The organization pointed out that an enormous expenditure would be incurred if all tanneries were to install the said treatment plants: the cost of a pre-treatment plant for 'A' class tannery was Rs. 368,000; the cost of the plant for a 'B' class tannery was Rs. 50,000. The Court was not persuaded by the above argument. It said:

> 'This cost does not appear to be excessive. The financial capacity of the tanneries should be considered as irrelevant while requiring them to establish primary treatment plants. Just like an industry which cannot pay minimum wages to its workers cannot be allowed to exist, a tannery which cannot set up a primary treatment plant cannot be permitted to continue to be in existence for the adverse effect on the public at large which is likely to ensue by the discharging of the trade effluents from the tannery to the river Ganga would be immense and it will outweigh any inconvenience that may be caused to the management and the labour employed by it on account of its closure.'[6]

The Court issued an order directing all the tanneries that did not have primary treatment plants to stop working. As for those that had already put up such plants the direction was that they should keep their primary treatment in working order. Those that had promised to establish primary treatment plants were ordered to do so within six months.

The judgement is noteworthy for the source of authority invoked for the issue of orders and directions noted above. "Under the laws of the land the responsibility for treatment of the industrial effluents is that of

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6. Ibid, p. 1045.

the industry", stated the Court, and added: "While the concept of 'strict liability' should be adhered to in some cases, circumstances may require that plans for sewerage and treatment systems should consider industrial effluents as well."[7] The Court did not find any circumstances to exonerate the industry from strict liability. As noted, it dismissed the argument based on costs. "For every breach of a right", the Court ruled, "there should be a remedy."[8] Justice K.N. SINGH, in a separate opinion, dismissed the supposed dichotomy between environment and development with the crisp, but effective, conclusion: "We are conscious that closure of tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance to the people."[9]

4. DEVELOPMENT V. ENVIRONMENT

Courts in India have grappled with the problem of balancing the ecological imperatives with the developmental needs of the country in a large number of cases that came up before them. One such set of cases related to the mining operations in Doon Valley. *The Rural Litigation and Entitlement Kendra, Dehradun* v. *The State of Uttar Pradesh*[10] was the first case that came up before the Supreme Court in which this conflict was sought to be resolved. The Supreme Court noted the havoc caused to the environment of the region by mining operations which had been a matter of concern of a number of committees, one of which was appointed by the Government itself. Of the three categories of limestone quarries, one was found by that committee to have done considerable harm to the ecology of the region. The Court therefore ordered their closure forthwith. There were two other categories of limestone quarries that were classified by one committee and lumped together by another. The Court ordered the closure of those of the quarries which were within the municipal limits of Dehradun, but allowed a few to continue with a clear directive that they should take into consideration the ecological needs of the region and that they should take precautionary measures so that the environment was not further damaged. The Court also ordered the quarries to conform to the safety regulations of the Mines Act, which was to be supervised by a committee appointed by the Court.

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7. Ibid, p. 1044.
8. Ibid, p. 1046.
9. Ibid, p. 1048.
10. AIR 1985 SC 652.

The Court was confronted with the problem of the developmental needs of the region and was particularly informed that the closure of the mining operations would result in the laying off of a number of workers which would result in acute unemployment in the region. The Court took the position that its action would undoubtedly cause hardship to them, but argued that it was a price that had to be paid for protecting and safeguarding the rights of the people to live in a healthy environment with minimal disturbance of the ecological balance and with avoidable hazard to them and to their cattle, homes and agricultural land. It nevertheless saw the need to mitigate the hardship caused by the closure of the quarries by directing the Government of India and the State of Uttar Pradesh to give preference to the owners of the quarries whenever new licenses for quarrying were given by the respective governments. The Court also ordered immediate steps to be taken for reclamation of the areas forming part of such limestone quarries with the help of the already available Eco-Task-Force of the Department of Environment, Government of India, and the workmen who were thrown out of employment in consequence of that order were, "as far as practicable and in the shortest possible time" were to be provided employment in the afforestation work and soil conservation programmes to be taken up in the area.

Allegations were made of unauthorized and illegal mining operations in the Mussouri Hills and the area around. The Court considered the letter received from the Rural Litigation Kendra, along with the accompanying affidavits, and treated it as a writ petition. The Court decided on 11 August 1982, after hearing the counsel of parties, to appoint a committee for inspecting all the mines other than those belonging to the State of U.P. and the Union of India, with a view to determining whether or not the safety standards laid down in the Mines Act, 1952, and the Mines Rules made thereunder were being observed and whether there was any danger of landslides on account of the quarrying operations, particularly during the monsoons, in any of the mines and if there was any hazard to the individuals, cattle or agricultural lands by reason of the mining operations. The Court-appointed committee came to be known as the *Bhargawa Committee* and its members were authorized to inspect the mines and give suitable directions. As stated, the Bhargawa Committee classified the mines in the area into three groups, "A", "B" and "C". As far as the mines in group "C" were concerned, the Committee was of the view that they were not suitable for continuance and should therefore be closed down, and as the group "A" mines were concerned, the Committee was of the opinion that the quarrying could be carried on without environmental or ecological hazards.

The judgement was delivered by RANGANATH MISRA, J. and P.N BHAGAWATI J. The judgement contains an erudite discussion of the problems of the Himalayan Range. It noted that this range of mountains had constituted the northern boundary of the country and until recent times had provided an impregnable protection to the Indian sub-continent from the northern direction. The Court also pointed out that the mountain range was responsible for regulating the monsoon and consequently the rainfall in the Indo-Gangetic belt. The Himalayas, the Court stated, were the source of perennial rivers – the Ganga, Yamuna and Brahamaputra and several other tributaries which joined those main rivers. For thousands of years, declared the Court, nature had displayed its splendour through the lush green trees, innumerable springs and beautiful flowers. The Himalayas had been a storehouse, the Court added, of herbs, shrubs and plants. The perennial water streams and the fertile soil had contributed, not only to the growth of dense, lush green forests, but had helped the yield of Basmati rice and leeches. The Court added that Mussouri, known as the queen of hill stations, situated at a height of 5,000 feet above sea-level, and Dehradun located below, were important places of tourist attraction, centres of education and research and a defence complex.

The Court stated that the valley was in danger because of erratic, irrational and uncontrolled quarrying of limestone. The landscape, the Court found, had been stripped of its verdant cover. The green cover today was only about 10 percent of the area, while some years ago it was almost 70 percent. Tracing the history of mining operations, the Court stated that there were 105 mining leases and that the limestone dug out from these quarries was useful for the manufacture of a special kind of steel. The U.P. Government had pleaded that the quarrying was in the national interest and that without this special kind of steel, which was used primarily in the manufacturing of defence equipment, the security of the nation would be jeopardized. The Court, however rejected this argument.

The Court paid obeisance to the prerogative of the Executive to decide the national priorities and whether the deposits should be exploited at the cost of the ecology and environmental considerations or whether the industrial requirement should be satisfied. It stated that it was perhaps possible to exercise greater control and vigil over the operation and strike a balance between the preservation and utilization that would indeed be a matter for an expert body to examine. On the basis of appropriate advice, the Government should take a policy decision and firmly implement the same. However, the Court ruled that the Governments both at the Centre and the State must realize and remain cognizant of the fact that the stake involved in the matter was large and far-reaching. The evil consequences of such mining could last long. Once that unwanted sit-

uation set in, the Court pointed out, amends or repairs would not be possible and it declared that the greenery of India might perish and the Thar desert may expand its limits. By specific reference to the Stockholm Declaration of June 1972, the Court stated that it was necessary that the Himalayas and the forest growth in the mountain range should be left uninterfered with so that there might be sufficient quantity of rain. The Court also stated that the top-soil might be preserved without being eroded and the natural setting of the area may remain intact. It urged the State Government to undertake a massive afforestation programme to remedy the harm already done to the region and to tap, for purposes of social development, the natural resources of the region with the requisite attention and care to the ecology and environment. The Court stated that it had always to be remembered that those were permanent assets of mankind and not intended to be exhausted in one generation. "Significantly", the Court noted, "preservation of the environment and keeping the ecological balance unaffected is a task which not only governments but also every citizen must undertake. It is a social obligation and let us remind every Indian citizen that it is a fundamental duty as enshrined in Article 51(g) of the Constitution."

It is not difficult to see in this judgement that the Court had only paid lip service to the authority or power of the Executive to decide or make policy decisions concerning the exploitation of natural resources and to take care of the developmental needs of the society. But then it had gone on to make that decision itself by ordering the closure of mines in the Doon Valley on the justifiable ground of preserving the environment. This judgement led to further litigation and, in 1988, the Court was confronted with the problem once again. In the *Rural Litigation and Entitlement Kendra* v. *State of Uttar Pradesh*[11] the Court explained its own jurisdiction to entertain a writ petition of the kind before it. The Court was faced with the argument that under the Environment (Protection) Act, 1986, the power was vested in the Central Government to take measures to protect and improve the environment. It was argued that the vesting of such power with the Central Government left no room for the Court to intervene in such matters. The Court stated that the Act did not purport to, and perhaps could not, take away the jurisdiction of the court to deal with a case of this type.

RANGANATH MISRA J. in this particular decision was even more picturesque in his description of the ecology of the region. The learned judge cited Kalidasa's *Meghadoot* to sing the glories of the Himalayas and repeated his earlier description of the cultural importance of the Ganga

11. AIR 1988 SC 2187.

and the Yamuna which provided the backdrop to *Krishna Lila.* He noted the contribution made by the Himalayas to the culture of the country and cited *Athurvaveda* to the effect that man's paradise was on earth and that the living world was the most beloved place of all. There were a number of passages in the judgement of RANAGATH MISRA J. dealing with the scientific significance of the Himalayan Range. The learned judge quoted reports of scientific institutions like the Birla Institute of Scientific Research to the effect that nearly 6,000 million tonnes of soil was washed away in floods every year, which was because of the deforestation of the Himalayas.

Addressing the problem of balancing the national security interests and development, on the one hand, and the ecological imperatives, on the other, the Supreme Court did the balancing itself by taking into consideration the statistics advanced by the Government of the Union of India in an affidavit on the requirement of the special steel which was manufactured by the lime extracted from the Doon Valley. It noted that the data furnished by the mine owners of the quarries in question showed that a total of 173,768 tonnes had been supplied to the steel plants from the Dehradun-Mussouri area during 1986 which was approximately 25 percent of the limestone production. Taking further into consideration the requirements of the sugar industry and the manufacture of chemicals and paper, which were also projected as the demands of development as against the environmental imperative, the Court noted the said requirements of the industries and dismissed the argument that the national interest or the foreign exchange requirements of the country or even the fact that the industries would be hard hit if mining activities in the Dehradun-Mussouri area were stopped. It stated that once the importance of forests was realized and the preservation of the same was accepted as a goal, nothing which would detract from that end should be permitted. The Court stated that trade would adjust itself to new circumstances. It reaffirmed its earlier decision to order closure of some of the mines which had clearly created hazard to the environment.

5. CASES UNDER THE FOREST (CONSERVATION) ACT, 1980

The Act extends to the whole of India, except the State of Jamu and Kashmir. Section 2 of the Act provides as follows: "Restriction on the dereservation of forests or use of forest land for non-forest purpose: Notwithstanding anything contained in any law for the time being in force in a State, no State Government or any other authority shall make, except with the prior approval of the Central Government, any order directing:

(1) that any reserved forest land or any portion thereof may be used for any non-forest purpose..." (Explanation for the purposes of this section: "non-forest" purpose means breaking up or clearing of any forest land or any portion thereof for any purpose other than reforestation). It will be seen that the section makes it obligatory for the State Government to obtain permission from the Central Government for dereservation of the reserved forest and for the use of forest land for non-forest purposes. It is apparent that two situations were intended to be prevented by the legislation in question, namely, dereservation of reserved forest and use of forest land for non-forest purposes.

A number of cases came up for consideration of the various High Courts or even the Supreme Court arising out of an interpretation of this particular section of the 1980 Act. One such case was the *Ambica Quarries Works* v. *The State of Gujarat.*[12] The Supreme Court was confronted in this case with the difficult, but persistent problem of striking a balance between the need for exploitation of the mineral resources lying hidden in the forests and the need to arrest the environmental deterioration of forests. The appellant had been granted a quarry lease for a minor mineral at site no. 73 of village Morai of Taluka Pardi in the district of Valsad in the State of Gujarat. The lease was granted on or about 29 November 1971 for a period of 10 years. The area comprised 13 acres of land for quarrying purpose. Three persons were granted two and half acres of land each and the remaining five and half acres land were placed at the disposal of the Industries, Mines and Power Department for the purpose of granting quarrying lease for the same. The case of the appellant was that the said lands were dereserved from the forest area of land since 1971. On or about 3 August 1981, when the lease was about to expire, the appellant applied for renewal of lease as per rule 18 of the Gujarat Minor Mineral Rules, 1966. The application was rejected by the Assistant Collector, Valsad on the ground that the land fell under the reserved forest area and hence the Forest Department of the State of Gujarat refused to give a "no objection" certificate. The contention of the appellant was that by the order dated 29 November 1971, the Forest Department had dereserved the said area and had allotted the land for quarrying by the appellant. It was further contended that the land was under the control of the Industries, Mines and Power Department, hence the 1980 Act did not apply to the same. The High Court of Gujarat dismissed the petition and the appellant went to the Supreme Court.

Counsel for the appellant argued before the Supreme Court that there was no question of extending the land in question to non-forest purposes,

12. AIR 1087 SC 1973.

and that at the relevant time when the request for renewal was made, the site of mining was already a dereserved forest. Therefore it was argued that the two conditions of section 2 of the 1980 Act were not applicable to the situation. Counsel also relied heavily on a case decided by the Supreme Court itself in which the Court had permitted the respondent to continue the mining operations even after the coming into force of the 1980 Act. The case under reference was *State of Bihar* v. *Banshi Ram Modi*[13] where a mining lease for extracting mica was granted by the State Government in respect of an area of 80 acres of land which formed part of the reserved forest before the coming into force of the 1980 Act. However, the forest land had been dug up and mining operations were being carried on only in an area of five acres out of the 80 acres allotted. During the mining operations, the respondent came across two associate minerals, namely feldspar and quartz, in the area. He therefore made an application to the State Government for the execution of a deed of incorporation to include the said minerals also in the lease. Though the 1980 Act had come into force, the State Government executed the deed incorporating these items without obtaining prior sanction of the Central Government under section 2 of the 1980 Act. Since the respondent in that case made a statement to the Court that he would carry on the mining operations only on five acres of land which had already been utilized for non-forest purposes even before the Act came into force, the question for determination was whether prior approval of the Central Government under section 2 of the 1980 Act was necessary for the State Government for granting permission to include the associate minerals also within the same area of five acres of land.

The Supreme Court answered the question in the negative and upheld the judgement of the High Court. The Court stated in *Banshi Ram Modi* that the result of taking the contrary view would be that while the digging for purposes of winning of mica could go on, the lessee would be deprived of collecting feldspar or quartz which he might come across while carrying out mining operations for winning mica. That, stated the Court, would lead to an unreasonable result which would not in any way subserve the object of the Act. Therefore, the Court was of the view that while before granting permission to start mining operations on a virgin area section 2 of the Act had to be complied with, it was not necessary to seek the prior approval of the Central Government for purposes of carrying out the mining operations on a forest area which was broken up or cleared before the commencement of the Act.

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13. AIR 1985 SC 814.

Distinguishing the above case and the ruling from the present one, the Court stated that in the *Ambica Quarries* case the operation of the 1980 Act had been given full effect. The Act, the Court stated, was enacted in recognition of the awareness of the fact that deforestation and ecological imbalances should be prevented. The Court added: "that was the primary purpose writ large in the Act of 1980. Therefore, the concept that power couples with the duty enjoined upon the respondents to renew the lease stands eroded by the mandate of the legislation as manifested in the 1980 Act, given the facts and circumstances of this case. The primary duty was to the community and that duty took precedence in our view in these cases. The obligation to the society must predominate over the obligation to the individuals".[14] In distinguishing *Ambica Quarries* from *Banshi Ram Modi* the Court stated that the appellant in the former was asking for the renewal of the quarrying leases, which would lead to further deforestation. From that view of the matter and the facts and circumstances of the case, the Court felt that the rationale of the latter case cannot be made applicable to support the appellant's demands in the present case because the facts were entirely different.

In *Kinkri Devi* v. *The State of Himachal Pradesh,*[15] the Himachal Pradesh High Court was moved under a social action litigation by a group of petitioners who depended upon an article published in the 6 April 1987 edition of *Indian Express* under the heading "Progress or People's Nightmare". The article highlighted the damage caused to the Shivalik hills in the Sirmaur district which were being "ruthlessly blasted for extracting limestone" and the danger and hazards faced by the inhabitants and the disturbance to the environment and ecology as a consequence thereof. The article was based on an investigative exercise made by a team of journalists who visited a number of mining sites in the district. The Court issued notices to the concerned officials and gave direction to the said officials to make an on-the-spot verification of the allegations contained in the *Indian Express* article. What emerged out of the investigations conducted by the various officials was very interesting.

The Court noted that a perusal and consideration of the material placed at its disposal by the various officials of the Government presented "a curious picture". The affidavit of the Deputy Commissioner and the reports of four senior officers of the State Government revealed the contents of the petition as well as of the newspaper article and the apprehensions expressed therein, with respect to the danger to the hilly tracks of the Sirmaur district and to its environment, etc. and the well-being of

14. AIR 1987 SC 1073, at 1076.

15. AIR 1988 Himachal Pradesh 4.

the inhabitants because of the quarrying of the limestone in the area in an unscientific and uncontrolled manner, were true to a large extent. However, the affidavit filed on behalf of the State of Himachal Pradesh and those on behalf of the third respondent, i.e. the Conservator of Forests and Wildlife, Shimla, presented a totally different picture. The Conservator of Forests had refuted every allegation made in the petition concerning the hazards resulting from the mining operations undertaken by him. The first respondent, i.e. the Conservator of Forests, Sirmaur district at Nahan, while reluctantly admitting that the mining operations caused a disturbance to the environment, made a statement to the Court that, with a view to protecting the environment and checking reckless or indiscriminate mining operations in the area, the Government had taken the decision not to entertain any mining lease application received after 5 December 1986 and had decided to undertake a detailed study as to the quality and quantity of the mineral deposits, the geological formations, physiography of the area, etc. The picture presented was, noted the Court, that all was well in the State of Denmark. The Court could not help observing that the stand of the State Government was "wholly irreconcilable with the versions of its own officers of rank in charge of the concerned fields of activity and that it is really difficult to appreciate such inconsistency of approaches and that upon the most charitable view being taken, it is capable of being explained only on the basis of a total lack of communication at different levels and organs of the Government machinery".[16]

After citing the Supreme Court directions and judgements in the *Rural Litigation and Entitlement Kendra* case, the Court held that the mining operations in the area had led to the cutting down of the forests, digging of the limestone and allowing the waste to roll down or carried down by rain water to the lower levels which had affected the villages as also the agricultural lands located below the hills. The Court further observed that the activity had led to blocking the naturally formed streams; that the blasting had disturbed the natural quiet, had shaken the soil, had loosened the rocky structures and had disturbed the entire ecology of the area. For removing the limestone quarried from the mines, roads had been laid and for that purpose the hills had been interfered with and traffic hazards for the local population had resulted both for animals and men. Given these facts, the Court, on the authority of the *Rural Litigation and Entitlement Kendra* case, had no difficulty in ordering the closure of the mining operations concerned.

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16. Ibid, p. 6.

After the citation of Articles 48(a) and 51(a)-(g) of the Constitution, by which a duty had been created for every citizen of India to protect and improve the natural environment, the Court stated that although the two provisions were under the Directive Principles of State Policy, they constituted a pointer to the State and created a constitutional duty for all citizens not only to protect but also to improve the environment and preserve the safeguards of the forests, the flora and fauna, the rivers and lakes and all other water resources of the country. The Court added: "The neglect and failure to abide by the pointer or to perform the duty is nothing short of the betrayal of the fundamental law which the State and indeed every Indian, high or low, is bound to uphold and maintain". The Court pointed out that exploitation of mineral resources in the interest of industrial growth of the country was necessary, but such mines should so work as not to disturb the ecology and not to affect the livelihood and the living conditions of a very large number of the people. The advantage gained by working the mines for industrial growth and national development in a manner which may seriously prejudice the interests of a large number of human beings and disturb the ecological balance, might very much be outweighed by the serious consequences which were likely to follow. The Court pointed out that industrial development was necessary for the economic growth of the country in the larger interest of the nation. If, however, industrial growth was sought to be achieved by a haphazard and reckless working of the mines resulting in the loss of life, property, basic amenities, like supply of water, and creation of ecological imbalance, there might ultimately be no real economic growth and no real prosperity. It was necessary to strike a proper balance. If the operations like the ones under consideration had resulted in a far-reaching and lasting adverse impact on the natural wealth and resources of the country, then the judiciary, affirmed the Court, cannot remain a silent spectator.

After the above strong statement, the Court ordered the setting up of a committee under the chairmanship of the Chief Secretary and consisting of the Secretaries in the departments of industry, public affairs, forest, agriculture, science and technology, and environment. The committee were to examine, *inter alia*, the question whether the grant of mining leases in respect of limestone in Tehsil Paonta Sahib, Renuka and Rajgarh, as per the particulars furnished in the annexe to the affidavit and filed by the Deputy Commissioner, Sirmaur, and more particularly the grant of such leases in or around the village Sangra, Tehsil, Renuka, District Sermaur was in accordance with the relevant statutory provisions, and whether the need for maintaining a proper balance between the tapping of the mineral resources for the development and the industrial growth on one hand, and the ecology, environment etc. on the other, had been

kept in view while making such grants, and whether those mines were being scientifically operated or worked in an erratic and uncontrolled manner, posing present and potential danger to the soil, the agriculture, the forests, the water resources and the water supply schemes, the rivers, streams, the flora and fauna, the ecology, the environment and life and living conditions of the people and their property. The Court directed the committee to hold such enquiry as it thought fit for the purposes of arriving at a considered opinion in regard to the above matters, taking such assistance of experts as was necessary. Obviously, the earlier affidavits filed by the various officers of the State Government had not satisfied the Court and it felt obliged to establish a high-level committee of its own.

The interplay between environment and development came to the fore in *Banwasi Sewa Ashram* v. *The State of Uttar Pradesh.*[17] The case presented for resolution a tangle of claims on a reserved forest declared so under section 20 of the Indian Forest Act 1927 by the State of Uttar Pradesh. The area contained 433 villages lying south of the Kaimur Range of the Mirzaput district. Of those, 299 were in Dughi tehsil and the remaining 134 in Robersganj tehsil. The area involved was 923,293 acres, out of which, in respect of 58,937.42 acres, notification under section 20 of the said Act had been made, declaring the same as reserved forest, and in respect of 789,086 acres notification under section 4 of the Act had been made. The *Adivasis* (tribals) in these forests had been in occupation of roughly 782,000 acres. There were two sets of claims and challenges to the proclamation of reserved forest made by the State Government in question; the first by some of the *Adivasis* who had used the forest area as their habitat. The Court noted that the *Adivasis* had raised several villages within the two tehsils and for generations had been using the jungles around for collecting the requirements for their livelihood — fruits, vegetables, fodder, flowers, timber, animals, by way of sport and fuel wood. When a part of the jungle became reserved forest and proceedings under the Act were initiated, the forest officers started interfering with their operations in those areas. Criminal cases for encroachment as also other forest offences were registered and a systematic attempt was made against the *Adivasis* to obstruct free movement. Steps were also taken to throw the *Adivasis* out of the area.

The State Government had decided in the meanwhile that a super thermal plant of the National Thermal Power Corporation Ltd. (for short, NTPC) would be located in part of the same area and acquisition proceedings for that purpose had been initiated. The NTPC was therefore a party before the Court.

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17. (1969) 4 Supreme Court Cases 753.

The Court had to strike a balance between the needs of the *Adivasis* and the development goals of the State. The Court did that by noting first that forests were a much wanted national asset and that depletion of forests had taken place alarmingly and the ecology had been disturbed. It further noted that the climate had undergone change and drains had become scanty; that the long-term adverse effects on national economy as also on the living process was self-evident. At the same time, pointed out the Court, "[w]e cannot lose sight of the fact that for industrial growth and also for provision of improved living facilities there is a great demand in this country for energy such as electricity. In fact, for quite some time the entire country in general and specific parts thereof in particular have suffered tremendous setback in industrial activity for want of energy. A scheme to generate electricity therefore is equally of national importance and cannot be deferred".[18]

The Court therefore adopted an elaborate mechanism and appointed a structure of committees and administrative machinery aimed at the investigation of the claims of the *Adivasis* with a view to satisfying their needs on part of the reserved land and allowing the NTPC to proceed with their scheme on the rest of the land which was sought to be acquired by the State. The administrative machinery consisted of two sets of officials of different levels, the first was empowered to investigate the claims of the *Adivasis* and consisted of revenue officials. The second rung comprised judicial officials of the rank of the Additional District Judge to be appointed by the Chief Justice of Uttar Pradesh. The forest settlement officer's finding on the maintainability of the claims of the *Adivasis* was to be placed for approval or otherwise of the judicial officers of the areas concerned. The Court also directed that legal aid shall be provided to the claimants and persons seeking to raise claims and for facilitating the obtaining of requisite information for lodging of claims. The Government was bound, so also the NTPC, to honour the decision of the forest settlement officers and also to provide facilities to land oustees. The Court appointed a Board of Commissioners to supervise the operations and oversee the implementation of the directions given before the Board of Commissioners.

The requirement of prior approval of the Central Government under section 2 of the Forest Conservation Act came up for a very close scrutiny in *Anupama Minerals* v. *The Union of India*.[19] The case concerned the land in survey number 7 of the Gandepalli village which was situated in the reserved forest bearing the same name. The said land was found to con-

18. Ibid, pp. 756-757.

19. AIR 1986 Andhra Pradesh 225.

tain limestone which is a minor mineral. The grant of leases with respect to minor minerals is governed by the Andhra Pradesh Minor Minerals Concession Rules, 1966. The appropriate authority to grant the mining leases under these rules is the Assistant or the Deputy Director as the case may be. The competent authority granted four leases in the area concerned to different individuals. A proviso to the A.P. Minor Minerals Concession Rules stated that leases in respect of a reserved forest land can be granted only after consultation with the divisional or the district forest office concerned.

Among the many issues contended before the Andhra Pradesh High Court was the one as to who was to seek the prior approval of the Central Government for permission under section 2 of the Forest Act. According to a circular letter sent by an Under-Secretary to the Government of India, Ministry of Agriculture in New Delhi, addressed to the Forest Secretaries of all States and Union territories, the individual departments of the State Governments were directed not to address the Central Government for approval and that it was the administrative responsibility of the Forest Departments which was the real custodian and owner of the forests in each State to correspond with the Central Government regarding transfer of forest areas, etc.

The Andhra Pradesh High Court held that the officer concerned had not "correctly appreciated the import of the procedure prescribed by the rules". The Court stated that the directive that prior approval of the Central Government should be sought for only by the Forest Departments was not the requirement by the rules. On the other hand, the Court added, Rule 4 spoke of permission being sought for by the State Government or other authority. Vesting the Forest Departments of the States with such a power would be, according to the A.P. High Court, "practically conferring a power of veto on the Forest Departments of the States in such matters." The Court further noted that the decision to approve or disapprove of requests made lay with the Central Government and such a power would not be transferred to the Forest Departments of the States because under the procedure suggested by the above mentioned officer of the Government of India all other departments of State would have to route the request of prior approval through the Department of Forests, and the Department of Forests under that procedure would gain a monopoly of such request-making.

Another important point that came up for consideration before the A.P. High Court was as to whether the Forest Department had a duty to forward a request for dereservation or otherwise under section 2 of the Forest Act in all cases. The Court noted that the Deputy Director of Mines and Geology had sought the prior approval of the Central Government;

such a contingency would arise only if and when the authority was satisfied that the application for grant of renewal of lease was in order and in conformity with the State Government rules and also only if he was of the opinion that the request ought to be granted. It was only when the officer concerned was of the opinion that an occasion had arisen for him to seek a prior approval of the Central Government that he ought to forward the application. If the application was not in order or, for some other weighty reasons of the State, the officer concerned was not convinced that there was a fit case for dereservation, etc., then the prior approval of the Central Government would only moot.

Adivasis are not the sole claimants for the use and fruits of the forests. *Kaniram* v. *State of Madhya Pradesh* offers a situation in which the objective of conservation of forests came into clash with the livelihood of a particular group of people who are not necessarily *Adivasis*. Petitioners in this case were residents of the District Mandsaur in the State of Madhya Pradesh, who had carried on the business of breeding and selling camels, and which business, according to the petitioners, was their only source of livelihood. The petitioners had been granted licenses for grazing their camels in the forest in accordance with the Madya Pradesh Grazing Rules, 1979, framed by the State Government in exercise of the power conferred by section 76 of the Indian Forest Act of 1927. In 1982, the applications of the petitioners for grant of grazing licences were, however, not accepted by the Government on the ground that there was an order issued by the State Government discontinuing the practice of granting grazing licences for that year.

The granting of licences for grazing purposes was covered by the rules entitled Madhya Pradesh Grazing Rates and Rules, 1979. Under these rules the State Government was empowered to grant permits for grazing at commercial rates. The rules prohibited grazing in reserved forests. The Court noted that the petitioners were not seeking the grant of licences for grazing their camel in the reserved forests. It was also admitted that the divisional forest officer had not declared the District of Mandsaur as closed for grazing under rule 4 of the aforesaid Rules. The Court also noted that the State Government had notified, in the Official Gazette of 28 August 1979, the rates for camel grazing. On the basis of a reading of the relevant rules, the Court found that the State Government did not have the power to impose a total ban on grant of licences for grazing by camels.

The plea taken by the State Government was that the granting of licences for grazing was a discretionary matter and that the applicants were not entitled to a concession of that nature as a matter of right. It was also pointed out that the grazing by camels had led to extensive destruc-

tion of trees. The Court, citing the Supreme Court decisions in *Ramana Dayaram Shetty* v. *International Airport Authority of India*[20] and *Messrs Kasturi Lal, Lakshmi Reddy* v. *State of Jammu and Kashmir*[21] ruled that it was well-settled that every activity of the Government had a public element in it and it must therefore be informed with reason and guided by public interest. It was no longer open to the State Government, the Court ruled further, to contend that it could exercise its discretionary powers in any manner it liked. The Court saw no evidence whatsoever that showed that the action of the State Government was based on sound reason and was not arbitrary and was in public interest. Therefore, the Court dismissed the State Government's contention on that score.

Deforestation in the country had led to some State Governments, under the inspiration of the Forests Conservation Act of 1980, to adopt a policy imposing a ban on cutting and felling of trees in the forest. The U.P. Government had declared on 21 October 1981 that henceforth no private individual would be allowed to cut and fell trees in the forest and that the task was to be done by the U.P. Forest Corporation only. The new policy led some enthusiastic forest officers to overreact to private felling even under licence. In *Daya Shankar Singh* v. *The Conservator of Forest (Southern Zone), U.P.*,[22] the Uttar Pradesh High Court was confronted with a case in which petitioners were forest contractors in the District of Mirzapur. They had purchased a number of forest lots in the Dudhi Forest division in the District of Mirzapur for cutting and removal of trees during 1980-81. The forest authorities entered into an agreement with the petitioners which stipulated that the petitioners would complete the cutting of trees by 31 March 1981. The petitioners had made the necessary deposits, but could not cut or remove the trees within this stipulated time. They applied for extension of period to enable them to cut and remove the trees on the ground that there was acute shortage of labour for the period in question. They had paid the contract money of Rs. 4.2 million.

On a reading of the standing orders governing the issue of licences and revoking of the same, the Court held that the Conservator of Forest, who was a public authority acting on behalf of the Government, was required to act in a reasonable manner while exercising his powers under the standing orders. In matters relating to granting of extension of periods of licence, he could not act arbitrarily at his own will, like a private individual. Instead, he must act in conformity with the Constitution and the principles laid down in the standing orders in a manner which may withstand

20. AIR 1979 SC 1628.
21. AIR 1980 SC 1992.
22. AIR 1984 Allahabad 188.

the test of reasonableness. Any departure from the principle of reason, held the Court, or the principle of equality would vitiate the order.

The Court found the facts pleaded, especially relating to the acute shortage of labour in the area, to be true. And the grounds on which the Conservator of Forest had refused extension, namely, that under the new U.P. Forest Policy no private individual was allowed to cut and remove forest trees, was held by the Court to be a prospective application of a policy unwarranted under the existing legislation of the State.

The U.P. High Court was quite considerate however, in the case of the *State of U.P.* v. *The Additional District Sessions Judge, Varanasi*[23] in which the notification required under sections 3 and 4 of the Forest Act (as amended in U.P.) was alleged to be vitiated by vagueness. The Court held that the area in question was huge and that the specifications made of the boundaries with reference to pillars was quite clear. The Court held that it was manifest that the specification given of the area in acres and also the boundaries was vague, but it was practically impossible to have specified the numerous plot numbers and there was no such requirement under the statute.

The objective of conservation of forest, which is the primary goal of the Forest Conservation Act, 1980, could and has run into problems when confronted with another salutary goal of State policy, namely distribution of land to the landless. In the *State of Kerala* v. *Musa Haji* case[24] the Kerala High Court had before it the Kerala Private Forests (Vesting and Assignment) Act of 1971 and the Madras Preservation of Private Forests Act of 1949 for interpretation and reconciliation. The first Act had an enabling provision for the vesting of private forests in the State Government and for assignment thereof to agriculturists and agricultural labourers for cultivation, as in the opinion of the legislature, all private forests in Kerala were agricultural lands. Section 10 of the said Act envisaged the vested forest's distribution among agricultural labourers, Scheduled Castes and Scheduled Tribes, unemployed young persons and others interested in taking up agriculture as their means of livelihood.

The Madras Preservation of Private Forests Act, 1949 (MPPF Act, for short) sought to prevent indiscriminate destruction of private forests and interference with customary and prescriptive rights therein. The Act applied to private forests of the Malabar and South Kanara Districts of the erstwhile Madras State. The key provision in that Act was section 3 which prohibited alienation of any part of the former and cutting of trees or the doing of any act that was likely to denude or diminish the utility of the for-

23. AIR 1984 Allahabad 1360.
24. AIR 1984 Kerala 149.

est, except with the previous permission of the District Collector. There were thus two Acts or legislative measures that sought to protect forests on the one hand and promote the interest of the weaker sections of the people, on the other.

In *Kerala* v. *Gwatiar Jain*[25], the Supreme Court had an occasion to examine the Kerala Vesting Act and had taken the view that the said Act was a legislative measure which could be construed as a scheme of agrarian reform designed to take over agricultural lands comprised in private forest and for the settlement of the poorer classes of the rural population on those lands for promotion of agriculture, etc. The Kerala Government had also adopted a Land Reforms Act in 1964, placing the ceiling on the land that could be possessed by private individuals or families, and had by that Act taken over the excess land on payment of compensation for distribution amongst the landless agricultural labourers, etc.

The *Musa Haji* case revolved around what could be considered as private forests and whether teak plantations were exempted under section B of the Act. The Court refused to classify teak cultivation under the exemption provisions of the Act insofar as teak could not be considered as a fruit-bearing tree or an agricultural crop. The detailed *exposé* on the interpretation of the Act and its exemptions is not relevant to the present purposes. What is noteworthy is the attitude of the Kerala Government which was *prima facie* in conflict with the requirements of the conservation of forests. The Court had, as the Supreme Court also in the *Gwaliar Ryan* case had done, construed the developmental aspirations of the State as consistent with the conservation requirements of the forests.

6. CASES UNDER THE WILD LIFE PROTECTION ACT

The Wild Life Protection Act, 1972, has received a heartening response from the Indian judiciary, at least in terms of its purposes and background. In *Nellikka Achuthan* v. *Deshabhimani Printing and Publishing House Ltd,*[26] the Kerala High Court noted that the Act had brought about "massive changes" and that it constituted "the projection of the Parliamentary will for the protection of the wild life, in the background of the well-known Stockholm Declaration of 1970 (*sic*) wherein the then Prime Minister of India was a principal participant".[27] In *State of Bihar* v. *Murad*

25. AIR 1973 SC 2734.
26. AIR 1986 Kerala 41.
27. Ibid, at 44.

Ali Khan,[28] the Supreme Court of India demonstrated an erudition that went beyond a mere familiarity with the Stockholm Declaration:

> "In policy and object the Wild Life laws have a long history and are the result of an increasing awareness of the compelling need to restore the serious ecological imbalances introduced by the depredations inflicted on nature by man. The state to which the ecological imbalances and the consequent environmental damage have reached is so alarming that unless immediate, determined and effective steps were taken, the damage might become irreversible. The preservation of the fauna and flora, some species of which are getting extinct at an alarming rate, has been a great and urgent necessity for the survival of humanity and these laws reflect a last-ditch battle for the restoration, in part at least, (of) a grave situation emerging from a long history of callous insensitiveness to the enormity of the risks to mankind that go with the deterioration of environment. The tragedy of the predicament of the civilized man is that every source from which man has increased his power on earth has been used to diminish the prospects of his successors. All his progress is being made at the expense of damage to the environment which he cannot repair and cannot foresee. In his foreword to International Wild Life Law: H.R.H. Prince Philip, the Duck (sic) of Edinburgh said..." [29]

Citing two more passages from the same foreword, the Supreme Court proceeded to quote the World Charter of Nature to emphasize the dependence of mankind on the natural systems, and a decree issued by the Emperor Ashoka in the third century B.C. that demonstrated the great ruler's concern for wild animals.

The Courts have had, however, considerable difficulty in translating into action this profound appreciation of the purport of the Act. The provisions of the Act, interfaced with the other laws of the land, produced the principal complications. But the Courts, on occasions, have had the unenviable task of choosing between the rights of human beings and those of the wild animals.

The Act itself seeks to resolve this dilemma, in a way. Section 218 of the Act, for instance, empowers the Government to declare an area as a "sanctuary" in order to protect one or more of the species of wild life. But the exercise of this power is subjected to certain conditions. The same section requires that such a declaration is to be made by a notification which, according to section 22, needs to be published in the Official Gazette. Section 19, substantially, enjoins the Collector to inquire into, and determine the existence, nature and extent of the rights of any person in or over the land comprised within the limits of the sanctuary. Sec-

28. AIR 1989 SC 1.
29. Ibid, at 3-4.

tion 21 and 22 oblige the Collector to issue the proclamation only after giving the notification the widest publicity in the language of the region, and after settling the claims preferred by the affected people.

If the stated conditions are met, the proclamation of a sanctuary will be valid. There is thus an apparent preference for the rights of the wild animals over those of human beings. But it is more apparent than real. For, it is the very existence of a certain species threatened with extinction that is sought to be protected, and the property, loss and displacement costs of the people are compensated. The task of the Guwahati Court in *Jaladhar Chakma* v. *The Deputy Commissioner, Aizawl*[30] was easy in that the declaration of a sanctuary was found to be in complete violation of the procedure and substance of all the above sections of the Act and was consequently struck down, but the concern for the petitioner's "hearths and home" and for the property rights over the "cultivable lands" comes out clearly. People, subliminally, appear to have had an edge over wild life in this case.

In the other two cases, cited above, namely *Nellikka Achuthan* and *Murad Ali Khan*, however, the Kerala High Court and the Supreme Court showed a touching concern for India's best-known and precious animal, i.e., the elephant. In the former case, the plaintiff was charged with the shooting down of a wild elephant that had strayed into his estate, and having removed its tusks. There was considerable argument, on the plaintiff's behalf, whether a wild elephant, when shot down on a private estate, would be property belonging to the Government or the plaintiff. The question had an important bearing on the plaintiff's defamation suit brought against the defendant newspaper which had reported the incident as "a case of theft".

The Kerala High Court decided the issue not by reference to what it called "the principles of abstract property law", but by reference to the *lex specialis*: the Madras Wild Elephants Act, 1878, the Elephants Preservation Act 1879 and the Wild Life (Protection) Act, 1972. Basing itself on the last enactment, the Court noted the definition of "wild animal" as one found wild in nature and included in the five schedules of the Act. The Court found that the elephant was included in Schedule II.

The Court stated that killing the elephant was prohibited by the Act, except in self-defence, and that under section 39 every wild animal hunted or killed in violation of the provisions of the Act shall be the property of the State Government. Disposal of such animal and removal of its tusks constituted theft under the Act. The Court found that the plaintiff

30. AIR 1983 Guwahati 18, at 20.

had "feigned innocence", but that the tusks were removed with "a dishonest intention" to appropriate to himself.

THE INTERNATIONAL REGULATORY REGIME FOR SATELLITE COMMUNICATIONS: THE MEANING FOR DEVELOPING COUNTRIES*

N. Jasentuliyana**

INTRODUCTION

The international regulatory regime for satellite communications has long been to work on a "first come, first served" basis which benefited the industrialized countries. Despite the general legal principle of equal access, a country wishing to put a communication satellite into the geostationary orbit had to ensure that it did not interfere with any system previously registered with the International Telecommunication Union, essentially placing a burden on the proposed new system. Since the technologically advanced countries were the first ones to set up communication satellite systems, the developing countries felt that the current registration procedures inequitably restricted their access to the geostationary orbit.

The developing countries have sought to ensure that the existing system of orbit allocation does not prevent them from implementing satellite networks. The forum in which they have sought change is the International Telecommunication Union (ITU), the specialized United Nations agency that co-ordinates orbital slots for communication satellites and registers the radio frequency assignments to avoid harmful interference between radio signals. Although the ITU does not have authority to enforce co-ordination of orbit position or radio signals, it does provide the framework for establishing the procedures for co-ordination agreed upon at specialized conferences known as World Administrative Radio

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* This paper was prepared in a personal capacity and its contents should not be attributed to the United Nations.

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Conferences (WARCs). It is at the WARCs in particular that Third World countries have sought to change regulation procedures so that they would be guaranteed access to the special orbit, the geostationary satellite orbit (GSO), in which communication satellites are placed.

1. BENEFITS OF SATELLITE COMMUNICATIONS

Today, it is unusual to establish long distance communications, television broadcasting, private data networks, maritime communications or disaster relief communications without satellite communications. Despite the initial financial costs, the implementation of a satellite system can be an efficient and economical solution for providing communications to widespread areas because distance has no effect on the cost of providing satellite service. Also, it is far easier to build satellite ground' stations and to use satellite circuits than to build a complete infrastructure of ground-based microwave systems, particularly over large geographic areas or difficult terrain. In addition, the implementation of a satellite system offers enormous social and economic benefits. By exploiting the broadcast capabilities, satellites can provide tele-education and tele-medicine services by transmitting educational programs and medical information directly to remote and rural villages. In terms of national sovereignty, satellites can be used to transmit vital information as well as to promote social integration by providing a means for the exchange of information between people in remote and urban areas. Also, for the 1990s, satellites are expected to be an essential element for the expansion of integrated digital networks, video programme delivery, and land and maritime mobile communications.

To implement a satellite network, however, it is necessary not only to have the financial and technical capability to launch a satellite, but also to obtain an orbit position that would adequately serve the target area and to co-ordinate the frequency assignment to avoid interference with other satellite radio signals. With the growth in the number of satellites launched, these latter requirements can present difficulties in implementing a new national satellite network because the satellites may need to be adapted to be compatible with existing systems.

2. NATURAL LIMITATIONS

The developing countries' concerns over accessibility are based on the natural limitations of the GSO and frequency spectrum. The GSO has a

unique physical nature that is indispensable for relaying communication satellite signals. While in this special orbit, satellites transmit and receive radio signals for a variety of purposes including television broadcasting, long distance telephone calls, high speed data transmission, communications with remote locations and defense communications. In the GSO, satellites appear to remain stationary above the same point on the equator because they revolve in a circular orbit above the equator with the same rotational period as the Earth. Although the geostationary orbit is not the only orbit that could be used for communication satellites, it is preferred for most purposes because a satellite in the GSO has a constant view of a large area of the Earth, is constantly visible from any point within that area, and does not require that a ground antenna be continually reoriented to track the satellite. To provide coverage to a particular area, however, a satellite must be within a certain portion of the GSO. Due to the fact that most satellites serve the most highly developed areas, some portions of the GSO are very congested.

Within the GSO, satellites rely on the radio frequency spectrum for radio communications to transmit or relay information. Thus a satellite in orbit is easily affected by radio frequency interference from other satellites that use the same operating frequency. To avoid interference, limitations need to be imposed on the distance between satellites using a particular frequency. Due to the fact that the frequency spectrum can therefore only be used by a certain number of satellites to avoid problems of congestion and interference between satellite communication systems, access to the radio-frequency spectrum can present a major constraint on the use of the geostationary orbit by latecomers.

3. EARLY DEVELOPMENTS

In the mid-1970s, India and Indonesia were planning the establishment of their respective domestic satellite systems using fixed satellite service (FSS) radio frequencies and GSO positions. Both Intelsat and nations with existing geostationary satellites did not readily agree to make adjustments to their systems and to the internationally co-ordinated system so that India's and Indonesia's proposed systems could be accommodated. The negotiations dragged on, and India and Indonesia saw that they were in a weak and disadvantageous position as latecomers vis-à-vis the industrialized countries, which already dominated the GSO. Subsequently, the Third World camp developed a strategy to seek means to deal with these issues, which were bound to increase as more and more countries launched satellites.

The existing regulatory regime gave priority to existing satellite systems, and the non-spacefaring nations, mostly developing countries, saw it as limiting their access to the GSO and frequency spectrum. Although the developing countries did not have any financial and technical resources to utilize satellite technologies, they wanted to ensure that they would not be precluded from access in the future by not obtaining an appropriate orbit position and frequency bandwidth now.

At the ITU, the developing countries fought for the adoption of an equitable approach to allocation. Their efforts resulted in modifications in the Radio Regulations, such as the adoption of Article 33 of the 1982 Nairobi Convention[1]. It laid down the principle that the geostationary orbit, a limited natural resource, must be used efficiently so that countries may have equitable access, taking into account the needs of developing countries and the geographical situation of particular countries. This was a milestone in the Third World effort to bring positive changes to the ITU regime. But despite this resolution, later entrants still faced the problem of adapting their systems to existing networks, changing satellite positions, and making adjustments in transponder frequencies.

In 1979, the ITU general WARC adopted resolutions (Resolutions 2 and 3) that recognized the congestion in the GSO and called on the world community to convene a conference to guarantee all nations access to the fixed satellite service radio frequencies and desired positions on the geostationary orbit. The objective of these resolutions was to fully review and revise the ITU regulations. The two-part conference known as the World Administrative Radio Conference on the Use of the Geostationary Orbit and the Planning of the Space Services Utilizing It, WARC-ORB (also known as Space WARC) of 1985 and 1988 set out to realize this objective.

4. WARC-ORB 85

The commencement of the 1985 WARC-ORB was characterized by a fair amount of political dissension and polarization between the developing countries and the industrialized countries. Developing countries argued for *a priori* planning with fixed orbital positions for most of the Fixed Satellite Service (FSS) bands to guarantee GSO access. The developed countries believed that the existing regulatory regime was adequate and that access to the GSO would continue to be available through technological advances.[2] It may have been true that advancing technology

1. International Telecommunication Convention, Final Protocol, Additional Protocols, Optional additional Protocols, Resolution and Opinions (Nairobi, 1982).

had the ability to relieve congestion on the GSO, but the developing countries saw that technology was controlled by the developed countries, and therefore, the developing countries preferred political solutions over technical ones.

Despite political tension, the 1985 WARC agreed on the general principle of an allotment plan limited to the expansion bands for FSS. The planning approach for these FSS bands would permit each country to satisfy requirements for national service from at least one orbital position within a predetermined arc and with a total of 800 MHz of bandwidth in a defined service area and within predetermined bands (specifically in the 6/4, 14/11-12 and 20/30 GHz bands). This arc allotment plan, or predetermined arc (PDA), allocated arc segments rather than specific orbital locations, and tried to guarantee access to all countries. The 1985 Conference also proposed that multilateral planning meetings (MPMs) would provide a mechanism for concerned nations to solve regional issues as equals by facilitating the co-ordination process between a country with a proposed new satellite system and others already using the frequency bands and orbital arcs concerned. Yet, while countries with existing assignments would be expected to make minor adjustments, if necessary, the essential burden was still on the proposed new satellite system.

The outline agreed at WARC-ORB 85 did not constitute international law, but was a report to the second session which then had to discuss details on implementation.

5. LEGAL PRINCIPLES

The 1967 Outer Space Treaty provides that outer space is "free for use by all States" and "is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means." Adopting the view of most States that the geostationary orbit is a part of outer space, it follows that the use of the GSO should be free for use by all States.

However, the effective use of the GSO for satellite communications requires satellite communication systems to be protected from interference from other satellites and radio signals/frequencies. Therefore, the freedom of use of the orbit needs to be regulated to prevent such interference. The ITU is vested with the responsibility for technical co-ordination of communication satellites to prevent such interference. The Interna-

2. On the positions of the developing and developed countries at Space WARC 1985, see M.L. SMITH, "A new era for the international regulation of satellite communications", 14 *Annals of Air and Space Law* (1989) pp. 449, 450.

tional Telecommunication Convention and the Radio Regulations, which are negotiated and revised regularly in the ITU, constitute binding treaties of international law. They contain policies and procedures for co-ordinating international telecommunications, including satellite communications. Resolutions and recommendations which are not legally binding are also attached to the Radio Regulations.

The contention lies in the theoretical conflict between the general principle of space law as established in the Outer Space Treaty, providing access and use of outer space by all States, and the co-ordination procedures established in the Radio Regulations necessitated to ensure interference-free operations. The developing countries see the Radio Regulations as a regime favouring existing satellite systems at the expense of future satellite systems. Article 13 of the Radio Regulations, for example, provides that a geostationary satellite frequency and position assignment, once registered with ITU's International Frequency Registration Board, will be protected against interference from new systems indefinitely as long as it is continuously used. Resolution 4 adopted at the 1979 WARC attempted to reconcile these two legal provisions, but it also demonstrated that imposing limitations on the period of use was difficult.

Resolution 4 provided that States which registered geostationary positions and frequency assignments were to specify the "period of operation" of the assignment which was to be "limited to that for which the satellite *network* was designed." The period of validity was limited to the planned lifetime of the satellite network, and not necessarily to the lifetime of any satellite; the resolution in fact specifically noted that a satellite could be replaced by another identical satellite without any effect on the assignment. Moreover, countries were able to extend the period of validity provided that new satellites did not increase the probability of interference with other registered assignments. Other considerations stipulated in the Resolution effectively kept the system of indefinite geostationary assignments intact.

Resolution 4 was not intended to change international space law; it was more a voluntary mechanism for encouraging countries to release assignments that were not needed. Satellite communication networks, though, are rarely set up for a limited duration, and generally are intended for permanent use, with the organizations and hardware evolving to meet the evolving functions of the system. Countries with networks have no interest in periodically shuffling their satellites around and reorienting all of their Earth stations merely to avoid permanent occupancy. The issue of indefinite period of assignments was to be dealt with at WARC-ORB 88.

The legal debate, though, goes beyond the question of access to the GSO.[3] The difference in approaches to the development of law runs at the core of this debate. The civil law tradition of continental Europe, generally followed by the developing countries, establishes general principles and then applies them to specific problems, whereas the Anglo-American common law tradition develops rules of law from precedent, and develops general principles gradually through resolution of specific practical problems as they arise. The ITU procedures basically follow the common law approach, having an *ad hoc* technical problem-solving mechanism. But the technical problem-solving mechanism tends to be dominated by experts from technologically advanced countries. The developing countries are instead pushing for immediate elaboration and application of general principles based on the equality of States.

More recently, a debate over the legal criteria on the use of the GSO has emerged. Various ITU resolutions include references to both "equal use" and "equitable use" of the GSO,[4] using these terms interchangeably, while in strict, legal terms they represent different concepts. For example, the 1979 WARC Resolution 3 that was titled "Equitable Uses" called for the "equal right" of all States to use the orbit and spectrum resource. Also, Resolution 3 identified the goal of the 1985/1988 WARC as being to "guarantee in practice for all countries equitable access."[5] In addition, the 1982 ITU Convention referred to the need of countries to have "equitable access" to the orbit.

The term "equitable" does not necessarily connote equal, which means the same or uniform treatment. The request for "equitable" treatment is generally understood by the ITU as a claim for equity or fairness of treatment taking into consideration facts and special circumstances of each case, and not unqualified equal treatment in all situations.[6] According to the Outer Space Treaty,[7] however, outer space is free for use by all countries irrespective of economic or scientific development[8] without discrimination of any kind. In the 1982 ITU Convention,[9] Articles 10 and

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3. N. JASENTULIYANA and R. CHIPMAN, "The current legal regime of the geostationary orbit and prospects for the future", 17:6 *Acta Astronautica*, pp. 600-601.

4. C. CHRISTOL, "The legal status of the geostationary orbit in light of the 1985-1988 activities of the ITU", *Proceedings of the Thirty-Second Colloquium on the Law of Outer Space*, 11-15 October 1989, pp. 215, 216.

5. Ibid.

6. See loc. cit. n.4, at n. 6 (analyzing the concept of equity and implications for an allotment plan).

7. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 10 October 1967, 610 UNTS 105.

8. Id. at Article 1.

9. *Supra* n.1.

33 require that some special treatment be given to the developing countries that did not currently possess the scientific, technological and economic means to utilize the geostationary orbit. Accordingly, the international law of the Radio Regulations gives special consideration to promote fair and equitable treatment for access to the GSO. Some international law specialists concerned with space law would like to see more clarification on the use of terms so that complications may be prevented.

6. WARC-ORB 88

The 1988 WARC, compared to the 1985 session, commenced with less political tension and ended successfully with a new addition to the international regulatory regime for radio communications that provided for an allotment plan for predetermined arcs and bands. The countries reviewed and revised existing resolutions and recommendations associated with international radio regulations and adopted new Resolutions and Recommendations in the Final Act.[10] These Acts, which entered into force on 16 March 1990, marked an important step for the Third World in regulating the use of the frequency spectrum and the geostationary orbit, particularly for FSS. Two regulatory regimes emerged for FSS: an allotment plan, and a regime for unplanned bands.

The primary result of WARC-ORB 88 is the establishment of a flexible predetermined arc allotment plan for FSS that permits at least one national orbital allotment and 800 MHz of frequency bandwidth. It is designed to assist ITU members in obtaining a new allotment, in converting an allotment into an assignment, in accommodating subregional systems, and in resolving incompatibilities between existing systems. Although the allotment plan gives each country one nominal orbital position, some countries, including Brazil, Canada, USSR and the United States, received two nominal orbital locations because these countries have service areas too large for one orbital location.

In addressing the issue of indefinite period of occupancy, the plan called for existing[11] systems (that had initiated the ITU co-ordinating process prior to WARC-ORB 88) to follow provisions of the allotment plan which imposed a time limit for use: a non-renewable period with a dead-

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10. Final Act, adopted by the Second Session of the World Administrative Radio Conference on the Use of the Geostationary Satellite Orbit and the Planning of the Space Services Utilizing It (ORB-88), Geneva 1988.

11. S. DOYLE, "Space law and the geostationary orbit: The ITU's WARC-ORB concluded", 17 *J. Space L.* (1989) p. 13.

line of 15 March 2010.[12] But it did not specify how existing systems were to be integrated in the plan.

Also, some countries were concerned that the allocated spectrum might not actually be used by the planned allotments, so WARC-ORB 88 established provisions for use of the orbit outside the plan, called additional use provisions, so that unused planned allotments could be utilized. To protect national allotments, however, additional uses shall have a maximum period of validity of 15 years and shall not be incompatible with any allotment or assignment in the allotment plan. This restriction was included to relieve the developing countries' concerns that the industrialized countries' additional uses would preclude the implementation of their allotments.

As for the regulatory regime of unplanned bands, the basic attributes of the former regulatory regime for FSS were preserved. The method of gaining access to the unplanned bands follows the procedures of Articles 11 and 13 of the Radio Regulations. There were a few changes made, though, to mitigate some of the perceived unfairness of the first-come-first-served approach. The simplification of procedures in the regime, such as those for network co-ordination and notification, for example, is a significant improvement.[13]

One of the changes in provisions from the 1985 WARC was the diminished role of the MPMs. The 1985 session envisioned MPMs as a regular method for gaining access to many of the FSS bands. The 1988 session, however, altered the requirements for MPMs, so that they would take place only in exceptional cases when major difficulties took place in obtaining co-ordination in specific FSS bands.

The Conference also adopted a feeder link plan for Broadcasting Satellite Systems (BSS), thereby allowing all countries to have a BSS feeder allotment. The allocation of frequencies for Satellite Sound Broadcasting and High Definition Television remained open for future consideration.

The allotment plan ensured that developing countries will not be entirely precluded from the GSO, and WARC-ORB 88 adopted this plan while introducing only minimal changes to the international regime for the co-ordination of satellites for the older FSS bands. The outcome, particularly for FSS, represented a reasonable compromise between maximum efficiency in use of the GSO and guaranteeing the developing countries' access to limited resource.

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12. B.J. TAYLOR, Depoliticizing Space WARC Satellite Communications (January 1989) pp. 28-29.

13. M.L. SMITH, *International Regulation of Satellite Communication* (Utrecht Studies in Air and Space Law, Volume 7 (1990)), p. 222.

7. INTERESTS OF DEVELOPING COUNTRIES

Despite the allotment plan, however, WARC-ORB 88 was perceived as not fully meeting the Third World's expectations. The allotment plan is limited to only one service (the FSS)[14] out of seventeen space services. The allotment plan defines only a nominal position in a predetermined arc, with the planned portion covering less than one percent of the total spectrum allocated to space services. The "first come, first served" basis in the occupation of the geostationary orbit is still more or less intact.[15] WARC-ORB 88 also reduced the use of the MPM process formulated in 1985. For some Third World countries, the restraints on the use of the MPM may limit their ability to resolve regional co-ordination and technical problems.

In addition, the WARC-ORB 88 did not resolve the equatorial States' claim to sovereignty or preferential rights to the GSO as presented in the 1976 Bogota Declaration. Several equatorial countries claimed that due to their special geographical relationship to the GSO they were entitled to exercise sovereignty over corresponding parts of the GSO. Other countries, however, expressed concern that any preferential access would preclude equitable access. It was also argued by other countries, including the developed countries, that any claim of sovereignty over the GSO would contradict the principles of the Outer Space Treaty, particularly Article II, which states that outer space is not subject to any national appropriation. The ITU is a regulatory body, so it is probably not the appropriate forum to handle the equatorial countries' claim, which rests on jurisdiction questions and on whether the GSO forms a part of the definition of outer space.

The outcome of WARC-ORB 88 exemplifies some of the problems developing countries face in the development of an international regulatory regime for satellite communications sympathetic to their needs and interests. Firstly, the unequal expertise of the negotiating parties can result in an acceptance of administrative procedures and technical standards that reflect the industrialized countries' interests. For example, in the preparation stages of the allotment plan, the developing countries did not have the technical resources to participate in the formulation of the advanced computer models used for the plan.[16] Typically, in meetings such as the WARCs, officials from developing countries face an array of

14. The BSS already received frequency allotment in 1977 and WARC-ORB 88 added only a feeder link plan to it, so strictly speaking the BSS is not a part of the allotment plan of WARC-ORB 88.

15. R. JAKHU, in *Proceedings of the 83rd Annual Meeting of the American Society of International Law*, Chicago (5-8 April 1989), p. 390.

technical experts from industrialized countries who will explain in great detail why the requirements of the developing countries are not feasible. They will then offer counter-proposals whose implications the developing countries' officials cannot accurately assess on the spot. At WARC-ORB 85, for instance, experts from the industrialized countries had computer systems on hand, giving immediate detailed assessments of the implications of any proposal that was brought up, while the developing countries were still discussing the need to co-ordinate their positions.

Divisions and differences among the developing countries also prevent them from effectively influencing the negotiations. Countries such as Brazil, China, India, Indonesia and Mexico, initial leaders in the GSO debates, now have implemented their own national satellite networks and consequently do not have the same interests as developing countries without satellite systems. Developing countries with satellite systems tended to be a moderating force of developing country demands to make changes in the ITU regulatory regime because they now have an interest in preserving the protection afforded to their systems under the ITU regime.[17] These changes may have left the Third World with no clear leadership for post-WARC-ORB 88 discussions.

CONCLUSION

Since the launching of the first communication satellite in the early 1960s the benefits of space technology have become an essential element in economic, political and social development. For those countries, mostly in the Third World, that have not implemented their own satellite systems, the possibility of preclusion from launching a satellite system and from realizing the benefits of the technology would represent a major handicap in their future national development.

WARC-ORB 88, despite some shortcomings, did create a precedent for the international community to accept some more equal sharing of the limited natural resources of the GSO and frequency spectrum. WARC-ORB 88 illustrated that both developed countries and the Third World can make compromises in an international forum. For the Third World, the WARC-ORB 88 Final Acts represented an important, though limited, step in the international regulation of space communications, although further steps will be needed to fully meet their concerns.

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16. *Supra* n. 13, p. 29. To assemble the plan, the Conference utilized requirements submitted by administrations along with software developed by Japan and the United States. The United States software NASAEC was developed to implement a key aspect of the allotment plan.

17. *Supra* n. 13, p. 6.

ASPECTS OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL*

Allahyar Mouri**

1. INTRODUCTION

On 4 November 1979 the United States Embassy in Tehran was invaded by a group of university students who were among people protesting in the street outside the compound against the United States' policies towards the Iranian revolution. The students later identified themselves as "Muslim Students Followers of the Imam's Line". It is this event which gave rise to what came to be known as the "hostage crisis".[1]

Ten days later, on 14 November 1979, Mr. BANI-SADR, then minister in the Government of the Islamic Republic of Iran with Finance and Foreign Affairs portfolios,[2] issued a statement suggesting the possible withdrawal of multi-billion dollar deposits with the United States banks. This somewhat provocative and unnecessary statement was considered sufficient justification for the United States Government, acting through its executive branch, to freeze assets and properties belonging to Iran, its organizations and entities, including its central bank and other banking institutions, which were within US territory or under the control of US nationals or bankers throughout the world, under the excuse of protecting the stability of the US dollar.[3] Without the occurrence of the embassy

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* This article was completed in May 1992.

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1. See, e.g., ICJ Judgement in *The Case concerning United States Diplomatic and Consular Staff in Tehran* (United States of America *v.* Iran), ICJ Rep. 1980, p. 3 et seq.

2. Mr. BANI SADR was the first President elected to the Islamic Republic of Iran. He fled the country after failing in struggles over power.

3. See R. BALL, "The unseemly squabble over Iran's assets", *Fortune*, 28 Jan. 1980, at 61; *New York Times*, 15 Nov. 1979, at 1, and R. HIGGINS, "The taking of property by the State: recent developments in international law"; 176 RdC (1982-II) p. 259, at 283-284.

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, Volume 2, 61-85

event it is unlikely that the Executive Branch would have been successful in freezing and maintaining the freeze of well over 12 billion dollars worth of Iranian assets and properties, including cash, military and non-military properties. Records indicate that Executive Order No. 12.170 of 14 November 1979,[4] the first of a series of freezing orders, was actually prepared under pressure brought to bear on President CARTER by bankers and multi-national companies well ahead of Mr. BANI-SADR'S assertion.[5]

Soon after Mr. BANI-SADR'S statement, Mr. ALI REZA NOBARI, then Governor of Bank Markazi (Iran's Central Bank) denied any intention to withdraw Iranian assets,[6] and the Iranian government officially and publicly confirmed Mr. NOBARI'S announcement.[7] In addition, it was widely believed that the new Iranian Government had every intention and desire to meet its obligations under the loan agreements, thus weakening the justification for President CARTER'S freeze.[8]

As legal justification for the freeze, President CARTER resorted to provisions of United States regulations, including the International Emergency Economic Powers Act[9] and the National Emergency Act.[10] In principle, these laws only permit the President to act to protect the "national security" of the United States. As there was to be no withdrawal of funds by Iran (and even if a withdrawal was imminent it could not have been considered a threat to the national security, foreign policy and economy of the United States) the legal authority of the President's action in this case, particularly in respect of the Iranian assets frozen outside the U.S. is open to question.[11]

Over time, freeze orders were made covering even more Iranian assets and properties and limiting, as much as possible, Iran's control over them. At the same time, Executive Orders allowed claims, attachments and injunctions to be brought by United States nationals against Iran in

4. 44 Fed. Reg. 65,729 (1979), reprinted in: 3 C.F.R. 457 (1981); 74 AJIL (1980), p. 428; A.F. LOWENFELD, *Trade Controls for Political Ends*, Vol. III (2nd ed., 1983) p. 546-547; and 13 *Lawyer of the Americas* (*University of Miami Journal of International Law*) A-61.

5. See: "Escalating the Iranian drama", *Business Week*, 26 Nov. 1979, p. 31; E. GORDON, "Trends, the blocking of Iranian assets", 14 *The International Lawyer* (1980), p. 659, at 660-661 and 671; and LOWENFELD, op.cit., p. 548 et seq.

6. R. BALL, op.cit. n. 3; and LOWENFELD, op.cit. n. 4, p. 550 and note d.

7. *The Wall Street Journal*, 3 Dec. 1979, at 2, 10.

8. "Legal repercussions of the freezing of Iranian assets and loans", 12 *International Currency Review* (1980) 25, 27.

9. 50 U.S.C., Section 1701 et seq. (1977); Pub. L. 95-223, 91 Stat. 1625 (28 Dec. 1977); see also LOWENFELD, op.cit. n. 4, DS. 729 et seq., and GORDON, op.cit. n. 5, 662 et seq.

10. 50 U.S.C. Section 1601 *et seq.*

11. *Iran: The Financial Aspects of the Hostage Settlement Agreement* III-IV (Staff of House Comm. on Banking, Finance and Urban Affairs, 97th Cong., 1st Session), at pp. 3-5, 12 and 43; RICHARD W. EDWARDS, Jr., "Extraterritorial application of the U.S. Iranian assets control regulations", 75 AJIL (1981) pp. 870, 871 and note 8 thereof, and R. HIGGINS, loc.cit. n. 3, p. 283.

respect of its assets and properties in the United States and elsewhere, giving rise to the filing of hundreds of court actions and requiring Iran and Iranian entities to defend themselves all over the world — with very little hope, if any, of success in protecting their rights and interests.[12]

2. THE ALGIERS DECLARATIONS

After Ayatollah KHOMEINI'S personal intervention on 12 September 1980 by announcing four conditions for a final resolution of the political issue, and after adoption of these conditions in a resolution passed by Iran's Islamic Consultative Assembly (Iran's "Parliament" or "Majles") on 2 November 1980,[13] indirect negotiations started between delegates of the Government of Iran and of the United States through mediation of the Government of Algeria.[14] As a result, on 19 January 1981 two documents which came to be known as the "Algiers Declarations" or "Algiers Accords" were adhered to by the Governments of Iran and the United States. The first is entitled simply "Declaration of the Government of the Democratic and Popular Republic of Algeria", and is usually referred to as the "*General Declaration*"; the second is the "Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States and the

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12. See, e.g., LOWENFELD, op.cit. n. 4, 579 et seq.

13. This resolution constituted the basis of the following negotiations and is referred to in the preamble to the General Declaration (see *infra*)as the framework within which the crisis was to be resolved (1 Iran-U.S. CTR 3). The resolution required, in essence, that the United States should: (i) refrain from interfering, directly or indirectly, in the internal affairs of Iran; (ii) nullify all presidential orders which froze Iranian assets and guarantee the free transfer of such properties; (iii) cancel and annul all economic, financial and legal actions, including claims, against Iran and Iranian properties; and (iv) take all legal and administrative actions necessary to transfer the properties of the deceased Shah to Iran. For the full English translation of Ayatollah KHOMEINI's four conditions and the *Majles* Resolution, see LOWENFELD, op.cit. n. 4, pp. 587-588 and DS-809.

14. The fact that the Algiers Declarations were not able to achieve entirely what the *Majles* Resolution intended to achieve is not denied by either of the two Governments. Iran has almost constantly, from the inception of the work of the Tribunal, accused the Government of the United States of being in breach of the Algiers Declarations, both in interpretative disputes (categorized as "A" Cases; including Case A/15 which encompasses the major part of such claims) and in "official claims" (i.e., "claims of the United States and Iran... arising out of the contractual arrangements between them for the purchase and sale of goods and services", categorized as "B" Cases), subject matter of para. 2 of Art. II of the Claims Settlement Declaration – see *infra*. In almost all these cases the *Majles* Resolution forms the corner stone of the Iranian arguments, paras 51-52 of Partial Award No. 282-B1 (Claim 4)-FT (19 Iran-U.S. CTR 273) and ITL 78-A/15(I-C)-FT, in *The Islamic Republic of Iran and United States of America*, reprinted in IALR, May 1992, p. 20849. The position of the United States Government in all such cases has always been that although the November Resolution of the *Majles* formed the basis of the negotiations towards the resolution of the crisis, the Declarations are the fruit of those efforts achieved with the mediation of the Algerian representatives, and any obligation should be understood within the frame-work of the Accords.

Islamic Republic of Iran", often called the "*Claims Settlement Declaration*".[15]

The Accords are different from normal treaties. They were declarations made by the Algerian Government and "adhered to" by the Governments of Iran and the United States of America. Ratification was not made a requirement for their international effect, and they were not ratified by the United States Senate or the Iranian *Majles*. The international validity of the Accords has not been questioned, though some controversy exists about their validity under the internal law of the contracting States. The present paper will not deal with this aspect of the Declarations. However, evidence of their approval and validity in US law are to be found in President CARTER'S Executive Orders which were issued simultaneously with the United States' "Statement of Adherence" to the Declarations and were made part of the Accords,[16] and later in Executive Order No. 12294 issued by President REAGAN on 24 February 1981.[17] The authority of the Executive Branch to enter into the Accords was eventually upheld by the United States Supreme Court in *Dames and Moore v. Reagan*.[18] As to the internal law of Iran, the matter is not as clear as is the case with the United States. The Iranian Constitution requires the *Majles* to ratify all international agreements[19] and all settlements of governmental disputes or their referral to arbitration.[20] Those who argue against the validity of the Accords contend that the Iranian negotiators had no authority to agree on arbitration without the specific approval of the *Majles*, and that in so doing they contravened Principle 139 of the Constitution.[21] Those arguing in favour of the Accords' validity refer to the Single Article Act

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15. For the complete texts of these Declarations, see, e.g., 1 Iran-U.S. CTR, 3, 9; 20 ILM (1981) 224, 230; 75 AJIL (1981) pp. 418, 422; A. LOWENFELD, op.cit. n. 4, DS-823 and DS-829; 13 *Lawyer of the Americas*, op.cit. n. 4, A-28 to A-39; and 7 *Droit et Pratique du Commerce International* (1981) 716, 722.

16. 46 Fed. Reg. 7913-7927 (1981); 3 C.F.R. 104-118 (1982), reprinted in U.S.C. Sec. 1701 at 150-151 (1982); and LOWENFELD, op.cit. n. 4, DS-850 to DS-869.

17. 46 Fed. Reg. 14,111 (1981); 3 C.F.R. 139-40 (1982) reprinted in 50 U.S.C. Sec. 1701 at 155, and LOWENFELD, op.cit. n. 4, DS-872. In order to determine whether the Government of the United States did breach certain provisions of the Accords by unilaterally altering the undertakings through President REAGAN's Executive Order, a separate thorough evaluation and analysis of the provisions of the Accords, and of President CARTER's and President REAGAN'S Executive Orders is required. For a brief analysis of those documents, see ITL 78-A/15(1-C)-FT, *supra* n. 14.

18. 453 U.S. 654 (1981)

19. Principle 77 of the Iran's Constitution provides: "International treaties, protocols, contracts and agreements must be ratified by the Islamic Consultative Assembly".

20. Principle 139 of Iran's Constitution prescribes: "Settling of claims relating to public and State property or referral thereof to arbitration is in any case subject to the approval of the Council of Ministers, and the Assembly must be informed. In cases where one party to the claim is a foreigner, as well as in important domestic cases, the approval of the *Majles* must also be obtained. The law shall determine important cases".

"Concerning the Settlement of the Financial and Legal Disputes of the Government of the Islamic Republic of Iran with the Government of America",[22] and to Article 27 of the 1969 Vienna Convention on the Law of Treaties.[23]

3. THE TRIBUNAL'S JURISDICTION

The Algiers Declarations established a Tribunal to settle certain disputes existing between the Governments on the date that the Declarations were adhered to. Apart from the social, political and economic ramifications of the events which ended in the issuance of the Declarations and the creation of the Tribunal (which fall outside the scope of this article),[24] the Algiers Declarations, in particular the "Claims Settlement

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21. In this connection, see, e.g., the dissenting opinion of SHAFIE SHAFIEI in *Phillips Petroleum Company and Iran* and *Amoco Iran Oil Company and Iran*, Interlocutory Awards Nos. 11-39-2 and 12-55-2, 3 Iran-U.S. CTR 297, 305-308.

22. The Law provided: "The Government is authorized, subject to observance of the provisions approved by the Islamic Consultative Assembly, to take steps by means of consensual arbitration to settle the financial and legal disputes between the Government of the Islamic Republic of Iran and the Government of the United States of America which did not arise out of the Islamic Revolution of Iran and the seizure of the Centre of the American plotting".

Note: Disputes, the settlement of which by competent Iranian tribunals has been provided in the respective contract, are excluded from being subject to this Single Article Act. (For a different translation, see LOWENFELD, op.cit. n. 4, p. 590 note "A").

The contemporaneous records of the *Majles* public debates during January 1981 (especially the debates on 13 and 14 January)show that in authorizing the Government, the members of the *Majles* expected that permission for every single case would be sought as provided by the provisions of Principle 139, op.cit. n. 20. In any event, it should be emphasized that both Iran and the United States treated the Algiers Declarations as constituting a treaty under international law (*see*: dissenting opinion of MAHMOUD M. KASHANI, SHAFIE SHAFIEI and SEYYED HOSSEIN ENAYAT, *Case A/2*, 1 Iran-U.S. CTR, 104, 109; decision of the Full Tribunal in *Case A/1*, Issue I (30 July 1982), ibid. p. 189; decision of the Full Tribunal in *A/18*, 5 Iran-U.S. CTR, 251, 259; and dissenting opinion of the Iranian arbitrators to the same decision at 279 et seq).

23. See, e.g., Judge BELLET's reasoning "on the First Point" in *Phillips Petroleum Company and Iran* (ITL 11-39-2) and *Amoco Iran Oil Company and Iran* (ITL 12-55-2) *in* 1 Iran-U.S. CTR, pp. 487 and 493 respectively. It should be noted that Art. 27 of the Vienna Convention which prohibits the invocation of a provision of internal law "as justification for... failure to perform" under a valid treaty cannot resolve the issue of the validity or lack of authority to enter into a treaty. (For the Vienna Convention, see U.N. Doc. A/CONF.39/27 (23 May 1969); also in 8 ILM (1969) p. 679).

24. "The occupation of the United States Embassy compound in Tehran was considered necessary to prevent the re-occurrence of what was engineered from those premises in 1953." (dissenting opinion of the Iranian Arbitrators in the interpretive *A/18 Case*, (cit. n. 22, 275-276). This is a reference to a *coup d'état* which the CIA admitted to have engineered to overthrow the then national government of Iran, which had nationalized the Iranian oil industry three years prior to the event. See KERMIT ROOSEVELT, *Countercoup, the Struggle for the Control of Iran* (1979); RICHARD W. COTTAM, *Nationalism in Iran* (1979); HOMA KATOUZIAN, *The Political Economy of Modern Iran* (1981); C. M. WOODHOUSE, *Something Ventured* (1982); BRIAN LAPPING, *End of Empire* (1985)). The event has also been considered by some learned scholars from a legal point of view as a legitimate act of self-defence. See in this connection, FRANCIS ANTHONY BOYLE, *World Politics and International Law*, pp. 182-203.

Declaration", created a unique venue for adjudication of a large number of commercial and contractual claims of United States nationals. The purpose of establishing the Tribunal is generally considered to have been "to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration.[25]

Before deciding a case, the Tribunal must satisfy itself, *ex officio*, that it has jurisdiction over the particular claim before it, even if a party raises no jurisdictional objection. The Full Tribunal has stated that "it is an undisputed fact that the extent of the Tribunal's jurisdiction has been determined by Iran and the United States in the Algiers Declarations, which contain detailed provisions on the jurisdiction of the Tribunal, and that, consequently, the Tribunal has no jurisdiction over any matter not conferred on it by these Declarations".[26] Moreover, Chamber One and Chamber Three of the Tribunal have stated more specifically that "the Tribunal holds that it has to determine *ex officio* whether it has jurisdiction in [a] case" before it.[27]

The Tribunal's jurisdiction, more specifically defined and delineated by the Claims Settlement Declaration ("CSD"), is restricted from various perspectives and subject to various exceptions. From the point of view of personal jurisdiction (*ratione personae*) recourse to the Tribunal is restricted to the nationals of Iran and the United States,[28] and to the claims of both Governments against each other. While claims of nationals of one State against the other State are considered to be within the jurisdiction of the Tribunal, claims of either of the two Governments against nationals of the other are considered admissible only if they are raised and formulated by way of counterclaim.[29]

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25. For the text of "Principle B" of the General Declaration, see the sources referred to in n. 15 *supra*. The provisions of "Principle B" have been among the many contentious provisions of the Accords, especially from the point of view of admissibility of claims and the obligation of the United States to vacate or annul court proceedings, attachments and injunction orders in the United States. Case A/15 (IV) is concerned with the interpretation of a part of this principle. Moreover, Iran interpreted this provision as limiting the jurisdiction of the Tribunal to those claims already put forward or filed with adjudicative bodies. Iran relied on the words "litigating" and "legal proceedings" used in "Principle B", the *Majles'* position (*supra* n. 13) and the *travaux préparatoires* in support of its interpretation. See also SHAFIE SHAFIEI (dissenting opinion) cit. n. 21, p. 310 et seq.

26. Case A/1, 1 Iran-U.S. CTR 11, 152.

27. Award No. 106-B/24-1 (*The United States of America and the Islamic Republic of Iran*), 5 Iran-U.S. CTR 97, 99, and Award No. 275-12783-3 in *Parguin Private Joint Stock Company* (a claim of less than US$250,000, presented by Iran), ibid. vol. 13, pp. 261, 263. See also *Marks and Harry Umann and Islamic Republic of Iran*, (ITL 53-458-3), ibid. vol. 8, 290 at 296-297; *Orton/McCullough Crane Company and Iranian State Railways, Bank Markazi Iran* (Award No. 484-440-3 para. 7), ibid. vol. 25 p. 17 and *ITEL International Corp. and the Social Security Organization et al* (Award 479-476-2 para. 31) ibid. vol. 24 p. 281.

In analyzing the Tribunal's personal jurisdiction, the legal personality of the respondents also plays an important role. Thus, even though claims of nationals of each high contracting party are considered admissible, such claims would not fall within the Tribunal's jurisdiction if they are not against either one of the two Governments, any political subdivision, agency, or instrumentality thereof, or any entity controlled by either of the Governments or any of their political subdivisions.[30]

The Tribunal's jurisdiction is further restricted to claims that had arisen prior to the date the Algiers Accords entered into force, 19 January 1981, and that were outstanding on that date (*ratione temporis*). In the Tribunal's view, the requirements for a claim to be outstanding within the meaning of Article II, paragraph 1 of the CSD vary, according to the cause of action. The Tribunal has, in expropriation cases, generally considered a claim to be outstanding from the date the measure or act affecting the property or property rights took place. A contract or debt claim is considered to be outstanding from the date the services were rendered or goods were delivered and payment was due, or when a debt matured, regardless of whether a demand was made or a proceeding instituted prior to 19 Jan-

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28. Art. VII of the CSD (*supra* n. 15) provides that:

"For the purpose of this Agreement: A national of Iran or the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states, territories, ... if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty percent or more of its capital stock."

See, *inter alia, Aeromaritime, Inc. and the Government of the Islamic Republic of Iran* (Award No. 2-373-2) 1 Iran-U.S. CTR 135; *General Atomic Co. and Atomic Energy Organization* (Award No. 12-281-3), ibid. p. 223; *Hawaiian Agronomics Co.* (Refusal Case No. 10) ibid. p. 138; and *Raymond International (U.K.) Ltd.* (Refusal Case No. 20) ibid. p. 394.

29. See Article II (1), page 69 *infra*. It appears that the Iranian negotiators did not have the technical meaning of the concept of "counterclaim" in mind when they negotiated the CSD. While "[s]uch a right of counterclaim is normal for a respondent" and is recognized and well defined, with almost no exception, by legal systems all over the globe, the use of the word does not mean that "by analogy, [...] each State is allowed to submit claims against nationals of the other State." (Decision 1-A/2-FT in interpretative *Case A/2*, Iran-U.S. CTR 101, 103.) As a result Iran was deprived of the opportunity to raise most of the claims it had in mind when it adhered to the Algiers Declarations. The cost of such a simple mistake was enormous, because, in contrast to the fact that there were thousands of pending or potential claims against Iran as defined in Article VII (3) of the CSD, few Iranian nationals, if any, could have thought of any claim against the United States, as defined by paragraph 4 of the same Article, due to the very nature of the relations between the two governments and of each government with the nationals of the other. As a result, about 1330 Statements of Claim were withdrawn by Iran after the Full Tribunal's Decision in *Case A/2*. These claims, so far as they were raised as counterclaims, were finally rejected, either based on the ground that they were unrelated to the contracts in dispute, or because they were not between the same parties. See also the Full Tribunal's decisions in cases *A/16* and *A/17*, Nos. 108-A-16/582/591-FT and 37-A17-FT, 5 and 8 Iran-U.S. CTR 58 and 189, respectively, whereby about 350 banking claims were also dismissed for lack of jurisdiction based on arguments similar to those relied upon by the Full Tribunal in Decision 1/A/2-FT.

30. See Article VII (3) and (4) of the CSD.

uary 1981.[31] On the other hand, the Tribunal has found in banking disputes (such as claims related to withdrawals and transfers from bank accounts or demands under bank guarantees) that the mere right to payment from a bank account does not constitute an outstanding claim and that a demand for payment must have been made prior to the jurisdictional date.[32] Interpretative claims and claims for performance of the Accords or in respect of breach of obligations undertaken pursuant to the Declarations themselves[33] are by their nature excepted from the *ratione temporis* limitation.[34]

There is also a procedural time bar to the jurisdiction of the Tribunal created by Article III(4) of the CSD, which required the filing of any claim within one year after the CSD entered into force. The Declarations were adhered to on 19 January 1981; consequently, claims not filed by 19 January 1982 were considered time barred, regardless of whether they would satisfy the other jurisdictional requirements.[35] In a matter of three months (from 19 October 1981 to 19 January 1982) a total of 3,816 claims

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31. See, e.g., ITL 11-39-2 and ITL 12-55-2, op.cit. n. 23 pp.487 and 493, respectively; *Starrett Housing Corporation et al. and The Government of the Islamic Republic of Iran*, Award No. ITL 32-24-1, 4 Iran-U.S. CTR 122, 143; *INA Corporation and The Government of the Islamic Republic of Iran*, Award No. 184-161-1, ibid. vol. 8, 373; *Oil Field of Texas, Inc. and Government of the Islamic Republic of Iran*, Award No. 258-43-1, para. 22, ibid. vol. 12 pp. 308, 314; *Mobil Oil Iran Inc. et al. and Government of the Islamic Republic of Iran et al.*, Partial Award No. 311-74/76/81/158-3, para. 46, ibid. vol. 16, 3, 17, and *Electronic Systems International, Inc. and Ministry of Defence of the Islamic Republic of Iran, Military Industries Organization*, Award No. 430-814-1, para. 51, ibid. vol. 22 p. 351.

32. For bank account claims see, e.g., *Harza Engineering Company and Islamic Republic of Iran*, Award No. 19-98-2 Iran-U.S. CTR 499, 504; *Tippets, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran et al.*, Award No. 141-7-2, ibid. vol. 6 pp. 219, 223; *Computer Sciences Corporation and Government of the Islamic Republic of Iran et al.*, Award No. 221-65-1, ibid. vol. 10 pp. 269, 299-300; *Training Systems Corporation and Bank Tejerat et al.*, Award No. 283-448-1, para. 24, ibid. vol. 13 pp. 331, 337; *Electronic Systems International, Inc.*, Award No. 430-814-1, loc.cit. n. 31, same para. note 5; *Robert R. Schott and Islamic Republic of Iran et al.*, Award No. 474-268-1, para. 47, ibid. vol. 24 p. 219, and paragraph 16 of Award No. 475-11491-1, *Ali Asghar and The Islamic Republic of Iran*, ibid., vol. 24 p. 238. For bank guarantee claims see, e.g., paragraph 183 of Award No. 260-308-2 in *Combustion Engineering, Inc. et al. and The Islamic Republic of Iran*, ibid, vol. 26 p. 110.

33. Paragraphs 16-17 of the General Declaration and Articles II(3) and VI(4) of CSD.

34. The Tribunal has not yet decided the issue, but there are some arguments in favour of the interpretation that the "official claims" (see n. 14) are also excepted from the requirements of outstandingness provided by paragraph 1 of the same Article and paragraph 2 of Article VII, in that there is no reference in Article II (2) to the concept of "outstandingness".

35. See, e.g., *Cascade Overview Development Enterprises, Inc.* (Refusal Case No. 1), 1 Iran-U.S. CTR 127; *Mohammad Sadegh Jahanger* (Refusal Case No. 2), ibid., p. 128; *Ateyeh Showarai* (Refusal Case No. 28), ibid., p. 226; *K and S Irrigation Co.* (Refusal Case No. 29), ibid., p. 228, and compare them with the contentious decision of the Full Tribunal in *Detroit Bank and Trust Company* (Refusal Case No. 2), ibid. vol. 2 p. 312. Claimants of the so-called "small claims" (see n. 37, *infra*) were more fortunate than those of "large claims" (see n. 36, *infra*) because they have been given a further opportunity to institute their claims, already time-barred, before the United States Foreign Claims Settlement Commission, pursuant to a global settlement reached between the two Governments. See Article III(IV) of the Settlement Agreement attached to the Award on Agreed Terms, n. 37, *infra*.

were filed with the Tribunal's Registry, including 965 large claims[36] and 2,782 small claims.[37] In addition, to date 69 "B" or official claims and 25 interpretative claims or claims connected with the performance of the Declarations ("A claims") have been filed with the Tribunal.

The subject matter of claims within the jurisdiction of the Tribunal (*ratione materiae*) is defined by Article II(1) and (2) of the CSD. Paragraph 1 of Article II of the CSD provides:

> "An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), *expropriation or other measures affecting property rights...*"[38]

Certain types of claims are specifically excluded from the Tribunal's jurisdiction. Thus, "claims arising under a binding contract between the parties specifically providing that any dispute thereunder shall be within the sole jurisdiction of the competent Iranian courts" were excluded "in response to the *Majles* position".[39] Also excluded are the claims "described in paragraph 11 of the [General Declaration],[40] and claims arising out of the actions of the United States in response to the conduct in such paragraph." Claims arising out of the contractual arrangements

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36. Cases with a relief sought of over U.S.$250,000 are called large claims.

37. Cases wherein relief of less than U.S.$250,000 is sought are termed small claims. After the resolution of about 444 small claims (decided, terminated by orders or awards, withdrawn, or reclassified), all the remaining small claims were settled, on 22 June 1990, by the Award on Agreed Terms no. 483-Claims of Less than $250,000/B86/B38/B76/B77-FT, pursuant to a global settlement reached between the two governments. (25 Iran-U.S. CTR 327).

38. Emphasis added. For the complete text, see sources referred to in n. 15, *supra*.

39. See n. 22. To solve the interpretative issues engendered by the provision of this exception and to provide a guideline for future decisions on jurisdiction, the Tribunal selected nine test cases (later known as "Forum Selection Clause Cases") and decided them in full plenary sessions by issuing nine separate Interlocutory Awards. 1 Iran-U.S. CTR 236-325. Notwithstanding the availability of its own Language Section (see n. 62, *infra*), the Tribunal rendered a number of these leading Awards without properly benefiting from the help and services of that section or any other expert in the Persian language, despite the fact that an investigation into the meaning of certain relevant Persian words was necessary and that the Iranian arbitrators advocated meanings that differed from those understood by the majority through recourse to certain abstract rules of interpretation (see, e.g., ITL 6-159-FT in *Ford Aerospace*, 1 Iran-U.S. CTR 268). For a detailed analysis of the Tribunal's failure see *Watkins-Johnson Company and Watkins-Johnson Ltd., and the Ministry of Defence of the Islamic Republic of Iran and Bank Saderat*, Award No. 429-370-1 (dissenting opinion of ASSADOLLAH NOORI, ibid. vol. 22 p. 257, paras 40-62). Against this background the Tribunal embarked, on one occasion, on a detailed analysis of the Persian text of similar provisions in *International Technical Products and The Government of the Islamic Republic of Iran* (Award No. 196-302-3), 9 Iran-U.S. CTR 206, 211-217.

between the two Governments, however, are specifically brought within the jurisdiction of the Tribunal by paragraph 2 of Article II of the CSD.

The Tribunal took the position that its jurisdiction ought to be interpreted restrictively. This requirement of restrictive interpretation is mandated, on the one hand, by the well-established rule that the jurisdiction of an arbitral tribunal, whether private or international, emanates from the consent of the parties to the arbitral agreement (an *act de compromis* or a *clause compromissoire*) and, therefore, cannot confer "wider jurisdiction than that which was specifically decided by mutual agreement"[41]; and, on the other hand, by the settled rule that "no State can, without its consent, be compelled to submit its dispute with other States either to mediation, or to arbitration or to any kind of pacific settlement".[42]

4. PROCEDURES FOR APPOINTING ARBITRATORS

The CSD provides that the Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree.[43] The present composition of the Tribunal (unchanged as to number from the beginning) consists of three members appointed by the Islamic

40. In summary, paragraph 11 of the General Declaration excluded from the Tribunal's jurisdiction all claims arising out of the Embassy event, injuries to persons and properties of the United States and its nationals within the Embassy compound, and "injuries to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran." It was pursuant to the provisions of paragraph 11 of the General Declaration that the United States withdrew its claim pending before the International Court of Justice (no. 1, *supra*).

41. See, interpretative *Case A/2* (decided by the Full Tribunal), 1 Iran-U.S. CTR 101, 103; *Case A/1* (Issue II decided by the Full Tribunal), ibid. pp. 144, 152; *Case A/16* (*United States of America and Iran*), Award No. 108-A/16/581/582-FT, 5 Iran-U.S. CTR 57, 60, 70; *Alexander Lyons Lianosoff and The Government of the Islamic Republic of Iran* (Award No. 104-183-1), ibid. vol. 5, pp. 90, 92-93, and *Watkins-Johnson Company* (dissenting opinion of A. NOORI), 22 Iran-U.S. CTR pp. 257, 296, and note 43.

Despite this understanding, and against the decision in *Case A/2*, the Tribunal interpreted its jurisdiction "very broad[ly]" in deciding other cases (see, e.g., ITL 11-39-2 and ITL 12-55-2, 1 Iran-U.S. CTR 487 at 490 and 496; dissenting opinions of SHAFIE SHAFIEI to the same Interlocutory Awards, 3 Iran-U.S. CTR 312; and decision of the Full Tribunal in *International Schools Services, Inc., and National Iranian Copper Industries Company* (ITL 37-111-FT), ibid. vol. 5, p. 338, to which President LAGERGREN dissented, n. 42 *infra*.)

42. See, *Lillian B. Grimm and The Islamic Republic of Iran*, Award No. 25-71-1, 2 Iran-U.S. CTR 78, 80; Award No. 105-B/16-1 (*Iranian Customs Administration and The United States of America*), 5 Iran-U.S. CTR 94-95; Award No. 106-B/24-1 (*The United States of America and The Islamic Republic of Iran*), 5 Iran-U.S. CTR p. 99; *International Schools Services, Inc.*, ITL 37-111-FT, loc.-cit. n. 41 (dissenting opinion of President LAGERGREN, citing the decision by the PCIJ in the *Eastern Carelia Case*, Ser. B. No. 5 (1923) p. 27); dissenting opinion of the Iranian Arbitrators in Case *A/18*, 5 Iran-U.S. CTR pp. 287-288, and *Watkins-Johnson Company and Watkins-Johnson Ltd.*, 22 Iran-U.S. CTR p. 296 note 44.

43. See Article III(1) of the CSD.

Republic of Iran, three by the United States of America, and three third country members either selected by agreement among the party-appointed arbitrators[44] or, where the latter are unable to agree, by the Appointing Authority as foreseen in the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)[45]. As one might expect, from the Tribunal's inception it has been difficult for the party-appointed arbitrators to agree on the third country members except for the first three third country arbitrators that were selected by mutual agreement after long debate.[46]

Iran[47] and the Iranian arbitrators[48] have taken the position that in arbitrations before a tribunal which, like the present one, has been established by agreement between two States as equal subjects of international law, the device of recourse to an Appointing Authority is unacceptable because it could eventually lead to the imposition of arbitrator(s) against the will of the States concerned, and is contrary to the

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44. These last three arbitrators have always been selected or appointed from among arbitrators of nationalities other than the nationalities of the contracting parties. This was due to the sensitivity of the issues involved and the hostility prevailing between the two Governments from the start of negotiations throughout the period of implementation of the CSD. Article 6(4) of the Tribunal Rules also advises and requires that such considerations be taken into account. As to the party-appointed arbitrators, due to the very sensitive political and economic considerations involved, both Governments found themselves more secure in relying on their own nationals, although nothing would have prevented them from appointing jurists or experts from some other country.

45. For the original UNCITRAL rules and the Tribunal Rules based on them, see, e.g., 1 Iran-U.S. CTR 57 and 2 Iran-U.S. CTR 405.

46. Judge GUNNAR LAGERGREN (Swedish), a former President of the Court of Appeal for Western Sweden, an eminent figure in international arbitration and President of the Arbitral Tribunal for the [London] Agreement on German External Debts, and also a Judge at the European Court of Human Rights; Judge PIERRE BELLET (French), a distinguished judge and former Chief Justice of France, and Mr. NILS MANGARD (Swedish), a professional arbitrator. Mr. MANGARD was soon challenged by the Government of the Islamic Republic of Iran and, not having resigned, was declared by the Iranian Agent to the Tribunal as "disqualified" (1 Iran-U.S. CTR 111). Although this challenge was not sustained by Mr. CH. M. J.A. MOONS (the then Chief Justice of the Supreme Court of the Netherlands) sitting as Appointing Authority (ibid. p. 509), the issue lasted as a point of dissatisfaction to Iran and the Iranian members, exasperated further by the belief that Mr. MANGARD remained hostile and maintained a persistent voting record against Iran (see, e.g., "The note of the Iranian members of the Tribunal attached to the Decision of the Full Tribunal in *Case A/18*", 5 Iran-U.S. CTR p. 266; the statement of Mr. M. M. KASHANI, 7 Iran-U.S. CTR, p. 281 et seq.; RAHMATULLAH KHAN, *The Iran-United States Claims Tribunal, Controversies, Cases and Contribution* (1990) p. 72; and other documents, 7 Iran-U.S. CTR, pp. 284-288 and 306-316). The tension, which could have been contained by the voluntary resignation of Mr. MANGARD, was finally brought to a head by his somewhat forced resignation when two of the Iranian arbitrators physically prevented him from entering the Tribunal premises on 3 September 1984 (7 Iran-U.S. CTR pp. 281-302, and IALR of 28 September 1984). The Government of the United States challenged both Iranian arbitrators allegedly involved in the act of preventing Mr. MANGARD from entering the Tribunal (7 Iran-U.S. CTR pp. 289-302), but their appointment was withdrawn before any decision on the challenge.

47. See, e.g., letters from Iran's Agent to the Tribunal addressed to the United States Agent dated 24 May and 6 September 1984 (6 and 7 Iran-U.S. CTR 300 and 283 respectively).

rule that no arbitrator can sit in judgement over States without having received their agreement.[49]

After selecting or appointing three third country arbitrators, the party-appointed arbitrators (or in case of failure of the party-appointed arbitrators to agree, the Appointing Authority) shall appoint one of the third country arbitrators as President of the Tribunal.[50] The nine members of the Tribunal thus constituted are divided into three panels, each panel forming a Chamber consisting of one Iranian, one American, and one third country member who acts as chairman.[51] Claims filed with the Tribunal are divided among the Chambers or are allocated to the Full Tribunal for

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48. See, e.g., dissenting opinion of MAHMOUD KASHANI to Presidential Order No. 31 dated 21 September 1984, 6 Iran-U.S. CTR 303; statement of the Iranian Arbitrators (7 October 1984) in connection with the 3 September event, ibid. vol. 7 p. 306, and letters dated 17 July and 24 September 1984 by M. M. KASHANI, Iranian Arbitrator, to Chief Justice of the Supreme Court of the Netherlands (the Appointing Authority), reprinted in IALR, 28 September 1984, p. 9362, and 6 Iran-U.S. CTR 305. The letter of 17 July was not published in the Iran-U.S. Claims Tribunal Reports (*Grotius* publishers apparently considered the material "defamatory", as explained in their letter dated 21 March 1989 answering the author's inquiry in his capacity as a Ph.D. student of the London School of Economics and Political Science while preparing his article).

49. This being the position, the negotiators should have avoided reference to the UNCITRAL Rules by agreeing on a more satisfactory alternative mechanism, or else they should have limited its application, assuming, of course, that they were aware of the consequences at the time of the negotiations. See, in this connection, letter from the Agent of Iran to the Agent of the United States, reprinted in 6 Iran-U.S. CTR 300.

50. See Article III(1) and (2) of the CSD. The first and the current President of the Tribunal (Judge GUNNAR LAGERGREN, of Sweden and Judge JOSE MARIA RUDA, of Argentina) were appointed by agreement between the party-appointed arbitrators. The other two presidents (Professor CARL H. BÖCKSTIEGEL from the University of Cologne, and ROBERT R. BRINER, a private practitioner in international arbitration (respectively German and Swiss nationals) were appointed by the Appointing Authority against Iran's and the Iranian arbitrators' strong objections (6 Iran-U.S. CTR 303 and IALR 10 February 1989, p. 16897). Professor BÖCKSTIEGEL resigned as of 15 December 1988. Mr. BRINER resigned as of 5 February 1991, after twice being challenged by the Islamic Republic of Iran. The first challenge related specifically to a large oil claim, *Amoco Iran Oil Co. and The Islamic Republic of Iran et al.* (Case No. 55), 16 September 1988 and 21 October 1988, issue 18. BRINER withdrew from the case on 6 December 1988 (IALR January 1989, p. 16802) before any decision by the Appointing Authority (For a collection of documents pertaining to the first challenge, see 20 Iran-U.S. CTR 175-330). The second challenge was filed by Iran on 28 July 1989 on the ground that he deliberately disregarded the fundamental tenets of adjudicative process in *Phillips Petroleum Company Iran and The Islamic Republic of Iran et al.* (21 Iran-U.S. CTR 79); MLR of 4 August 1989, Issue 13, p. 3; IALR of 8 August 1989, Issue 14, pp. 17651 et seq; and 15 YCA (1990) 195-197. This challenge was dismissed by Mr. MOONS on 19 September 1989 (Decision served on 21 September), primarily based on Article 11 of the Tribunal Rules for not being timely raised (IALR of 22 September 1989, p. 17808; MLR of 13 October 1989, p. 3). In the course of the second challenge another general challenge was filed by Iran on 11 September 1989 asserting other "improper conduct". This challenge was also denied by the Appointing Authority by his decision dated 25 September 1989, served on 26 September 1989 (IALR of 5 October 1989, p. 17879 and 15 YCA (1990) p. 197. Documents relating to the second series of challenges reproduced in 21 Iran-U.S. CTR 318, 402). This time Iran also moved to vacate the English version of the Award No. 425-39-2 in *Phillips Petroleum Company Iran* by filing *Case A/25* (MLR of 1 September 1989 and 21 Iran-U.S. CTR 283). *Case A/25* was later withdrawn and the English version of Award No. 425-39-2 was considered null and void pursuant to the Award on Agreed Terms No. 461-39-2, (IALR of 12 January 1990, 18281 and 18289; MLR of 4 January 1990 and MLR of 12 January 1990); 15 YCA (1990) p. 197 and 21 Iran-U.S. CTR 285, 286.

decision.[52] The third country arbitrators play the most important and conclusive role in the Tribunal's decisions. The importance of the third-country arbitrator's role is better appreciated if one considers the fact that, except as to a few issues, the Chambers did not feel obliged to follow the decisions of the other Chambers. Moreover, the rulings varied not only among the Chambers, but have also changed over time within a Chamber following the replacement of the chairman of the Chamber, or within the Full Tribunal, following changes in its composition.[53] Even in the eyes of two of the third-country arbitrators, one of whom served as the first President of the Tribunal and Chamber of Chamber One and the other as the first Chairman of Chamber Three, this fact and the forceful

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51. The present Chairmen of the three Chambers are: (1) Prof. BENGT BROMS (Finland), Professor of the Faculty of Law at the University of Helsinki, representative of Finland in the Sixth Committee of the U. N. General Assembly, head of the Finnish delegation to many legal conferences around the world, member of the Institute of International Law and a member of the Permanent Court of Arbitration in The Hague; (2) Judge JOSE MARIA RUDA (Argentina), a former Rapporteur of the Sixth Committee of the U.N. General Assembly, Chairman of the Argentine delegation to the U.N. General Assembly, ICJ Judge for 18 years and President of the Court before his appointment to replace Mr. BRINER and (3) Professor GAETANO ARANGIO-RUIZ (Italy), Professor of Public International Law at the University of Rome, a member of the Institute of International Law and a member of the United Nations International Law Commission.

52. All of the group "A" cases (such as interpretative cases and claims related to breaches or non-performance of the undertakings under the Accords) and the most important cases of the group "B" cases (official claims, *see* n. 14) and cases concerned with a common issue are normally decided by the plenary sessions of the Tribunal. All other claims, including some of the group "B" cases, are divided, by lot, among the Chambers.

53. For an example of such an attitude, see the interpretative decision No. 62-A21-FT (Case *A/21, The Islamic Republic of Iran and The United States of America*, 14 Iran-U.S. CTR 324), wherein the Full Tribunal found that although "[t]he Tribunal has no authority under the Algiers Declaration to prescribe the means by which each of the States provide for... enforcement" of the Tribunal awards, none the less it is "incumbent on each State Party to provide some procedure or mechanism whereby enforcement may be obtained..." and "[i]f procedures did not already exist as part of the States' legal system they would have to be established." (loc. cit. para. 15). There are many other rulings whereby the Respondent Government was requested to take certain specific action such as preventing the local courts from adjudicating cases filed with the Tribunal, or preventing calls under a particular bank guarantee or stand-by letter of credit, or to provide for their release (e.g., *E-Systems and The Islamic Republic of Iran*, ITM 13-388 FT, 2 Iran-U.S. CTR 51; *Watkins-Johnson Company and Watkins-Johnson Ltd.*, 22 Iran-U.S. CTR pp. 218, 256). Contrary to such a precedent, the Full Tribunal, with a different composition in a very recent decision, referred to *A/21* and, while citing the first negative sentence as a precedent, stopped short of stating what it had stated in *A/21* and did not require the United States to vacate a Treasury Department regulation which the U.S. maintained and continues to maintain in breach of its undertaking, until the time of the Award and to the present date. (See: para. 35 of Interlocutory Award No. 78-A15(IC)-FT (loc.cit. n.14).

Compare also *Lillian B. Grimm*, Award No. 25-71-1, 2 Iran-U.S. CTR 78, *Haji-Bagherpour and The United States* (Award no. 23-428-2) 1 Iran-U.S. CTR 38, and *Manouchehr Hadadi and The United States*, ibid. vol. 8, p. 20, with *Alfred L. W. Short* (Award No. 312-11135-3) ibid. vol. 16, p. 76, *Jack Rankin* (Award No. 326-10913-2) ibid, vol. 17, p. 135 and *Kenneth P. Yeager* (Award No. 324-10199-1) ibid. vol. 17, p. 92. Compare further *INA Corporation and The Government of the The Islamic Republic of Iran*, Award No. 184-161-1 (separate opinion of Judge LAGERGREN), ibid. vol. 8, 373, at 387-388, with the decision of the same Chamber in *Sola Tiles, Inc. and The Government of The Islamic Republic of Iran*, Award No.298-317-1, rendered under the chairmanship of K. H. BÖCKSTIEGEL, 14 Iran-U.S. CTR p. 233.

dissenting and separate opinions tend to limit the authority of the awards.[54] It is perhaps because the third country arbitrators were deemed to be the actual decision-makers, that neither of the Governments considered the party-appointed arbitrators to be disqualified because of their past employment or other affiliation with their respective governments. This position has been endorsed by a decision taken by the Appointing Authority in the case of a challenge of an Iranian arbitrator.[55]

5. AWARDS AND OTHER DECISIONS OF THE TRIBUNAL[56]

The Accords provide that all awards and decisions of the Tribunal[57] are final, binding[58] and enforceable against either of the two Governments in the courts of any nation.[59] The awards of the Tribunal are not, however, identified as being rendered in any particular country that is party to a convention on recognition and enforcement of arbitral awards, such as the 1958 New York Convention. It is therefore difficult to believe that the municipal courts of a given country will automatically enforce such awards on the strength of the mere reference to their "finality" and "enforceability" in the Accords.[60] However, the Full Tribunal has ruled, in an Interim Award in *E-Systems, Inc.*,[61] that at least so far as the courts of the States parties to these Accords are concerned "the Award to be rendered by the Tribunal, which was established by inter-government agreement, will prevail over any decisions inconsistent with it rendered by

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54. *See* Judge LAGERGREEN, *Five Important Cases on Nationalization of Foreign Property*, published by the Raoul Wallenberg Institute (Report No. 5, Lundo 1988) p. 7; Nils Mangard, book review in 24 Vanderbilt JTL (1991) 597, 609. *See also* David D. Caron, "The Nature of the Iran-United States Claims Tribunal and the evolving structure of international dispute resolution", 84 AJIL (1990) 104, 105 and note 4.

55. See Appointing Authority's Decision in *A. Noori Challenge* (IALR, 22 October 1990, p. 19501). Judge GEORGE ALDRICH, one of the United States appointed arbitrators was former Ambassador and had previously served as Senior Deputy Legal Advisor at the State Department (IALR, 1 and 15 May and 5 June 1981, pp. 2874, 2950, 2046). Judge CHARLES N. BROWER, another United States appointed arbitrator, with State Department background, did interrupt his appointment as an arbitrator at the Tribunal temporarily in early 1987 to serve as Deputy Special Counsellor to President REAGAN (see IALR, 23 January 1987, p. 13876.

56. The Tribunal has generally allowed four rounds of filings: (1) Statement of claim and statement of defence; (2) claimant's reply and respondent's rejoinder; (3) claimant's and respondent's memorial and evidence; and (4) the rebuttals to each other's memorials and evidence. Except for Chamber One for a short period under the chairmanship of Judge BÖCKSTIEGEL in certain cases, all Chambers and the Full Tribunal followed the practice of sequential exchange of filings, giving the last opportunity of say to the respondents.

57. For this purpose, awards and decisions of each Chamber are considered as those of the Tribunal. (See *Case A/18*, 5 Iran-U.S. CTR 251)

58. See Article IV (1) of the CSD and Article 32 (2) of the Tribunal Rules of Procedure.

59. Para. 17 of the General Declaration and Article IV (3) of the CSD.

Iranian or United States courts".[62] Notwithstanding the provisions of the Declarations characterizing the awards as final, binding and enforceable, and apart from the instances mentioned in Articles 35 to 37 of the Tribunal Rules, the Tribunal has indicated, in a number of decisions, that it has an inherent power to re-open a case and reconsider or revise a decision under exceptional circumstances where elements such as fraud, forgery or perjury are present.[63]

The official languages of the Tribunal being Persian and English, all written and oral pleadings of the parties must be prepared and conducted – and all orders, decisions and awards of the Tribunal must be rendered – in both languages. Every matter made the subject of an Award must be formulated in precise terms in both languages.[64]

One of the unique and unprecedented features of the Tribunal and one of the special benefits to successful United States claimants, is the cre-

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60. An attempt by the Dutch Government to give Dutch nationality to the awards of the Tribunal through drafting legislation regarding "Applicability of Dutch Law to the awards of the Tribunal" (4 Iran-U.S. CTR 305) was abandoned, apparently in the wake of the Iranian Government's vigorous objection and the threat to change the Tribunal venue if the bill was to be passed. See, e.g., the statements by the then President and Prime Minister of Iran and the contents of the letter of the Iranian Agent to the Tribunal addressed to the Legal Adviser's Office of the Netherlands Ministry of Foreign Affairs, reprinted or quoted in 5 Iran-U.S. CTR 428, 405, and IALR of 9 March and 13 April 1984, pp. 8067 and 8248.

In a Swiss arbitration decision in *Textron Inc. (USA) and Bell Operations Corporation (USA)* v. *Islamic Republic of Iran* and a judgment rendered by the Court of Appeal of the Canton of Zürich upholding that decision in *Islamic Republic of Iran v. Textron Inc. (USA) and Bell Operations Corporation (USA)* (reprinted in 6 Iran-U.S. CTR 328 and 350, respectively), it has been held that the effect of the Algiers Declarations "must be regarded as limited to courts, institutions and state agencies which are subject to the jurisdiction of the two States in question" (ibid. p. 349 and 354) and that "a treaty does not create any rights or obligations for a third party without the lather's consent" (ibid. p. 354).

61. 2 Iran-U.S. CTR 57.

62. But the U.S. Ninth Circuit Court of Appeal held in *Gould Marketing* (IALR 3 November 1989, p. 18011) that the awards of the Tribunal are enforceable in the United States under the Federal Arbitration Act and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards without any reference to such supremacy. On 5 March 1990, the United States Supreme Court denied, without comment, a petition for a writ of certiorari by Gould Inc. to the Ninth Circuit ruling (IALR 26 March 1990, p. 18660). Whatever the motives and irrespective of any international weight that the decision might carry with it, the Ninth Circuit decision provided the Government of the United States a way out of the deadlock created by the Full Tribunal in Case A/21 (14 Iran-U.S. CTR 324).

63. See *Henry Morris and The Government of the Islamic Republic of Iran et al.* (Decision No. 26-200-1) 3 Iran-U.S. CTR 364, 365; *Mark Dallal and The Islamic Republic of Iran et al.* (Decision No. 30-149-1) 5 Iran-U.S. CTR 74- 75; *Dames and Moore and The Islamic Republic of Iran* (Decision No. 36-54-3) 8 Iran-U.S. CTR 107, 117-118; *World Farmers Trading Inc. and Government Trading Corporation* (Decision No. 93-764-1) and *Reza and Shanaz Mohajer Shojaee and The Government of Islamic Republic of Iran* (Decision No. 95-273-1). Apart from the problematic lack of the Iranian arbitrator's signature and its incompleteness because of not being filed with Persian text (see n. 62 *infra*), Award No. 425-39-2 in *Phillips Petroleum Company Iran* (21 Iran-U.S. CTR p. 50) was the subject of an application for revision before the Full Tribunal "because of being arrived at in violation of due process of arbitral procedure and *ordre public international*" (Iran's application in Case A/25). The application was later withdrawn (n. 50 *supra*), the real extent of the intended inherent power remained undecided.

ation, with funds provided by Iran, of a Security Account for securing payment of the awards rendered against Iran.[65] While the Accords contain rhetoric in Articles IV(1) and (3) concerning enforcement of awards in Iran's favour, there is no similar mechanism available to Iran to execute any awards against the Government of the United States and its nationals. Awards against Iran, Iranian entities and instrumentalities are satisfied by payment out of the Security Account shortly after the filing of an Award, upon the issuance of a payment instruction by the President of the Tribunal. Initially one billion dollars was deposited in an account with the N.V. Settlement Bank, a subsidiary of the Netherlands Central Bank (*De Nederlandsche Bank N.V.*), formed specifically for the purpose of maintaining and administrating the account. The Central Bank of Algeria is entrusted with the role of Escrow Agent,[66] and Iran undertook to maintain a minimum balance of U.S.$500 hundred million in the account until the time that the President of the Tribunal has certified that all the awards against Iran have been satisfied, at which point of time the balance in the account will be transferred to Iran. The Accords state further that "all the funds in the Security account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with" the CSD.[67]

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64. Articles 17(2) and 32 (note 2) of the Tribunal Rules. Because of these requirements, the Tribunal is fully equipped with a Language Section. The Section also provides simultaneous interpretation into Persian and English during oral presentations at the hearing sessions, and at deliberations or plenary sessions.

65. See, e.g., STEPHEN J. TOOPE, *Mixed International Arbitrations, Studies in Arbitration between States and Private Persons* (1990) 278-283.

66. Because the negotiations were conducted with the active participation of the Government of Algeria as intermediary, which had "consulted extensively with the two Governments as to the commitments which each of them" was "willing to make in order to resolve the crisis within the framework of four points stated in the Resolution of 2 November 1980 of the Islamic Consultative Assembly of Iran" and which had, as a party to the Accords, declared the "interdependent commitments" made by the two Governments, (see the preamble to the General Declaration, loc.cit. n. 1), Iran expected a more responsible role on the part of the Government of Algeria and its Central Bank. Iran expected that Government and its Central Bank to play an active role in interpreting the Accords and in implementing the undertakings, of the quality and extent of which they were, more than anyone else, aware (see the Statement of 24 April 1984 by the then Prime Minister of Iran, 5 Iran-U.S. CTR 430). Iran sought, with no success, the help of the Algerian Government to intervene in instances where it considered an Award to be against the plain wording of the Accords, against the expectation of Iran which considered the Algerians as a fiduciary to whom the large amount of one billion dollars, plus accrued interest, was entrusted. However, the Government of Algeria and its Central Bank contented themselves with the role of automatically issuing instructions for payment. (Refer, e.g., to IALR of 15 October and 5 November 1982, pp. 5324 and 5511 respectively, of 4 November 1983, p. 7370 and of 14 August 1987, p. 14574).

Despite the fact that, except for a few cases,[68] the bulk of the claims before the Tribunal were filed by United States nationals, the costs and expenses of the Tribunal are shared equally by the two Governments.[69]

6. THE TRIBUNAL'S NATURE

Whether the Tribunal can be characterized as an international tribunal established to decide claims of Governments and/or those of their nationals espoused by them, has been a point of dispute in many instances, particularly in relation to the dual national cases and in the so-called "small claims". The Parties to the Algiers Accords thought that characterization of the Tribunal would affect the applicable law and thus the treatment of the claims. Iran characterized the Tribunal as an international (inter-State) tribunal and argued that the fact that the Accords permitted individual claimants to present their claims was solely intended to facilitate the processing of those claims before the Tribunal.[70] Iran also took the position that the claims of individuals are espoused by the respective Governments of those individuals and, as a consequence, the claims of dual nationals with Iranian and United States nationality could not be brought before such an international tribunal by either of the States as being precluded by the principle of the equality of States, and the principle of non-responsibility of a State under international law for the treatment of its own nationals. As to the applicable law, Iran's position is that although normal choice of law rules apply to the underlying private contracts and transactions, the rules of public international law on State

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67. For a detailed analysis of the provisions of the Accords and other agreements related to the Security Account, refer to the Decision of the Full Tribunal, and Concurring and Dissenting Opinions rendered in *Case A/1*, 1 Iran-U.S. CTR 145-149 and 189-214. In this Decision the Full Tribunal ruled that interest must be credited as it accrues to a separate interest-bearing account in the N.V. Settlement Bank until the time that any remaining balance in the Security Account is returned to Iran. As a matter of fact the interest so accrued is only used to replenish the Security Account (ibid. p. 192).

68. Including "B" claims, among them one of the largest claims against the United States of America for the pre-revolution sale and purchase of arms and ammunition.

69. Article VI (3) of the CSD. The fact is that the United States Government regains all or at least the major part of its costs by "skimming off" 1 or 1.5 per cent (depending on the amount awarded) from the judgments in favour of United States' claimants.

70. See, e.g., Iran's position as summarized in the Decision of the Full Tribunal in *Case A/18*, 5 Iran-U.S. CTR pp. 251, 254-256; dissenting opinion of Iranian arbitrators in the same case, p. 275, at 291 et seq.; concurring/dissenting opinion of A. NOORI to Award No. 360-10514-1 in *Leonard and Mavis Daley* (a claim of less than US$250,000 presented by the United States of America) *and The Islamic Government of Iran*, 18 Iran-U.S. CTR 244, 245; separate opinion of SAYED KHALIL KHALILIAN in *Lord Corporation and Iran Helicopter Support and Renewal Company*, Award No. 346-10973-2, ibid. pp. 377, 382, and dissenting opinion of A. NOORI in *Watkins-Johnson Company and Watkins-Johnson Ltd.*, 22 Iran-U.S. CTR 257.

responsibility should apply to any findings against the Governments and agencies and/or instrumentalities involved.

The position taken by the United States, on the other hand, appears difficult to reconcile. In many instances during the early stages of the Tribunal's work, the United States argued that the Tribunal was created by treaty and therefore "a creature of international law, and its decisions are part of international law... not part of domestic law",[71] and that the Government was presenting claims "in continuance of the exercise of diplomatic protection of its nationals, acting as *parens patriae*, trustee, guardian and representative, and on their behalf."[72] By the time of the proceedings in Case A/18, the Government of the United States adopted the position that "the general character of the Tribunal does not support Iran's position that the Tribunal's function is the exercise by States of diplomatic protection" and that "Iran's assumption concerning the nature of the Tribunal is unfounded."[73]

Referring to the *Panevezys-Saldutiskis Railway Case,*[74] the Full Tribunal found in *Case A/18,* that:

> While this Tribunal is clearly an international tribunal established by treaty and while some of its cases involve disputes between the two Governments and involve the interpretation and application of public international law, most disputes (including all those brought by dual nationals) involve a private party on one side and a Government or Government-controlled entity on the other, and may involve primarily issues of municipal law and general principles of law. In such cases it is

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71. Statement of the United States Agent (ARTHUR ROVINE) in the hearing of 10 January 1983, in *E-Systems, Inc. and The Islamic Republic of Iran.*

72. Page 1 of the Statement of Claim in the Sample Case, *The Government of the Unites States of America on behalf and for the benefit of its nationals* v. *The Islamic Republic of Iran, Case No. 86.* In the 64th session of the Full Tribunal, held on 5 November 1982, the same Agent took the position that owing to the nature of these claims as espoused claims, in bringing claims before this Tribunal "no instructions were being sought or received from individual claimants". See, dissenting opinion of A. NOORI in *Leonard and Mavis Daley,* 18 Iran-U.S. CTR p. 246 note 5. In the capacity as "*parens patriae*, trustee, guardian and representative" of the Claimants, Mr. JOHN CROOK, the United States' Agent who replaced Mr. ROVINE, did consider himself entitled to intervene in the settlement negotiations if the Security Account or position of other Claimants was, in his view, at stake. During the drafting of a settlement with two major oil companies wherein the author was directly involved, the American agent tried hard to prevent the Claimants involved from agreeing with the conditions which, on their face, showed that the money paid from the security account would ultimately be used, in addition to other funds, to satisfy the National Iranian Oil Company's counterclaims for crude oil sold and supplied. See, e.g., the awards on Agreed Terms Nos. 208-73-3 and 209-78-3 in *Iran Chevron Oil Company and the Government of The Islamic Republic of Iran and National Iranian Oil Company;* and *Transocean Gulf Oil Company and Government of The Islamic Republic of Iran and National Iranian Oil Company,* 10 Iran-U.S. CTR 357 et sep.; IALR, 24 January 1986, pp. 11813, 11836, 11845; 1 MLR, Issue No. 48, 17 January 1986, pp. 3340, 3649; and JOHN CROOK's letter dated 6 January 1986 to the Iranian Agent and the reply of the Iranian Agent dated 9 January 1986.

73. Decision in *Case A/18,* 5 Iran-U.S. CTR p. 258.

74. PCIJ Sec. A/B No. 76.

> the rights of the Claimant, not of his nation, that are to be determined by the Tribunal.[75]

The premises on which the Full Tribunal's conclusion is drawn are not plausible. The assumption of the Tribunal seems to be that municipal law and general principles of law would only apply where a private party is a claimant. No case involving individuals can be decided, even in espousal claims, by mere reference to public international law. On the other hand, application by a tribunal of general principles of law or the municipal law of a given country will not deprive it of its international (inter-State) character. To argue the contrary would seem to be inconsistent with the precedents established before both the Permanent Court of International Justice in the *Serbian and Brazilian Loans Cases*[76] and its successor the International Court of Justice in the *Barcelona Traction Case.*[77] In these cases the Courts applied general principles of private law and yet their international character can not be doubted. The Iran-U.S. Claims Tribunal also found it appropriate to apply, as an international tribunal, general principles of law as "rules or principles codified or judicially recognized in the great majority of the municipal legal systems of the world" that are widely accepted and applied by such tribunals.[78] In fact by assimilating its character to that of the International Court of Justice in *Barcelona Traction Case,*[79] the Full Tribunal created a *de facto successorship* legal principle by deriving the rule "from principles of international law applicable in analogous circumstances or from general principles of law", in a situation wherein the circumstances did not, to the Tribunal's own judgement, fall "within well developed and discussed doctrines of law".[80]

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75. 5 Iran-U.S. CTR p. 261. It is worth noting that the Tribunal in this case was dealing with issues ("nationality and dual nationality") purely from the public international law view, and tried to resolve the case on the basis of rules of international law and precedents established by international fora, including those by the International Court of Justice and its predecessor. Moreover, the award itself refers to the "international" character of the Tribunal at the start of this part of its argument. In other awards rendered after the decision in *A/18 Case*, the Tribunal stated, very plainly, that "it has a specific international character" (*Bendone-Derossi International and The Government of the Islamic Republic of Iran*, Award No. ITL 40-375-1, 6 Iran-U.S. CTR, 130, 132) and that "the Tribunal is a truly international tribunal which, as such, is concerned with the rights and duties of States in public international law." (*Mobil Oil Iran Inc. et al.*, 15 Iran-U.S. CTR 23 (para 66)).

76. Both decided in 1929, PCIJ Ser. A Nos. 20/21, 16-49 and 101-126.

77. Barcelona Traction, Light and Power Company Limited (*Belgium* v. *Spain*), ICJ Rep. 1970 p. 4.

78. *Sea-Land Service Inc. and Government of the Islamic Republic of Iran*, Award No. 135-33-1, 6 Iran-U.S. CTR 149, 168. See also *Benjamin R. Isaiah and Bank Melat*, Award No. 35-219-2, ibid. vol. 2 pp. 232, 237; *T.C.S.B., Inc. and The Islamic Republic of Iran*, Award No. 114-140-2 ibid. vol. 5, 160, 171-2; *DIC of Delaware Inc. et al. and Tehran Redevelopment Corporation et al.*, Award 176-255-3, ibid. vol. 8 pp. 144-161 and *Questech. Inc. and The Ministry of National Defence*, Award No. 191-59-1, ibid. vol. 9 pp. 107, 122-123.

79. *Supra* n. 77.

There can be little doubt that the Tribunal is an international institution established by two sovereign States through the mediation of another sovereign State – the Democratic and Popular Republic of Algeria – and subject to public international law. The Accords by their plain terms state that the Tribunal is established as "an international arbitral tribunal".[81] This is further established by the fact that the Accords were negotiated, and the Tribunal was established with the intent to settle international disputes existing between the two adhering States and to resolve a number of inter-State disputes including the purely public international law issue with which the International Court of Justice was dealing just prior to the entry into force of the Accords and the release of several billion dollars in Iranian assets and properties. Moreover, the States parties to the Accords acted in their international capacity by espousing the claims of their nationals for the benefit of these nationals, and it should be noted that the proceeding in *Case A/18* can be seen as involving a defence by the Government of the United States of the principle of espousal of claims. In that case the U.S. argued that a number of claimants who alleged that they had both Iranian and United States nationality had the right to bring claims before the Tribunal, so that the United States was in fact "espousing" those claims.[82]

It was on the basis of this right that the Supreme Court of the United States upheld[83] the President's power to settle claims on United States nationals' behalf or to bar them from prosecuting their claims against Iran.[84] In light of the unique situation of the Tribunal, however, and because of the thousands of very complex and complicated claims filed there, the States parties did agree to allow the claimants seeking over U.S.$250,000 to present their claims in person to facilitate the Tribunal's task.[85] Otherwise, as was the case with the small claims, the claims would have been presented by the respective Government of each such national.[86]

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80. ITL 10-43-FT, *Oil Field of Texas, Inc. and The Islamic Republic of Iran et al.*, 1 Iran-U.S. CTR 347, 361.

81. Article II para. 1 CSD.

82. "It should be reiterated that the point of the exercise was that... the nationality of claims rules did apply and it was necessary to show that individual claimants had a *right to the protection of one of the State parties, a protection operating through the grant of access to the Tribunal.*" TOOPE, op.cit. n. 65, p. 303 (emphasis added).

83. *Dames and Moore v. Reagan*, loc.cit. n. 18 pp. 679-680.

84. See, para. 11 of the General Declaration.

85. See, IAN BROWNLIE, *Principles of Public International Law* (1981), p. 578; and DAVID LLOYD JONES, *"The Iran-United States Claims Tribunal: Private Rights and State Responsibility"*, 24 Va JIL (1984) pp. 259, 266 (note 30) and 276.

7. THE APPLICABLE LAW

Whatever the outcome of the discussions on its nature, the fact is that the Tribunal has not been established by contractual agreement between individuals or governmental entities, and does not derive its authority from their will, but has instead been established by inter-governmental agreement and is therefore subject to international law.[87] The law to be applied by the Tribunal can be viewed from three different perspectives: (1) the law applicable in interpreting the terms and conditions of the Accords including the Governments' performance of each of them; (2) the law to be applied in deciding claims brought by a national of one State against the Government of the other, or in deciding officials; and 3) the procedural law.

By characterizing the Algiers Declarations as a treaty, the Tribunal has ruled unequivocally that the interpretation of the Accords is governed by the rules and principles of public international law.[88] Accordingly it has applied the rules of treaty interpretation to determine the meaning of terms, conditions and wording of the Algiers Declarations.[89] In deciding inter-governmental disputes and official claims, emphasis has been placed on the Tribunal's mandate to "decide all cases on the basis of respect for law".[90] This being the case, the Tribunal is barred from taking decisions as *amiable compositeur* or *ex aequo et bono*. Moreover, as is clearly stated in Article 33(2) of the Tribunal Rules, the Tribunal is, absent express written authorization by the arbitrating parties, prevented from basing its decisions on such rules.[91] While the Tribunal must look to rules of law, given the variety of issues raised by the cases before it, the Tribunal is called upon to choose from among categories of rules of law to decide those issues.[92] Generally the Tribunal has to apply two main categories of legal rules. First, rules of private law including princi-

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86. Article III (2) of the CSD. *In Parguin Private Joint Stock Company and United States of America* (decision of 20 December 1983), 4 Iran-U.S. CTR 210, Chamber Three found it to be unjustifiable to dismiss a small claim purely on the ground that it was filed "without the Claimant being represented by the Government" at the time of filing. For more arguments on the whole issue, see DAVID LLOYD JONES, loc.cit. n. 85.

87. *Anaconda-Iran, Inc. and The Government of the Islamic Republic of Iran et al.*, ITL 65-167-3, 13 Iran-U.S. CTR 199, 223.

88. In this respect reference may be made to almost all interpretative and other decisions rendered in connection with performance disputes between the two Governments party to the Algiers Declarations, e.g., 1-A/2-FT, 1 Iran-U.S. CTR 104; Full Tribunal Decision in Case A/1 (Issue I) 1 Iran-U.S. CTR 189; *Nasser Esphahanian and Bank Tejerat* (Award No. 31-157-2), ibid. vol. 2 pp. 175, 160-161; A/18, 5 Iran-U.S. CTR 251; *International Schools Services and Iranian Copper Industries*, ITL 37-111-FT, ibid. vol. 5 p. 338; *Burton Marks and Harry Umann*, ibid, vol. 8, 290; ITL 63-A/15(IG)-FT, 12 Iran-U.S. CTR p. 40; DEC 62-A/21-FT, ibid. vol. 14 p. 324; Award No. 382-B/1 (Claim 4)-FT, ibid. vol. 19, 273 and Para. 26 of ITL 78-A/15(I-C)-FT, IALR, May 1992, p. 20849.

ples of commercial law and usages of trade; and second, rules and principles of international law. In determining the proper law applicable to a given dispute, the Tribunal should in principle respect the agreement of the parties as reflected in the provisions of the relevant contracts and transactions (whether public or private) and apply the appropriate choice of law rules.[93] To judge from the Award in *Anaconda-Iran Inc.*,[94] it would seem that the Tribunal is vested with such broad freedom of discretion as to be able to disregard not only the law determined to be applicable by such well-settled rules and principles as *lex loci contractus, lex*

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89. It is hard to criticize the Tribunal for applying such rules of interpretation. Yet, in circumstances such as those of the Algiers Declarations, application of the "plain meaning" or "common intent" rules might not necessarily be a reliable guide to the real intention of the parties. Here the entire negotiation process was conducted indirectly. The representatives of the United States possessed a vast amount of legal and historical experience in the field of mixed, general or special claims commissions or tribunals. By contrast, the Iranian negotiators had little practical experience in law and no experience with these sorts of agreements and therefore were not at an equal bargaining level with their American counterparts (*see*, e.g., Rahmatullah Khan in *supra* n. 46). So much so that, as we have seen in *supra* n. 29, they had confused the meaning of counter-claim with that of claims that Iranian Government entities and organizations had in turn against United States nationals. The Tribunal did not, and as a matter of fact could not, by resorting to the rules of interpretation, accept the sincere explanation of the Iranian negotiators that the phrase "whether or not filed with any court" in paragraph 1 of Art. II of the CSD was proposed by them "to merely protect and secure the position of Iran by providing for the Iranian ministries and organizations the possibility of referring their respective disputes against the United States corporations to the Arbitral Tribunal" since those Iranian entities "had not previously filed their claims with any court". Yet the Tribunal used the same phrase against Iran to expand its jurisdiction to claims not previous filed with any court, although the prime reason for adhering to the CSD (as is contemplated in Principle "B" of the General Declaration, see *supra* n. 25) was to vacate the attachments and to terminate the claims already filed against Iran (See Interlocutory Awards Nos 11 and 12 in *Phillips Petroleum Co. and Amoco Iran Oil Co.*, loc.cit. n. 23, pp. 491-2 and 497). All this occurred because the United States negotiators, cleverly enough, placed the phrase where it best suited them. Therefore, to talk about a common intention of the parties is, in many ways, a mockery.

90. Article V of the CSD provides: "The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."

91. Article 33 (2) provides that "[t]he Tribunal shall decide *ex aequo et bono* only if the arbitrating parties have expressly and in writing authorized it to do so". Despite this clear mandate, Chamber Two of the Tribunal ruled that the Tribunal's "search is for justice and equity". *CMI International, Inc. and Ministry of Roads and Transportation* (Award No. 99-245-2), 4 Iran-U.S. CTR 263, 268. Chamber One, with Judge LAGERGREN as Chairman, also felt free, in a couple of cases, to base certain of its findings on the rules of equity. See *Foremost Tehran, Inc. et al. and The Government of The Islamic Republic of Iran et al.* Award No. 220-37/231-1, 10 Iran-U.S. CTR 229, 240.

92. *CMI International Inc.*, loc.cit. n. 91, pp. 267-268; and *Anaconda-Iran Inc.*, loc.cit., n. 87, pp. 199, 232.

93. See, e.g., *White Westinghouse Int'l Co. and Bank Sepah-Iran, New York Agency* (Award No. 7-14-3), 1 Iran-U.S. CTR 169, 171; *Economy Forms Corporation and The Government of The Islamic Republic of Iran* (Award No. 55-165-1), ibid. vol. 3 pp. 42, 47-48; *Harnishfeger Corporation and Ministry of Road and Transportation et al.* (Award No. 144-180-3) ibid. vol. 7 pp. 90, 99; *DIC of Delaware, Inc. et al. and Tehran Redevelopment Corporation et al.*,ibid. vol. 8, 161-166 and *Ali Ashgar*, ibid. vol. 24, p. 238.

94. Paras 127-134 of ITL 65-167-3, *Anaconda-Iran Inc.*, 13 Iran-U.S. CTR 231-232.

loci solutionis, lex rei sitae or the law of the contracting State, but even to disregard the choice of law provisions of the relevant contract when deciding the validity and scope of a contractual term. Although the Tribunal appears to have derived such a power from the phrase "*as the Tribunal determines*" contained in Article V of the CSD, the *Anaconda* decision should be limited to the particular context of that case where the claimant had himself argued that the relevant contract was "self-sufficient under all circumstances and that no law shall govern" the contract. Any other interpretation of the *Anaconda* decision would lead to an incorrect interpretation of Article V, and thus to inadequate attention being paid to the actual terms of that Article, in particular where the phrase "*as the Tribunal determines*" has been used. Moreover, although similar provisions are contained in Article 13 (3) of the rules of the ICC Court of Arbitration[95] – which provides that "the arbitrator shall apply the law designated as the proper law by the rules of conflict *which he determines appropriate*" – and in Article 28 of the UNCITRAL Draft Model Law on Arbitration[96] – which provides that "failing designation by the parties, the arbitral Tribunal shall apply the law determined by the conflict of laws, rules *which it considers applicable*" – no one has interpreted these provisions to empower the arbitrator(s) to disregard completely choice of law rules and contractual provisions. Such broad freedom in applying the law would be tantamount to giving the arbitral body the power to re-write the contract and/or the relationship of the parties in a way completely alien to what the latter had intended.

There are, of course, issues that cannot be decided unless the underlying private law relationship or transaction is determined. Such cases would include claims for debts between private parties arising out of negotiable instruments or out of invoices issued for services rendered pursuant to a contract. In such circumstances, the Tribunal must first search for the proper law to apply in deciding the validity of the transaction if this is disputed and in interpreting the intent of the parties thereto. In cases involving State responsibility, however, the Tribunal must apply international law and general principles of law when it reaches its decision on liability, quantum of damages and compensation,[97] unless the contract provided for a particular, legally acceptable, standard.[98]

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95. 28 ILM (1989) p. 231.

96. 24 ILM (1985) p. 1302.

97. "[T]he Tribunal may often find it necessary to interpret and apply treaties, customary international law, general principles of law and national laws... With respect to the assessment of damages, the Tribunal considers its main task to be determining what are the losses suffered by the Claimant and to award compensation therefor... the Tribunal prefers to analyze the damage questions in accordance with general principles of law". (CMI International Inc., 4 Iran-U.S. CTR p. 268).

There are also issues that must clearly be decided under public international law, such as disputes relating to dual nationality and proof of nationality,[99] or issues involving State responsibility for expulsion,[100] expropriation or similar measures.[101]

The third group of rules consists of procedural rules to be applied by the Tribunal in conducting its business. As established by paragraph 2 of Article III of the CSD, the Tribunal is required to apply the "arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL)" to its procedures "except to the extent modified by the parties or by the Tribunal". After long debate, and in most instances over the dissent of the Iranian Arbitrators, the Full Tribunal adopted its provisional procedural rules on 10 March 1982. These rules are modeled after the UNCITRAL rules but implement changes, *mutatis mutandis*, to make them compatible with the provisions of the Algiers Declarations. The Final Tribunal Rules of Procedure were eventually adopted on 3 May 1983.[102]

8. CONCLUSION

The foregoing comments address some salient aspects of the Tribunal's work, while making no attempt to deal in depth with the many com-

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98. *Parguin Private Joint Stock Company* (Award No. 275-12783-3), 13 Iran-U.S. CTR 261; *Ultrasystem Inc. and The Islamic Republic of Iran and ISIRAN* (Award No. 27-84-3), 2 Iran-U.S. CTR 100, 106-107, 110, 116-118; *R.N. Pomeroy and The Government of the Islamic Republic of Iran* (Award No. 50-40-3) ibid. pp. 372, 383-384; *AHFI Planning Associate, Inc. and The Government of Iran et al.* (Award No. 234-179-2), ibid. vol. 11 pp. 168, 178; *Richard D. Harza et al. and The Islamic Republic of Iran* (Award No. 232-97-2), ibid. vol. 2, pp. 76, 105, 107, and *R.J. Reynolds Tobacco Co. and The Government of Iran, Iranian Tobacco Company* (Award No. 143-35-3), ibid. Vol. 7 pp. 55, 60.

99. Order filed on 20 December 1982 in *Flexi-Van Leasing, Inc. and The Islamic Republic of Iran*, 1 Iran-U.S. CTR 455 and dissenting opinion of M. M. KASHANI regarding the same Order, ibid. p. 463; *Nasser Esphahanian*, 2 Iran-U.S. CTR pp. 161-164, and Full Tribunal Decision in *A/18 Case*, 5 Iran-U.S. CTR 251. For standing of partners in a partnership, see *Housing and Urban Services Int'l Inc. and Tehran Redevelopment Corporation* (Award No. 201-174-1), ibid. vol. 9 p. 313.

100. See, e.g., *Alfred L. W. Short* (Award No. 312-11135-3); *Jack Rankin* (Award No. 326-10913-2) and *Kenneth P. Yeager* (Award No. 324-10199-1), Iran-U.S. CTR vol. 16 p. 76, vol. 17 p. 135 and vol. 17 p. 92 respectively.

101. See, e.g., *Benjamin R. Isaiah and Bank Mellat*, 2 Iran-U.S. CTR 237; *American International Group Inc. and The Islamic Republic of Iran* (Award No. 93-2-3), 4 Iran-U.S. CTR 96; *Sea-Land Service, Inc.*, 6 Iran-U.S. CTR 149; *INA Corporation and The Government of the Islamic Republic of Iran* (Award No. 184-161-1) 8 Iran-U.S. CTR pp. 373, 377-379; Separate opinion of Judge LAGERGREN in *INA Corporation*, ibid. p. 385; *Amoco International Finance Corporation and The Government of the Islamic Republic of Iran et al.* (Award No. 310-56-3), ibid. vol. 15 pp. 189, 214-229, and *Mobil Oil Iran Inc. et al. and The Government of the Islamic Republic of Iran et al.* (Award No. 311-74/76/81/150-3) 16 Iran-U.S. CTR pp. 20-28.

102. For the Provisional and Final Rules adopted by the Tribunal, see Iran-U.S. CTR vol. 1 p. 57 and vol. 2 p. 405.

plexities of its mandate. The juridical nature of the Algiers Accord, the limits of the Tribunal's jurisdiction, the procedure for appointing arbitrators, the "Security Account" as a mechanism for securing payment of awards against one of the parties to the Accords, whether the Tribunal is an "international tribunal" arbitrating between States extending diplomatic protection to their nationals or whether, in determining the rights of private claimants, the Tribunal somehow lost its international character and, finally, the law to be applied by the Tribunal, are among matters that are likely to generate considerable discussion among scholars in the future. On 30 June 1991 the Iran-United States Claims Tribunal completed 10 years of work. With all claims of less than $250,000 removed from the roll following arbitration of a few of them and negotiated settlement of the rest, and only some one hundred claims remaining to be dealt with, it would appear that the Tribunal should, within a relatively short period, be able to bring its work to a close. That this anniversary went unmarked in any way by the two Governments reflects a general wariness on their part of making any overall evaluation of what the process has meant to them in financial, economic, and ultimately, political, terms. Any such evaluation would be premature, and scholars are likely to argue for many years about the weight and durability of the Tribunal's contribution to legal analysis, the elucidation of legal concepts, and the degree to which distributive justice might have been served through its hundreds of awards, not to mention the dissenting, concurring or separate opinions. It would be difficult to deny, however, that in the course of adapting the UNCITRAL Arbitration Rules and applying them in many hundreds of cases, the Tribunal has explored the intricacies of the international arbitral process itself to an extraordinary, perhaps unprecedented, degree.

It is to be hoped that this expensive, but instructive experience will provide valuable insights for other States when choosing inter-State arbitration as the means of resolving their differences.

JOINT DEVELOPMENT OF MINERAL RESOURCES – AN ASIAN SOLUTION?

Yu Hui*

1. INTRODUCTION

With recognition of the petroleum potential of submarine areas, the consequent development of offshore oil industries, and the extension of coastal state jurisdiction over marine resources up to 200 nautical miles and beyond, many continental shelves bearing oil and gas have become subject to overlapping or concurrent claims by the opposite and adjacent coastal States. Such situations have given rise to both ocean boundary delimitation problems and oil exploration and exploitation problems, inviting the concern of the international community not only regarding the commercial and political aspects of those problems, but also their academic or conceptual aspects.

In recent years there has been a substantial increase in State practice favouring regimes for the joint development of such areas. The first example related to joint development in connection with offshore delimitation is the Agreement concerning the Delimitation of the Continental Shelf in the Persian Gulf between the Shaykhdom of Bahrain and the Kingdom of Saudi Arabia of 1958[1]. The two Governments agreed, while dividing the continental shelf in the Persian Gulf between them, to develop the oil resources of a defined hexagonal area under Saudi Arabia's jurisdiction in the manner determined by Saudi Arabia, but to share equally in the income from the exploitation of those resources[2]. Although this agree-

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1. Agreement concerning the Delimitation of the Continental Shelf in the Persian Gulf between the Shaykhdom of Bahrain and the Kingdom of Saudi Arabia, 22 February 1958, in: R. CHURCHILL, M. NORDQUIST and S. HOUSTON LAY, *New Directions in the Law of the Sea,* Vol. 5 (Oceana Publications, 1977) pp. 207-211.

2. Ibid., Art. 2.

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, Volume 2, 87-112

ment does not establish a joint regime, it finds a way to resolve together both boundary delimitation and oil exploitation problems.

The first agreement on co-operation for joint development was concluded with respect to resources extending across a land boundary: the Agreement between Czechoslovakia and Austria concerning the Working of Common Deposits of Natural Gas and Petroleum concluded in 1960[3]. This agreement recognizes the utility and necessity of co-operation and co-ordination in the working of a natural gas deposit on the Vysoká-Zwerndorf frontier and similar common deposits, and stipulates that the Contracting Parties shall work their proportionate shares of the total reserves in each individual common deposit to ensure that each party receives a share of total production in proportion to the amount of reserves in its territory[4]. In 1962, following the discovery of huge deposits of natural gas and oil in the Ems Estuary, the Netherlands and the Federal Republic of Germany concluded a Supplementary Agreement to the Ems-Dollard Treaty signed by the two States in 1960[5]. The Supplementary Agreement leaves the boundary question unresolved, and calls on the Parties to "co-operate in a spirit of good-neighbourliness with respect to all questions arising in connection with prospecting for and the extraction of natural resources"[6]. According to the agreement, German and Netherlands concessionaires are entitled to an equal share of the petroleum and natural gas obtained in the course of their extraction in a clearly delimited zone.[7] Although the latter agreement only relates to an estuary area, it was referred to by the International Court of Justice in the 1969 *North Sea Continental Shelf Cases*[8] and opened the way for application of the idea of joint development in respect of overlapping claims to continental shelf areas. In 1965, Great Britain and Norway concluded an agreement on the delimitation of their continental shelf[9], in which they included a "common resource clause" in order to provide for co-opera-

3. Agreement between the Government of the Czechoslovak Republic and the Austrian Federal Republic concerning the Working of Common Deposits of Natural Gas and Petroleum, 23 January 1960, 495 UNTS pp. 134-140.

4. Ibid., Preamble, and Arts. 1 and 5 para. 1; see also R. LAGONI, "Oil and Gas Deposits Across National Frontiers", 73 AJIL (1979) pp. 222-223.

5. Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany concerning Arrangements for Co-operation in the Ems Estuary (Ems-Dollard Treaty), 8 April 1960, 509 UNTS P. 64; Supplementary Agreement to the Treaty concerning Arrangements for Co-operation in the Ems Estuary, 14 May 1962, 509 UNTS p. 140. A new treaty concerning the Ems-Dollard region was signed in 1984: Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany concerning Co-operation in the Area of the Ems and Dollard as well as in the Adjacent Region, 10 September 1984, *Tractatenblad* (Netherlands Treaty Series) 1984 No. 118.

6. Supplementary Agreement *supra* n. 5.

7. Ibid., Art. 5 para. 1.

8. [1969] ICJ Rep. para. 97; reprinted in 8 ILM (1969) p. 382.

tion in case a transboundary deposit of fluid minerals were discovered in the future. Since then, this clause has become a kind of standard formula for many obligations on co-operation under such agreements. In the 1969 *North Sea Continental Shelf Cases*, the International Court of Justice referred to the idea of "joint exploitation":

> "In a sea with the particular configuration of the North Sea, and in view of the particular geographical situation of the Parties' coastline upon that sea, the methods chosen by them for the purpose of fixing the delimitation of their respective areas may happen in certain localities to lead to an overlapping of the areas appertaining to them. The Court considers that such a situation must be accepted as a given fact and resolved either by an agreed, or failing that by an equal division of the overlapping areas, or by agreements for joint exploitation, the latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit"[10].

Judge Jessup further emphasized in his separate opinion that,

> "as the Court states, the principle of joint exploitation is particularly appropriate in cases involving the principle of the unity of a deposit, it may have a wider application in agreements reached by the parties concerning the still undelimited but partially overlapping areas of the continental shelf which have been in dispute"[11].

Joint exploitation was also favoured in the *Tunisia and Libya Continental Shelf Case*. Judge Evensen concluded in his separate opinion that:

> "It seems advisable that the Parties in the present case...should include provisions on unitization in cases where a petroleum field is situated on both sides of the dividing line or the dividing line for the above proposed zone of joint exploitation"[12].

The signing (11 December 1989) of a Treaty on the Zone of Co-operation in the Timor Sea between Indonesia and Australia[13] serves to highlight the current interest of the international community in joint development regimes, and to demonstrate the acceptability and viability of such regimes.

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9. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway relating to the Delimitation of the Continental Shelf between the Two Countries, 10 March 1965, 551 UNTS p. 214.

10. [1969] ICJ Rep. para. 99; ILM *supra* n. 8, p. 383.

11. Separate Opinion of Judge JESSUP, ibid., p. 392.

12. [1982] ICJ Rep. pp. 322-323; reprinted in 21 ILM (1982) p. 317.

13. Australia-Indonesia: Treaty on the Zone of Co-operation in an Area between the Indonesian Province of East Timor and Northern Australia, 11 December 1989, 29 ILM (1990) pp. 469-537.

The very idea of joint development implies the willingness of States to work together in a spirit of co-operation, and to co-ordinate their activities. Since the Truman Proclamation of 1945, the continental shelf has been regarded as an important part of State territory. For a State to put aside boundary delimitation issues, and instead place a part of its continental shelf under an arrangement for joint exploitation with a neighbouring State or States, involves a decision to abstain from exercising, fully or partially, the exclusive sovereignty to which it is entitled. This raises issues of extreme political sensitivity which can be resolved only after careful appraisal of the political, economic, scientific or other benefits perceived, and consideration of available alternatives.

Many considerations could motivate a State in its choice of co-operation through joint development over unilateral exploitation of a resource: (*1*) The physical and geological properties of the resource (say petroleum and natural gas) may be such that unilateral exploitation could adversely affect the physical condition of the deposit in the overlapping area. It may impair, and under certain geological conditions even destroy, the possibility to exploit a part of the deposit. In such a situation, joint development can prevent the infringement of the interests of one of the States concerned. (*2*) From the technical point of view, joint development arrangements provide the possibility of increasing efficiency and productivity by reducing costs, while at the same time facilitating transfer of technology. (*3*) Economic factors, including a State's urgent need for oil and gas, would move a government to seek a solution that could provide early benefits from development rather than let the resource remain unutilized while negotiations over boundaries which have the potential to sour relations between the parties, drag on. (*4*) From the legal and political points of view, States may see in a joint development arrangement the means of laying aside sovereignty issues without actually abandoning their claims to sovereign control and administration over such activities. As one authority observes,

> "Perhaps the strongest reason for State's opting for a joint undertaking would be its sense of urgency or obligation to protect its interests in oil and gas deposits combined with a desire to maintain or cement good relations with the other State"[14].

The purposes of this study are to note the common features of existing joint development arrangements by analyzing State practice in the field; to discuss the legal issues arising in context of joint development in light of relevant provisions of the 1982 United Nations Convention on the Law

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14. M. J. VALENCIA et al., 'Southeast Asian Seas: Joint Development of Hydrocarbons in Overlapping Claim Area?', 16 *Ocean Development and International Law* (1986) p. 223.

of the Sea; and to explore China's policy with respect to joint development of its marine areas.

2. OVERVIEW OF STATE PRACTICE

For the purpose of this study, "joint development" is a regime which has the following features: *First*, by definition, "joint" development is opposed to "individual" or "unilateral" development, e.g. development under the exclusive sovereignty of a single State. *Second*, joint development arrangements generally relate to exploration and exploitation of transboundary or "straddling" deposits or fields of mineral resources in the sub-soil of a geographically defined area, often a continental shelf or exclusive economic zone, i.e. deposits or fields that lie across and on either side of a potential territorial boundary. *Third*, joint development regimes are based on inter-governmental agreements. *Fourth*, there have been in practice two types of joint development arrangements: (*a*) joint development pending delimitation, and (*b*) joint development with the boundary delimited. The following published agreements concerning joint development of a resource, listed chronologically, seem to indicate increasing recognition by States of the efficacy and viability of the concept.

(1) *Agreement concerning the Delimitation of the Continental Shelf in the Persian Gulf between the Shaykhdom of Bahrain and the Kingdom of Saudi Arabia*, dated 22 February 1958[15]. The agreement provides that the oil resources in the Fasht bu Saafa Hexagon, which is under Saudi Arabian jurisdiction, are to be developed in the manner determined by Saudi Arabia on condition that it gives the Government of Bahrain half of the net income derived from this development. The arrangement is not to impair the rights of sovereignty and administration of the Saudi Arabian Government in the area[16].

(2) *Agreement between the Government of the Czechoslovak Republic and the Austrian Federal Government concerning the Working of Common Deposits of Natural Gas and Petroleum*, dated 23 January 1960[17]. This Agreement is designed to promote co-operation and co-ordination for the development of a "common" deposit of natural gas on both sides of the boundary in the Vysoká-Zwerndorf frontier area so that each party may

15. See *supra* n. 1.
16. Ibid.
17. See *supra* n. 3.

receive a share of the total production in proportion to the amount of reserves in its territory[18].

(3) *Supplementary Agreement to the Treaty concerning Arrangement for Co-operation in the Ems Estuary (Ems-Dollard Treaty)* between the Netherlands and the Federal Republic of Germany, dated 14 May 1962[19]. The Agreement establishes a resource exploitation area partitioned by a boundary line, and provides that each party shall exercise its jurisdiction and carry out prospecting and extraction on its side of the line, but would be entitled to an equal share of the petroleum and natural gas extracted, expenses also being shared in the same proportion[20].

(4) *Agreement between the State of Kuwait and the Kingdom of Saudi Arabia relating to Partition of the Neutral Zone*, dated 7 July 1965[21]. Under this Agreement, the "Neutral Zone" established by the Aqeer [Al Uqair] Agreement of 1922 between Kuwait and Saudi Arabia in which the two States had equal rights[22], was partitioned by a boundary line into two equal parts, annexed respectively to each State "as an integral part of its territory". Each State is to exercise over that part of the partitioned Neutral Zone identical rights of administration, legislation and defence, and to respect the rights of the other Party to the shared natural resources in that part of the partitioned zone annexed to its territory[23]. The Agreement goes on to provide that "the two Contracting Parties shall exercise their equal rights in the submerged area beyond the aforesaid six mile limit...by means of joint exploitation, unless the two Parties agree otherwise"[24].

(5) A*greement on Settlement of Maritime Boundary Lines and Sovereign Rights over Islands between Qatar and Abu Dhabi,* dated 20 March 1969[25]. The Agreement provides that the al-Bunduq field ("Hagl Elbundug") shall be "equally shared" by the parties, and the Parties shall from time to time consult each other on all matters pertaining to this field in order to exercise all the rights on an equal basis. The field is to be developed by the Abu Dhabi Marine Areas (ADMA) Company in accordance with the terms

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18. See *supra* n. 4.

19. See *supra* n. 5.

20. Ibid., Arts. 1, 4, and 7.

21. Agreement between the State of Kuwait and the Kingdom of Saudi Arabia relating to Partition of the Neutral Zone, 7 July 1965, 6 *Energy* (1981) pp. 1330-1334; CHURCHILL et al., op. cit. n. 1, p. 212.

22. See W. T. ONORATO, A Case Study in Joint Development: The Saudi Arabia-Kuwait Partitioned Neutral Zone, 10 *Energy* (1985) p. 540.

23. See *supra*, n. 21, Arts. 1-4.

24. Ibid., Art. 8.

25. Agreement on Settlement of Maritime Boundary Lines and Sovereignty Rights over Islands between Qatar and Abu Dhabi, 30 March 1969, ST/LEG/SER.B/16, p. 403.

of the concession granted to it by the Ruler of Abu Dhabi, and all royalties, profits and fees are to be equally divided between the two Governments[26].

(6) *Memorandum of Understanding between Iran and Sharjah*, dated 18 November 1971, concerning their overlapping claims to the island of Abu Musa[27]. The two States agreed that exploitation of the petroleum resources in the Abu Musa area would be carried out by Buttes Gas and Oil Company and that "half of the governmental oil resources hereafter attributable to the said exploitation shall be paid directly by the Company to Iran and half to Sharjah"[28].

(7) *Convention between the Government of the French Republic and the Government of the Spanish State on the Delimitation of the Continental Shelf of the Two States in the Bay of Biscay*, dated 29 January 1974[29]. The Convention establishes a rectangular special zone for common development, which extends on both sides of their continental shelf boundary. Each party is to exercise sovereign rights over the mineral resources in the zone on its side of the dividing line. However, in an annex to the Convention, the Parties agree to share equally in the resources of the whole zone and to undertake to guarantee interested companies of both parties participation on an equal footing in the exploitation of the mineral resources of the zone[30].

(8) *Agreement between Japan and the Republic of Korea concerning Joint Development of the Southern Part of the Continental Shelf adjacent to the Two Countries*, dated 5 February 1974[31]. The Agreement establishes a joint development zone which may be divided into nine subzones, each of which is to be explored and exploited by concessionaires of both parties in accordance with operating agreements. The concessionaires of both parties share equally the natural resources extracted from the joint development zone, as well as the expenses of exploration and exploitation[32]. The agreement also sets up a Japan-Republic of Korea Joint Committee as

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26. Ibid., Arts 6 and 7.

27. Memorandum of Understanding between Iran and Sharjah, November 1971, *Middle East Economic Survey*, Vol. 15, No. 28 (1972), Supplement.

28. Ibid.

29. Convention entre le Gouvernement de la République Française et le Gouvernement de l'Etat Espagnol sur la Délimitation des Plateaux Continentaux des deux Etats dans le Golfe de Gascogne (Golfe de Biscaye), 29 Jan. 1974, ST/LEG/SER.B/19, p. 445.

30. Ibid., art. 3, Annex 2.

31. Agreement between Japan and the Republic of Korea concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, 5 February 1974, Churchill, et al., op.cit. n. 1, Vol. 4 (1975), pp. 117-133.

32. Ibid., Arts. 4, 5 and 9.

a mechanism for consultation on matters concerning the implementation of the Agreement[33].

(9) *Agreement between Sudan and Saudi Arabia relating to the Joint Exploitation of the Natural Resources of the Sea-Bed and Sub-soil of the Red Sea in the Common Zone*, dated 16 May 1974[34]. The Agreement recognizes both States' exclusive sovereign rights over the sea-bed areas adjacent to their coasts to a depth of the superjacent water of one thousand meters. The sea-bed area lying between the two areas so defined is to be treated as a "Common Zone", and "the two Governments have equal sovereign rights in all natural resources of the Common Zone which rights are exclusive to them"[35]. The Agreement sets up a Joint Commission consisting of an equal number of representatives from each party to exercise comprehensive functions relating to granting licenses and concessions, supervising exploitation, promulgating the relevant regulations, etc.[36]

(10) *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway* relating to the Exploitation of the Frigg Field Reservoir and the Transmission of Gas therefrom to the United Kingdom, dated 10 May 1976[37], concluded pursuant to the British-Norwegian Continental Shelf Delimitation Agreement of 1965[38]. The Frigg Field Agreement stipulates that the gas reservoir is to be exploited as a "single unit" by means of installations through a "unit operator" appointed by agreement between the licensees of both States, subject to the approval of the two Governments. The Governments jointly determine the position of each installation in relation to the boundary line, and consult with a view of agreeing a determination of the limits and estimated total reserves as well as the apportionment of the reserves of the Frigg Field Reservoir. Exploitation by licensees does not affect each State's jurisdiction over the continental shelf on its side of the boundary[39].

(11) *Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Establishment of a Joint Authority for the Exploitation*

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33. Ibid., Art. 2.

34. Agreement between Sudan and Saudi Arabia relating to the Joint Exploitation of the Natural Resources of the Sea-Bed and Sub-soil of the Red Sea in the Common Zone, 16 May 1974, ST/LEG/SER.B/18 pp. 452-455.

35. Ibid., Arts. 3, 4 and 5.

36. Ibid., Arts. 7-14.

37. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway relating to the Exploitation of the Frigg Field Reservoir and the Transmission of gas therefrom to the United Kingdom, 10 May 1976, 6 *Energy* (1981) pp. 1317-1324.

38. See *supra* n. 9.

39. See *supra* n. 37, Arts. 1, 2, 5 and 29.

of the Resources in the Sea-Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand, dated 21 February 1979[40]. The parties recognize the existence of an overlapping area in the Gulf of Thailand, consider that it is in the best interests of the two countries to exploit the resources of the sea-bed in the overlapping area jointly through mutual co-operation, and establish a Joint Authority which will assume all rights and responsibilities on behalf of both for the exploration and exploitation of non-living resources in the overlapping areas[41].

(12) *Agreement on the Continental Shelf between Iceland and Jan Mayen*, dated 22 October 1981[42], concluded between Iceland and Norway on the basis of recommendations made by a Conciliation Commission[43]. Both parties agree to establish a joint development zone which is divided into a Norwegian sector north of the boundary and a smaller Icelandic sector south of the boundary. Each State Party is to apply its legislation and petroleum policy to the sector under its jurisdiction, while exploration and production in the joint development zone is to be based on joint venture contracts[44].

(13) *Aden Agreement* between the Yemen Arab Republic and the People's Democratic Republic of Yemen, dated 19 November 1988[45]. The Agreement provides for joint investment in the exploration and joint development of the potential hydrocarbon resources of a "Common Region" through the medium of a jointly owned Corporation[46].

(14) *Treaty on the Zone of Co-operation in an Area between the Indonesian Province of East Timor and North Australia*, concluded between Australia and Indonesia, dated 11 December 1989[47]. The Treaty opens a formerly disputed area of the Timor Sea for joint development and profit-sharing between the two countries. Without prejudice to any final settlement of the boundary, the Zone of Co-operation is divided into three

40. Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Establishment of the Resources of the Sea-Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand, 21 February 1979, 6 *Energy* (1981) pp. 1356-1356.

41. Ibid., Preamble and Arts 1 and 3.

42. Agreement on the Continental Shelf between Iceland and Jan Mayen, 22 October 1981, 21 ILM (1982) pp. 1222-1226.

43. Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen, Report and Recommendation to the Governments of Iceland and Norway, 20 ILM (1981) pp. 797-842. The Conciliation Commission was established in accordance with Article 9 of the Agreement concerning Fishery and Continental Shelf Questions of 28 May 1980.

44. See supra n. 42, Arts. 1, 2, 3, 5 and 6.

45. Agreement for the Exploitation of [and Investment in] the Joint Area between the Two Sectors of Yemen, 19 November 1988, published in Arabic in the United Yemen; see W. T. ONORATO, "Joint Development in the International Petroleum Sector: the Yemeni Variant", 39 ICLQ (1990), pp. 653-662.

46. Ibid., p. 656.

47. See *supra* n. 13.

areas: Area A, where a Joint Authority will control petroleum exploration and exploitation and provide equal sharing of benefits; Area B, where Australia will have the right to make certain notifications as to permits, licences and leases and share with Indonesia a "resource rent tax"; and Area C. where Indonesia will have a corresponding right. Treaty annexes applicable to Area A establish a Petroleum Mining Code, a Model Production Sharing Contract between the Joint Authority and Contractors, and a Taxation Code for the Avoidance of Double Taxation[48].

(15) *Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand on the Constitution and the Other Matters relating to the Establishment of the Malaysia-Thailand Joint Authority*, dated 30 May 1990[49]. The Agreement is designed to implement the 1979 Memorandum of Understanding between the two countries, and lays down details of legal status and organization, power and functions as well as financial provisions concerning a Joint Authority. The Joint Authority is to have a legal personality, and will formulate policy and exercise control over all exploration and exploitation of the non-living natural resources in the Joint Development Area[50].

3. COMMON FEATURES OF STATE PRACTICE

From this brief overview of State practice, it will be observed that, although joint development, with or without boundary delimitation, is taking place in a variety of regions in the world, each situation has its own peculiarities, and that no fixed pattern has, as yet, emerged. On the other hand, the arrangements concluded do have similar features, which include the following:

(1) *Definition or demarcation of an area as the joint development zone.* This is of fundamental importance, although the technique by which this is accomplished, varies. Thus, under the Thailand-Malaysia, Japan-South Korea arrangements, the issue of delimitation was shelved, and the areas of overlapping claims were defined as joint development zones[51]. The Joint Development Zone between Iceland and Norway in the Jan Mayen area was defined by geographical co-ordinates, and divided into a Norwe-

48. Ibid., Arts. 2, 3, 4 and annexes B, C and D; see also the *Report of the Secretary General, Law of the Sea*, A/45/721, 19 November 1990, p. 12.

49. Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand on the Constitution and the other Matters relating to the Establishment of the Malaysia-Thailand Joint Authority, 30 May 1990; see D. ONG, "Thailand/Malaysia: the Joint Development Agreement 1990", Appendix II, 6 IJECL (1990) pp. 64-72.

50. Ibid.

51. See *supra* n. 40, Art. 1; *supra* n. 31, Art. 3.

gian sector of approximately 32,750 square kilometres (70%) north of the boundary and smaller Icelandic sector of approximately 12,720 square kilometres (30%) south of the boundary[52]. The Sudanese-Saudi Arabian Agreement having delimited the respective national jurisdictions by reference to a continuous isobath, designated the deeper area beyond it as the "common zone"[53]. The Zone of Co-operation between Australia and Indonesia is divided into three areas, A, B and C by geographical co-ordinates, each of which has a separate exploration and exploitation regime applicable to it, and the central and largest area, Area A, being designated an area for joint development[54].

(2) *Apportionment of jurisdiction.* Generally, each State party exercises its jurisdiction and applies its laws on its side of a defined boundary within the joint development zone. Thus, the limits of jurisdiction are clearly defined in the Kuwait-Saudi Arabia[55], Iceland-Norway[56] and Japan-South Korea[57] agreements. Under the Thailand-Malaysia agreement, the two countries divide the joint development zone into a Malaysian subzone and a Thai subzone for the exercise of criminal jurisdiction, whereas the agreement is silent as to the application of administrative and civil laws. The jurisdiction, laws and regulations of either Party pertaining to fishing, navigation, marine pollution, and similar matters in the joint development zone are not affected by the agreement[58].

(3) *Choice of development arrangement.* In embarking upon joint development, the States concerned must take into account possible differences in their laws, as well as in their contract, finance and customs regulations and practices. Thailand and Malaysia agree to use a system of production sharing in their joint development area[59]. The Japan-South Korea agreement uses the term "concessionaire"[60], and the Kuwait-Saudi Arabia agreement chooses an oil concession system[61], while joint development between Iceland and Norway takes place on the basis of a joint-venture contract[62]. Australia and Indonesia have devised a complete, interlocking contractual and fiscal framework to govern joint develop-

52. See *supra* n. 42, Arts 2, 5 and 6.
53. See *supra* n. 34, Art. 5.
54. See *supra* n. 13, Arts. 2, 3, 4 and Annex A.
55. See *supra* n. 21, Art. 3.
56. See *supra* n. 42, Arts. 5 and 6.
57. See *supra* n. 31, Arts. 7, 8, 16 and 19.
58. See *supra* n. 40, Arts. 5 and 6, para. 1.
59. Ibid.; see *supra* n. 49, Art. 8.
60. See *supra* n. 31, Art. 3
61. See supra n. 21, Art. 9.
62. See *supra* n. 42, Arts. 4, 5 and 6.

ment in a central joint development zone, Area A. According to the treaty, a Petroleum Mining Code governs operational activities relating to exploration and exploitation of the petroleum resources in that Zone. A Model Production Sharing Contract provides the format to be used in all production sharing contracts in the Zone, and a Taxation Code spells out provisions for the avoidance of double taxation in respect of activities connected with the Zone[63].

(4) *Establishment of organs and scope of their authority.* Generally, joint development agreements create a joint commission or authority based on equal participation, either with broad legal capacity enabling it to enter into agreements with foreign companies, to issue licences and to stipulate terms and exemptions; or a body with limited technical functions, and the power only to co-ordinate activities. Methods of constituting these organs vary, as do their powers. Thailand and Malaysia, by a Memorandum of Understanding in 1979, established a Joint Authority consisting of two chairmen and equal numbers of members from each country, and invested it with "all rights and responsibilities on behalf of both parties for the exploration and exploitation of the non-living natural resources of the sea-bed and sub-soil in the overlapping areas and also for the development, control, and administration of the joint development area"[64]. The 1990 Agreement between Malaysia and Thailand on the Constitution and Other Matters relating to the Establishment of the Malaysia-Thailand Joint Authority, which is designed to implement the Memorandum of Understanding, specifies that the Joint Authority "shall have a juristic personality" and "shall control all exploration and exploitation of the non-living natural resources in the Joint Development Area and shall be responsible for the formulation of policies for the same"[65]. By contrast, the Japan-Republic of Korea Joint Commission and the Kuwait-Saudi Arabia Joint Permanent Committee are to serve only as liaison or consultative organs[66]. The Timor Gap Treaty between Australia and Indonesia creates two bodies charged with the duty of exercising both parties' rights and responsibilities: (1) a Ministerial Council composed of an equal number of ministers from each State, with the responsibility of overall control of petroleum activities in the joint development Zone; and (2) a Joint Authority, responsible to the Ministerial Council, endowed with legal personality and capacity under the laws of each Contracting State,

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63. See *supra* n. 13, annexes B, C, and D. See also W. T. ONORATO, et al, "International Co-operation for Petroleum Development: The Timor Gap Treaty", 5 *ICSID Review-Foreign Investment Law Journal* (1991) pp. 9-12.

64. See *supra* n. 40, Art. 5, para. 2.

65. See *supra* n. 49, Arts. 1 and 7.

66. See *supra* n. 31, Arts. 14 and 15; *supra* n. 21, Arts. 17, 18 and 19.

and charged with the day to day administration and management of petroleum operations in the Zone. The Joint Authority comprises four "Directorates" dealing respectively with technology, finance, legal affairs and corporate services, each of which will be responsible to a group of Executive Directors appointed by the Ministerial Council and consisting of equal numbers of representatives of Australia and Indonesia[67].

(5) *Duration and Termination.* Joint development arrangements generally stipulate a period of operation, reflecting the Parties' political expectations, as well as the limits of economic and technological forecasting. Thus, the agreement between Thailand and Malaysia is for a period of 50 years, and is to remain in force even after the expiry of the 50 year period, unless the State Parties have delimited the continental shelf in the area of overlapping claims before expiry of the period[68]. The agreement between Japan and South Korea was concluded also for a period of 50 years, but is to continue in force thereafter if it is not terminated[69]. The Timor Gap Treaty between Australia and Indonesia is to operate for an initial period of 40 years from its entry into force, and thereafter for further periods of 20 years unless the Contracting States agree otherwise[70].

(6) *Settlement of disputes.* While dispute settlement is generally provided for, there is no uniformity or preference for a particular method. Thus, the agreement between Iceland and Norway, for example, provides for conciliation[71], whereas some other agreements call for binding dispute settlement[72].

4. RELEVANT PROVISIONS OF THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The 1982 United Nations Convention on the Law of the Sea makes little express provision regarding the exploration and exploitation of natural resources which extend across a boundary or lie in an area subject to overlapping claims. However, four features of the Convention offer guidance, if not explicit direction, in resolving the issues associated with joint development of resources. They call for application of the principle of co-

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67. See *supra* n. 13, Arts. 5-11. See also G. J. MOLONEY, "Australia-Indonesia Timor Gap Zone of Co-operation Treaty: A New Offshore Petroleum Regime", 8 JENRL (1990) p. 136; W. T. ONORATO, *supra* n. 63.

68. See *supra* n. 40, Art. 3, para. 1 and 6.

69. See *supra* n. 31, Art. 31.

70. See *supra* n. 13, Art. 33.

71. See *supra* n. 42, Art. 9.

72. E.g., Saudi Arabia-Kuwait Treaty, Art. 22; Frigg Field Treaty, Art. 28.

operation as reflected in such conduct as consultation, notification, co-operation and agreement. Thus, the Convention, recognizing the marine environment as a shared resource which must be protected and preserved by all States (article 197), goes on to require preventive (protective) action by States (articles 194-5) and to call for global and regional co-operation in the formulation of international rules to that end, as well as to specify the conduct (notification, co-operation) required of a State which becomes aware of immediate threat of damages to the marine environment (articles 198-9). A second feature relates to living resources which occur within the exclusive economic zones of two or more coastal States, or both within the exclusive economic zone and in an area beyond and adjacent to – the so-called "straddling stocks" (article 63). Here States are directed to reach agreement upon "measures necessary to co-ordinate and ensure the conservation and development of such stocks" or, when the stocks traverse an adjacent area beyond an exclusive economic zone, to seek directly or through appropriate sub-regional or regional organizations to agree upon the "measures necessary for the conservation of these stocks in the adjacent area".

The third and fourth features of the Convention relevant to the merging concept of joint development deal directly with mineral resources, viz. articles 74 and 83, drafted in identical terms, concerning delimitation of exclusive economic zones and continental shelves respectively; and article 142 on resource deposits which extend from an exclusive economic zone into the international sea-bed "Area".

Article 74 on exclusive economic zone delimitation (identical in form with article 83 on continental shelf delimitation) in paragraph 1 directs the States concerned to effect delimitation "by agreement on the basis of international law", requiring also that:

> "3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation."

The States concerned are thus under an obligation in the first instance to enter into negotiations with a view to concluding an agreement, and pending agreement, to enter into provisional arrangements governing the area in question during a transitional period which would terminate upon conclusion of a delimitation agreement. While the obligation to negotiate is clear, the outcome of such negotiations cannot be foreseen. Accordingly, the States concerned are directed (1) "if no agreement can be reached within a reasonable period of time..." to have recourse to the

Convention's dispute settlement procedures; and (2) in any event, until agreement is reached, to "enter into provisional arrangements" of the type specified in the third paragraph of both articles. Dispute settlement would, however, be necessary only if a dispute has actually arisen, or persists. If, on the other hand, a dispute over delimitation could be avoided, or an existing territorial dispute laid aside while the parties decide instead to grasp the benefits of co-operative exploitation of an area subject to concurrent claims, the resulting "provisional arrangement" could be embodied in an agreement which, although not dealing with delimitation as such, would satisfy the letter and spirit, as well as the aims, of articles 74 and 83. This may be implied from the final paragraph of articles 74/83:

> "4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the [exclusive economic zone] [continental shelf] shall be determined in accordance with the provisions of that agreement."

The provision is thus broad enough to comprehend situations in which the parties have decided to postpone delimitation questions, or lay them aside altogether.

Article 142 of the Convention deals with resource deposits lying across the boundary between an area subject to a coastal State's jurisdiction, and "the Area" subject to the jurisdiction of the International Sea-Bed Authority to be established under the Convention. Assuming the State's boundary to be dealt with in consultation with the Commission on the Limits of the Continental Shelf, the article does not address delimitation issues, but instead offers an outline of the basic principles and procedures applicable in such circumstances, when exploitation of the "straddling" resource is contemplated. These principles and procedures could well serve as the basis for a regime of joint development between the coastal State and the Authority, and indeed, between two or more coastal States:

> "*Article 142*
>
> 1. Activities in the Area, with respect to resource deposits in the Area which lie across limits of national jurisdiction, shall be conducted with due regard to the rights and legitimate interests of any coastal State across whose jurisdiction such deposits lie.
>
> 2. Consultation, including a system of prior notification shall be maintained with the State concerned, with a view to avoiding infringement of such rights and interests. In cases where activities in the Area may result in the exploitation of resources lying within national jurisdiction, the prior consent of the coastal State concerned shall be required.

3. ....."

Article 142, no less than paragraph 3 of articles 74 and 83, seems to be derived from a solid basis in State practice followed with regard to oil-bearing structures lying across national boundaries. The first clause embodying that practice occurs in the 1965 agreement between the United Kingdom and Norway delimiting their continental shelves in the North Sea:

"*Article 4*

If any single geological petroleum structure or petroleum field, or any single geological structure or field of any other mineral deposit, including sand or gravel, extends across the dividing line and the part of such structure of field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties shall, in agreement with the licensees, if any, seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the proceeds deriving therefrom shall be apportioned."

Similar clauses have since been included in a wide range of delimitation agreements[73] and joint development agreements[74].

5. EMERGING FEATURES OF JOINT DEVELOPMENT

Although we have no reason to conclude that the provisions of articles 74, 83, and 142 of the 1982 United Nations Convention on the Law of the Sea were drafted with a view to encouraging arrangements for joint development of the type here considered, read together they provide such arrangements with an authoritative basis in principle with the following parameters:

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73. Norway-United Kingdom, 1965; Netherlands-United Kingdom, 1965; Denmark-Norway, 1965; United Kingdom-Denmark, 1966; Norway-Sweden, 1968; Italy-Yugoslavia, 1968; Indonesia-Malaysia, 1969; Iran-Qatar, 1969; Iran-Bahrain, 1971; F. R. of Germany-Denmark, 1971; F. R. of Germany-Netherlands, 1971; F. R. of Germany-United Kingdom, 1971; United Kingdom-Denmark, 1971; Italy-Tunisia, 1971; Indonesia-Thailand, 1971; Denmark-United Kingdom, 1971; Australia-Indonesia, 1971; Sweden-Finland, 1972; Denmark-Canada, 1973; Iran-United Arab Emirates, 1974; Indonesia-Malaysia-Thailand, 1974; India-Sri Lanka, 1974; India-Indonesia, 1974; Italy-Spain, 1974; Sudan-Saudi Arabia, 1974; India-Sri Lanka-Maldives, 1976; Greece-Italy, 1977; Thailand-India, 1978; Thailand-Malaysia, 1978; Venezuela-Netherlands, 1978; D. R. of Germany-Sweden, 1978; Thailand-Malaysia, 1979; Denmark-Norway, 1979; Iceland-Norway, 1981; Sweden-Denmark, 1984; Colombia-Honduras, 1986; Solomon-Australia, 1988; United Kingdom-Ireland, 1988.

74. France-Spain, 1974, art. 4 para. 2; Japan-South Korea, 1971, Art. 23; Sudan-Saudi Arabia, 1974, Art. 14; Thailand-Malaysia, 1979, Art. 3, para. 6; Iceland-Norway, 1981, Art. 8.

(1) use or exploitation of a resource on one side of a national boundary must take account of rights and legitimate interests of the State on the other side of the boundary, implying obligations of a co-operative character such as accommodation of uses, and equitable apportionment of resources (art. 142(1));

(2) where activities on one side of a national boundary would result in exploitation of resources on the other side of such a boundary, mutual consent is required (art. 142(2));

(3) prior notification and consultation are prescribed as the means for ascertaining mutual consent (art. 142(2));

(4) the solution arrived at (whether or not accompanied by actual delimitation) must be equitable (art. 74/83(1) and (3));

(5) mutual consent is to be recorded in a written agreement (art. 74/83(1));

(6) the agreement must have a basis in international law (art. 74/83(1));

(7) the Parties are obliged, pending conclusion of an agreement, to enter into "provisional arrangements of a practical nature and... not to jeopardize or hamper the reaching of the final agreement....", implying establishment of a dynamic, use-oriented and mutually beneficial regime which, since the issue of delimitation is not addressed, could well mature into a system of joint exploitation if managed in "a spirit of understanding and co-operation", i.e., in good faith;

(8) the agreement should generally,

(a) demarcate the joint development zone by geographical co-ordinates and other appropriate points of reference;

(b) apportion jurisdiction among the States concerned;

(c) lay down the basic system to be followed, e.g., production-sharing, profit-sharing;

(d) establish one or more supervisory organs with proportionate representation and appropriate provisions on decision-making;

(e) state its duration and/or procedure for renewal;

(f) provide for the settlement of disputes.

Have some or all of these features become part of customary international law? We may recall here, that referring to the emergence of customary law, the International Court of Justice in the 1969 *North Sea Continental Shelf Cases* observed that:

> "... an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision involved, and should

> moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved"[75].

As has been noted above, State practice concerning joint development has existed for over 30 years: some 13 Asian, 9 European, 1 African, and 1 Australian States are current parties to joint development agreements. Evidence of the emergence of an *opinio juris* among the generality of States may also be derived from the broad support attracted to the text of the 1982 United Nations Convention on the Law of the Sea, and particularly articles 74, 83 and 142, in respect of which acceptance may be said to be unanimous, and to have remained uncontroverted in the years since formal adoption of the Convention.

In the opinion of one recent authority:

> "There is... a legally binding and practically implementable regime of law which governs the apportionment of international common petroleum deposits among interested States... The practice of negotiation and seeking agreement on the exploitation and apportionment of a common deposit is not mere usage but, rather, a current customary rule of international law"[76].

Another disagrees, observing that "what might be reasonable and obligatory in one part of the world might not necessarily be considered so in other parts with different conceptions of law"[77], questioning the validity of a purely objective appraisal in determining the existence of a customary rule, and doubting whether it would be "admissible in customary international law to compel interested States to co-operate for joint development when they are not disposed to it for some reasons"[78].

While conceding that it might be premature to conclude that State practice regarding joint development with respect to certain "straddling" resources has matured into rules of customary international law, the trend in that direction emerging, principally as it happens among Asian States, seems clear. In this connection we may recall the dictum of Judge Tanaka in his dissenting opinion in the 1969 *North Sea Continental Shelf Cases* favouring an objective mode of determining the emergence of customary rules, when he observed that there was

> "no other way than to ascertain the existence of *opinio juris* from the fact of the external existence of a certain custom and its necessity felt in the inter-

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75. [1969] ICJ Rep. para. 74; 8 ILM (1969) p. 375.

76. W. T ONORATO, "Joint Development of Sea-Bed Hydrocarbon Resources: An Overview of Precedents in the North Sea", 6 *Energy* (1981) p. 1315.

77. M. MIYOSHI, "The Basic Concept of Joint Development of Hydrocarbon Resources on the Continental Shelf", Appendix II, 3 IJECL (1988) p. 9.

78. Ibid. p. 10.

national community rather than to seek evidence as to the subjective motives for each example of State practice"[79].

6. CHINA AND JOINT DEVELOPMENT

China has a continental coastline of some 18,000 kilometres, and about 6,000 islands with a total area of 80,000 square kilometres scattered in the Bo Hai (an internal sea), the Yellow Sea, the East China Sea and the South China Sea. These marine areas are rich in natural resources, both living and non-living, and are of vital importance to China both for its economic development and national security. Committed to a programme of modernization, China currently lacks the energy resources needed for its implementation. However, China's onshore and offshore oil potential is considerable. Some one million square kilometres of China's continental shelf area in the Bo Hai, Yellow Sea, East China Sea and South China Sea are believed to contain rich oil and gas deposits and may together comprise one of the largest oil bearing areas of the world[80]. Moreover, these offshore areas are close to domestic industrial centres, so that exploitation and transport of oil for domestic use and export would be relatively easy. Given China's economic objectives and strategic interests, it is hardly surprising that offshore energy resource development became an important element in its modernization strategy.

However, the discovery of rich petroleum deposits offshore during the late 1970s and early 1980s led the coastal States of the Yellow and East China Sea and the South China Sea to declare 200 mile exclusive economic zones, fishery zones or continental shelves[81]. Many areas thus became subject to overlapping claims by two or more countries, in some instances accompanied by active occupation[82], raising political tensions in the region.

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79. [1969] ICJ Rep. Dissenting Opinion of Judge TANAKA; 8 ILM (1969) p. 408.

80. See P. C. YUAN, "China's Offshore Oil Development Policy and Legislation: An Overall Analysis", 3 IJECL (1988) p. 108. Estimates of the oil resources in China's offshore area vary greatly, but both Chinese and foreign sources unanimously agree that there are good prospects for oil exploitation in China's offshore.

81. In 1977, Vietnam made a statement on its territorial sea, contiguous zone, continental shelf and exclusive economic zone. North Korea declared to establish a 200-mile EEZ. South Korea promulgated a law for the development of submarine mineral resources. In 1979, Japan proclaimed a 200-mile fishery zone. In 1980, Indonesia and Malaysia proclaimed their rights to a 200-mile EEZs respectively.

82. Vietnam, the Philippines and Malaysia have occupied some islands of the Nan Sha (Spratly) Archipelago. For details, see C. LO, *China's Policy towards Territorial Disputes* (Routledge, 1989).

From China's perspective, the main problems concern its claim to territorial sovereignty over the Diao Yu Dai Islands (Senkaku in Japanese) in the East China Sea, and the Xi Sha (Paracel) and Nan Sha (Spratly) islands in the South China Sea; the identification of its economic zone and continental shelf; and the settlement of disputes over demarcation of maritime boundaries among all the claimants. The complex historical bases of the claims, the importance of oil and gas to the claimants, and their national security interests, as well as the involvement of powers from outside the region, make it unlikely that formal settlement of territorial and maritime boundaries could be reached in the short term. China, in search of an alternative approach, may be willing to endorse the concept of "joint development".

Under China's new "open door" policy for economic development, which has removed political barriers to China's acceptance of co-operation with foreign capital and technologies in developing its offshore oil resources, joint development of disputed sea areas with foreign co-operation is no longer regarded *per se* as infringement of China's sovereignty and an unacceptable diversion of China's resources into foreign hands. On 10 February 1982, China promulgated *Regulations of the People's Republic of China on the Exploitation of Offshore Petroleum Resources in Co-operation with Foreign Enterprises,* the first ocean mineral law to be enacted since the establishment of the People's Republic of China in 1949. The Regulations establish a broad framework of principles and guidelines governing petroleum exploitation in offshore areas and co-operation with foreign entities in such operations. The strategic measures adopted by the China National Offshore Oil Corporation include provisions on encouragement of foreign collaboration, and opening the East China Sea to development by foreign contractors[83].

The concept of "joint development" seems to have received the endorsement of DENG XIAOPING himself. During a press conference in Tokyo in 1978, on the prospects for settling the dispute on the Diao Yu Dai Islands DENG said that:

> "It is true that the two sides maintain different views on this question... It does not matter if this question is shelved for some time, say, ten years. Our generation is not wise enough to find common language on this question. Our next generation will certainly be wiser. They will certainly find a solution acceptable to all"[84].

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83. The five strategic measures are: 1. Sticking to and developing foreign co-operation; 2. Continuously developing China's independently managed prospecting and exploitation; 3. Building a natural gas production base in the western part of the South China Sea; 4. Opening the East China Sea to the outside world; 5. Building oil refining and petrochemical industries. *Beijing Review*, 10-16 July 9 1982, p. 29.

In 1984, during a meeting with a delegation from the West, DENG spoke about the new approach to territorial disputes:

> "I have also considered the possibility of resolving certain territorial disputes by having the countries concerned jointly develop the disputed areas before discussing the question of sovereignty. A new approach should be sought to solve such problems according to realities"[85].

Later, in October 1984, at the Third Plenary Session of the Central Advisory Committee of the Communist Party of China, DENG mentioned the idea again:

> "International disputes that are not handled right can reach the flash point. I asked them (foreign guests) whether the policy of 'one country, two systems' could be adopted in some cases and the policy of 'joint development' in others... We Chinese stand for peace and hope to solve disputes by peaceful means. What kind of peaceful means? 'One country, two systems' and 'joint development'. Everyone says this is a new and very interesting idea"[86].

The East China Sea

Since the 1970s, the idea of "joint development" has attracted the attention of the countries in this region. Following a report of high probability of rich oil resources in the Yellow and the East China Seas[87], Japan, South Korea and Taiwan began protracted negotiations over claims to their continental shelves, presumably ignoring China's historic claim. In 1970, the parties agreed in principle to set up a joint development project, but following strong protest by China, the scheme was abandoned two years later[88]. Undeterred by this failure, Japan and South Korea resumed negotiations in late 1972, and this time, spurred by the oil crisis of 1973, went on to conclude a joint development agreement in February 1974[89]. As noted above, this agreement divided a specified joint development, and established a joint commission to carry out various functions therein. South Korea ratified the agreement in December 1974, but

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84. *Peking Review*, 3 November 1978, p. 16.

85. DENG XIAOPING, *Build Socialism with Chinese Characteristics* (Beijing: Foreign Language Press, 1985), p. 24.

86. Ibid., p. 56.

87. EMERY, et al., "Geological Structure and some Water Characteristics of the East China Sea and the Yellow Sea", 2 *ECAFE/CCOP Technical Bulletin* (1969) p. 41; see also D. M. H. Johnston, et al., *Ocean Boundary Making: Regional Issues and Development* (Croom Helm, 1988) p. 91.

88. JOHNSTON, op. cit. n. 87, p. 82.

89. See *supra* n. 31.

approval by Japan took four and a half years. Exploration operations began in mid-1979, but thus far no commercial quantities of oil have been discovered[90]. China's response to the joint development, was to declare promptly:

> "To one-sidedly mark off a large area of the continental shelf as a so-called 'joint development zone' behind China's back is an infringement on China's sovereignty... anyone who arbitrarily carries out development activities in this area must bear full responsibility for all the consequences arising therefrom"[91].

While China remains opposed to the Japan-South Korea arrangement because of continental shelf delimitation problems[92], China's approach to the concept of joint development itself was positive. Thus, having launched exploration and exploitation of oil and gas resources with foreign co-operation in offshore areas such as Bo Hai and Ying Ge Hai, China has cautiously turned to consideration of the possibility of joint development with Japan in the disputed East China Sea. In September 1979, during a visit to Tokyo, China's Vice-Premier, GU MU, suggested that the dispute over the Diao Yu Dai should be shelved while the two countries undertook joint development of oil resources in the surrounding sea areas[93]. The Japanese Government responded positively to the idea[94]. In December 1980, a meeting at expert level between China and Japan took place in Beijing, the Chinese side advocating the creation of joint development zones in the area of overlapping claims. The proposal was taken back to Tokyo for consideration, but evidently evoked no response[95]. In October 1982, China's Vice-Premier, YAO YILIN, expressed the view that it might be desirable to invite the United States to participate in such a joint development project as well as Japan[96].

Recently, China and Japan resumed negotiations on joint development in the East China Sea at the level of the oil industries of the two countries. Two problems must be resolved before there can be agreement on the matter. The first of them concerns sovereignty over the Diao Yu Dai Islands. China prefers issues of sovereignty to be shelved in order to permit oil exploration to proceed, while Japan, with the Islands under its

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90. JOHNSTON, op.cit. *supra* n. 87, p. 92; see also M. MIYOSHI, "The Japan-South Korea Agreement on Joint Development of the Continental Shelf", 10 *Energy* (1985) p. 551.

91. *Peking Review*, 12 April 1974, p. 7.

92. E.g., see *Peking Review*, 8 February 1974, p. 3; 17 June 1976, pp. 16-17; 26 June 1978, p. 25.

93. C. LO, op.cit. *supra* n. 82, p. 172.

94. Ibid., pp. 172-173.

95. See M. J. VALENCIA, "Northeast Asia: Petroleum Potential, Jurisdictional Claims, and International Relations", 20 ODIL (1989), p. 53.

96. JOHNSTON, op.cit. *supra* n. 87, p. 101.

physical control, is reluctant to admit any doubt as to its sovereignty claim.

The second problem is that of selecting and demarcating the joint development zone. China suggests confining the joint development zone to the area of overlapping claims, while Japan would like to establish the zone across the median-line and into the Chinese side beyond the area of overlap[97]. As one commentator points out,

> "for the idea of joint development to be successful, the gap between overlapping claims to maritime space should not be too wide, otherwise both sides to the dispute might feel that they would have to make too great a compromise"[98].

The difficulty of negotiating a joint development arrangement is compounded by the fact that in the East China Sea, China claims sovereignty over its continental shelf based on the principle of "natural prolongation", while Japan insists on the median line approach. If joint development were to be limited to an area of the continental shelf on either side of a median line, China might be seen implicitly to accept the Japanese approach, thus adversely affecting China's position in any final settlement of the boundary delimitation question. However, as neither side seems willing to yield on the question of sovereignty over the Diao Yu Dai Islands, and the surrounding area has good prospects for oil production, to shelve the question and conclude a joint development arrangement with Japan could offer a sound practical solution.

The recent signing of the Timor Gap Treaty between Australia and Indonesia could well encourage the emergence of such a solution, through demonstrating the feasibility of joint development under the geological conditions prevailing in East Timor between Australia and Indonesia, which closely resemble the geology in the East China Sea[99]. Both the negotiation and the operation of the Timor Gap agreement could provide China and Japan with valuable experience and precedent. Since oil is of critical importance to both countries' economies, and given their successful co-operation in the Bo Hai and the Yellow Sea, there is every likelihood that negotiations over joint development in the East China Sea will lead eventually to agreement.

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97. See also ZHIGUO GAO, *Joint Development of Overlapping Continental Shelf Areas in International Law - with Special Reference to Joint Development in the East China Sea* (occasional paper, 1990) p. 37.

98. C. LO, op.cit. *supra* n. 82, pp. 173-174.

99. See K. F. ROYER, "Japan's East China Sea Ocean Boundaries: What Solutions can a Confused Legal Environment Provide in a Complex Boundary Dispute?", 22 Vanderbilt JTL (1989) pp. 522-630.

The South China Sea

In the South China Sea as well, the question of access to the area's mineral resources is complicated by territorial disputes involving several countries. Proposals for joint development in the South China Sea are being considered by China, and the attitude of the Chinese leadership could also be positive. DENG'S remarks concerning the East China Sea could be seen as the expression of a general policy applicable also in respect of the South China Sea. Thus DENG has suggested to the Philippine Government the idea of shelving sovereignty disputes and, instead, establishing a joint development arrangement for oil exploitation in the Nan Sha Islands. Such a scheme finds endorsement in the writings of experts in the field. MARK VALENCIA, for example, has observed:

> "Perhaps one of the best candidates for joint development would be portions of the Spratly [Nan Sha] area. If Vietnam and the Chinese province of Taiwan could somehow be excluded from the Spratly issues, China, the Philippines and Malaysia could undertake joint exploration there, perhaps in areas farthest from Vietnamese claimed islands"[100].

However, much preparatory work remains to be done before China takes a final position on proposals for joint development in the South China Sea. First, China must clearly identify its own maritime space in the sub-region. In order to do so, China would have to overcome difficulties similar to those which it faced in the dispute with Japan over Diao Yu Dao Islands and the continental shelf boundary delimitation in the East China Sea. Second, China has remained consistent and firm in its assertion of sovereignty over the Xi Sha (Paracel) and Nan Sha (Spratly) Islands, in respect of which Vietnam, the Philippines and Malaysia have not only put forward sovereignty claims, but also followed strategies of establishing and maintaining physical presence. Although China's recent establishment of a marine scientific survey station on one of the Nan Sha Islands in 1988 demonstrated its determination to exercise sovereignty and the capacity to defend its claims, it has yet to maintain a permanent physical presence on the Islands generally, and thus strengthen its position in any negotiation over joint development of their resources. It seems safe to conclude that, given the legal complexities arising out of conflicting claims, the movement toward joint development is likely to progress more slowly in relation to the resources of the South China Sea than of the East China Sea.

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100. M. J. VALENCIA, et al., Marine Policy, p. 187, as cited in C. LO, *supra* n. 82., p. 175.

7. CONCLUSION

"Joint development", or co-operative exploration, exploitation and management of off-shore mineral resources pursuant to inter-governmental agreement, seems assured of a place among the strategies of good-neighbourliness which may be used to establish or maintain friendly and mutually beneficial relations among States. Applied with a view to early realization of benefits from mineral wealth which might otherwise be left undeveloped during protracted negotiations concerning the limits of national sovereignties, joint development is representative of a modern trend away from narrow autarkic nationalism, and toward recognition of the benefits of consensus, co-operation and balanced inter-dependence among States. "Joint development" is a pragmatic solution capable of accomplishing the avoidance of confrontation and its wasteful consequences, through focusing on positive approaches and the initiation of productive activity from which tangible benefits accrue to all concerned.

While one need look no further than common sense for the roots of the idea of joint development, conceptual endorsement is to be found in relevant provisions of the United Nations Convention on the Law of the Sea, particularly articles 74 and 83, and article 142 discussed in part 4 above, and in an emerging customary framework discussed in part 5. In their search for new sources of petroleum and natural gas more coastal States are likely to turn away from sterile jurisdictional controversy, and to consider the practical advantages to be derived from regimes of joint development. Among the marine areas in which such regimes might usefully be applied are those between Vietnam and Kampuchea in the Gulf of Thailand[101]; between the United States and the Soviet Union in the Bering Sea[102]; between Venezuela and Trinidad and Tobago in the Gulf of Paria[103]; between the United States and Canada in the Beaufort Sea[104]; and between the United Kingdom and Denmark in the North Sea[105]. As one authority has observed:

> "In an energy-poor world with many areas of off-shore hydrocarbon potential claimed by more than one desperate country, joint development is an idea whose time is coming"[106].

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101. See M. J. VALENCIA, et al., *supra* n. 14.

102. See C. M. ANTINORI, "The Bering Sea: A Maritime Delimitation Dispute between the United States and the Soviet Union", 18 ODIL (1987) p. 1.

103. See E. L. RICHARDSON, "Jan Mayen in Perspective", 82 AJIL (1988) pp. 454-455.

104. Ibid., pp. 456-457.

105. Ibid. p. 457.

106. M. J. VALENCIA, et al., *supra* n. 14, p. 247.

While the present essay does not afford the proper context for a full examination of the cultural aspects of the emerging concept of joint development in international law, it may not be out of place to suggest here that joint development might, for several reasons, be a device of particular interest and appeal to Asian societies. In the first place, Asia as a geographic area is vast, and as a geo-political concept may be said to extend from the shores of the Red Sea eastward across a massive continental landmass and beyond, to encompass even the island States of the Pacific Ocean. The sheer number of maritime boundaries, demarcation of which could needlessly divert the slender resources of the States concerned, is substantial, and the need for imaginative ways to resolve such situations expeditiously, is correspondingly great.

Again, scholars have for centuries observed at the core of Asian cultures an essential need to preserve harmony. Overt expression of that need is seen in conduct directed at consensus-building, as well as in co-operative behaviour governed by rules that emphasize the collectivity rather than the individual. These characteristics may well be found to predispose Asian cultures to accept regimes of joint development, the essence of which is setting conflict aside in favour of co-operative endeavour for mutual benefit. The spirit of joint development may, indeed, be epitomized in an ancient Chinese proverb which runs "Qiu Tong Cun Yi" or "Seek common ground while preserving differences".

Although the earliest agreement mentioned above providing for joint development of mineral resources (albeit land resources) is between European States (Austria and Czechoslovakia) the question of where the modern concept originated is not necessarily of critical significance. The examples quoted in part 2 show convincingly the substantial contribution made to the elaboration of the concept by European States whose cultures emphasize the individual rather than the collectivity, but have achieved, nevertheless, the most complete workable model to-date of regional co-operation and integration. It is nevertheless worth noting that of some 24 States currently parties to joint development arrangements, the majority, 13, are Asian. The acute need of all but a few Asian States to speed economic development, and the cultural core characteristics referred to, are likely to steer these States in the direction of adopting co-operative arrangements with features such as those mentioned in part 5. With endorsement forthcoming from larger Asian States such as China, Japan and Indonesia, techniques of joint development may well make a major contribution to the well-being of peoples of the region, becoming in time the solution most appropriate as being the most readily internalized among the States concerned.

ENVIRONMENTAL PROBLEMS AND POLICY RESPONSE IN HONG KONG: AN EVALUATION FROM AN INTERNATIONAL LEGAL PERSPECTIVE

Roda Mushkat*

1. APPLICABILITY OF INTERNATIONAL ENVIRONMENTAL LAW TO HONG KONG

Before discussing Hong Kong's compliance with international environmental law, it may be desirable to examine whether, and to what extent, the relevant provisions pertain to the Territory. As observed by an international expert in the field,[1] the law of the environment is a new form of international law, similar in many respects to human rights law, in that it has developed beyond the mode of reciprocal obligations between individual States to broader concepts of duties *erga omnes* to protect the environment for the benefit of the international community as a whole and, indeed, for the entire human race, including future generations.

Some commentators, in fact, locate the normative basis of international environmental law within the context of human rights, as the entitlement to a healthy environment is increasingly viewed as a fundamental human right.[2] First enunciated at an international level in 1972 by the UN Conference on the Environment, the right of persons to "freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and self-being",[3] has since been reaffirmed in governmental[4] and non-governmental[5] meetings as well as incorporated in the constitutions of numerous States.[6] Indeed, such a right is in full

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1. See A. KISS, *Droit International de l'Environnement* (Paris: Editions A. Pedone, 1989).

2. See generally W. P. GORMLEY, *Human Rights and Environment. The Need for International Cooperation* (Leyden: A.W. Sijthoff, 1976).

3. 1972 *Stockholm Declaration on the Human Environment.* UN Doc. A/CONF. 48/14 (1972), 11 ILM (1972) 1416 [hereafter: Stockholm Declaration].

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, Volume 2, 113-126

accord with the guidelines laid down by the UN in respect of emerging human rights.[7]

It is in any event clear, that in addition to a large body of treaty law,[8] some norms embodying an international duty of care in relation to the environment have assumed the status of customary international law binding on all nations. Thus, as aptly reflected in their practice (coupled with the relevant *opinio juris*),[9] States have accepted responsibility based on the principle of *sic utere tuo ut alienum non laedas*, namely of not using

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4. See, e.g., *1989 Hague Charter Declaration on the Environment*, 28 ILM (1989) 1308 (proclaiming the "right to live in dignity in a viable global environment").

5. See, e.g., *Draft Charter on Environmental Rights and Obligations*, adopted at the UN Experts Meeting in Oslo, Norway, 29-31 October 1990, 21 *Environmental Policy and Law* (1991) 81 ("Everyone has the right to an environment adequate for his general health and well-being").

6. E.g., Spain, Portugal, Peru, Yugoslavia, Poland. A duty imposed on the government to protect the environment is included in the constitutions of Greece, Switzerland, the People's Republic of China [PRC], USSR, Sri Lanka. See MARKS, 'Emerging Human Rights, a New Generation for the 1980s?', 33 *Rutgers Law Review* (1981) 435, 443.

7. It is consistent with the existing body of human rights law; it is of fundamental character and derives from the inherent dignity and worth of the human person; it gives rise to identifiable and practicable rights and obligations; there exists generally an implementation machinery; it attracts broad international support. See G.A. Res. 41/120, UN GAOR 41st sess. Supp. No. 53 (A/41/53) at 178 (1987).

8. For a useful collection of relevant treaties, see A.C. KISS (ed.), *Selected Multilateral Treaties in the Field of the Environment* (Nairobi: UNEP, 1983). There is no universal treaty imposing clear obligations on States to protect the environment or to prevent its pollution. There are, however, many treaties which touch on these issues in connection with the primary purposes of these treaties, e.g., the 1958 Geneva Convention on the High Seas (Arts. 24, 25); 1967 Outer Space Treaty (places an obligation on states parties to conduct the exploration of outer space so as to avoid harmful contamination or adverse changes in the environment of the earth resulting from the introduction of extra-terrestrial matters – Art. IX; 1979 Moon Agreement (parties assume duty not to alter the natural balance of the environment by introducing adverse changes or by contamination with extraneous substances, or by any other means – Art. 7); 1968 Non-Proliferation Treaty (imposes a ban on nuclear tests in the atmosphere – Art. 1); 1982 Convention on the Law of the Sea (Part XII, Arts. 192-237). In addition, there is a fairly large body of multilateral conventions which regulate specific aspects of environmental protection, e.g., 1954/1971 International Convention for the Prevention of Pollution of the Sea by Oil; 1971 Convention on International Liability for Damage Caused by Space Objects; 1972 Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircrafts; 1974 Convention for the Prevention of Marine Pollution from Land-Based Sources and its 1986 amending Protocol; 1976 Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources; 1979 Convention on Long-Range Transboundary Air Pollution and its 1984/1985 Protocols; and most recently, 1985 Vienna Convention for the Protection of the Ozone Layer and 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. The conventional body of rules is further buttressed by regional agreements, e.g., the 1970 Nordic Convention on Protection of the Environment; 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution, and Protocols; 1978 Kuwait Regional Convention for Cooperation on the Protection of Marine Environmental Pollution; 1981 Abidjan Convention for Cooperation on the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, and Protocols; 1983 Catagena de Indias Convention for the Protection and Development of Marine Environment of the Wider Caribbean Region; 1986 Convention for the Protection of the Natural Resources and the Environment of the South Pacific Region, and Protocols concerning Cooperation in Combating Pollution Emergencies in the South Pacific Region and for the Prevention of Pollution of the South Pacific Region by Dumping. Finally, many treaties in this field are of a bilateral nature governing environmental issues in border areas or regulating shared natural resources (e.g., US/Canada; US/Mexico).

their territory in a manner contrary to the rights of others. Such a primary obligation has been further elaborated[10] as consisting of a series of four duties – to prevent environmental harm, provide timely notice and information to affected parties, conclude environmental cooperation agreements to minimize expected damage, and repair loss when injury occurred.

While as yet not codified nor forming part of an integrated Asia-Pacific strategy, certain norms may also be said to emerge in the form of "softer law", giving expression to the environmental needs and priorities of the region. Regarded as authoritative in this context are the recommendations and guidelines formulated by ESCAP-organized experts' meetings[11] and intergovernmental conferences.[12]

As a "subject" of international law in possession of an international legal personality,[13] Hong Kong has international obligations incumbent upon it and may be held internationally liable for their breach. In particular, given Hong Kong's control, jurisdiction and regulatory capacity[14] over its people[15] and territory, the Government's responsibility for the management, use, development, lease or grant of land and natural resources,[16] and its power to render decisions affecting the environment

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9. See references cited in R. MUSHKAT, 'The Daya Bay Nuclear Plant Project in the Light of International Environmental Law', 7 *UCLA Pacific Basin Law Journal* (1990) 87, 88-9, notes 7-10.

10. See, in particular, the Schematic Outline presented in R. QUENTIN-BAXTER, Special Rapporteur, *Fourth Report on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law*, (UN Doc. A/CN.4/373 and Corr. 1 & 2), reproduced in *Yearbook of the International Law Commission*, 1983 Vol. 2 Part 1 at 223.

11. See, e.g., Recommendations of the Expert Group Meeting, Tokyo, 5-11 June 1984, in *Integration of Environment into Development: Institutional and Legislative Aspects* (Bangkok: ESCAP, 1985). For a summary of the recommendations, see R. MUSHKAT, 'International Environmental Law in the Asia-Pacific Region: Recent Developments', 20 *California Western International Law Journal* (1989-90) 21, 28, note 36.

12. See *Recommendations of Intergovernmental Meeting*, Bangkok, 26-30 November 1984 and *Report of the Ministerial-Level Conference on Environment and Development in Asia and the Pacific*, Bangkok, 15-16 October 1990, IHE/MCED/Rep. 19 November 1990.

13. See R. MUSHKAT,'Hong Kong as an International Legal Person', 8 *Emory International Law Review* (1992) 105.

14. Contemporary discussions of international responsibility, especially in the area of international environmental law, emphasize jurisdiction competence (*i.e.*, competence to make and apply law) and effective control over territory as the bases for ascription of international responsibility. See *Fourth Report, supra* n. 10 at paras 7-8 (analogy is drawn with the duties owed by a State as the territorial controlling authority in respect of aliens within its borders); see also Julio BARBOZA, Special Rapporteur, *Fourth Report on International Liability of Injurious Consequences arising out of Acts not Prohibited by International Law*, UN Doc. A/CN.4/43, and related discussion by the International Law Commission in its 2075th meeting on 7 July 1988, in *Yearbook of the International Law Commission* 1988 Vol. 1 at 222. Indeed, the various ILC's reports reflect recognition of the need for a new system of international obligations in which the source of international liability is the mere causal connection between an activity and occurrence of serious harm rather than a wrongful act on the part of, or imputed to, the governing authorities.

15. Including vessels or aircraft possessing the "Hong Kong nationality".

based on its political, economic and social objectives, the local authorities incur the corollary international duties regarding protection of the environment and prevention of environmental harm to others.

Thus, Hong Kong's responsibility may be engaged as a result of violations of international environmental norms that are binding on the Territory either under applicable treaties or as part of customary international law which is incorporated in the local law.[17] Additionally, in view of the pivotal role played by Hong Kong in the region's economic affairs, the Government is also expected to abide by the norms which have been accepted as regional environmental law.[18]

2. ENVIRONMENTAL PROTECTION IN HONG KONG

Notwithstanding derogatory references to Hong Kong's "record" in environmental protection,[19] there is little doubt that environmental issues loom larger on the current political agenda of the Territory, and both the Government and the private sector[20] are more attuned to environmental concerns. A reasonably sound institutional infrastructure has been erected, indeed boosted,[21] and numerous laws enacted[22] in an effort to arrest the degradation of the environment and improve the quality of environmental life in the Territory. It should nonetheless be explored to

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16. It may be interesting to note that this responsibility is to be maintained post-1997 under the Basic Law of the Hong Kong Special Administrative Region [HKSAR] of April 1990, Art. 7.

17. In accordance with established British judicial practice, customary international law forms part of the common law of England and hence applicable as part of the law of Hong Kong. On the "incorporation doctrine" and its limits of application, see R. MUSHKAT, 'International Human Rights Law and Domestic Hong Kong Law, in R. WACKS (ed.), *Hong Kong's Bill of Rights Problems and Prospects* (Hong Kong: Faculty of Law, University of Hong Kong, 1990) 25.

18. See *supra* ns. 11 & 12 and corresponding text.

19. Hong Kong has been described as a "traditional bastion of environmental insanity". See C. LONSDALE, 'Time to Take Polluters in HK to task', SCMP 29 December 1990. The Territory has also been said to have "a First World Economy but a Third World Environment". See M. APPLEYARD, 'Time to Tackle Pollution. HK's Third World Environment', SCMP 26 March 1989.

20. Note, e.g., the high-powered Private Sector Committee on the Environment [PSCE] established in 1988 with the aim of addressing critical environmental problems. The PSCE is comprised of the territory's "*hongs*" such as the Hong Kong Bank, Swire, Jardine, Wharf (Holdings), Hutchison Wampoa and the South China Morning Post.

21. What began as a small environment protection "unit" within the Government in 1980 developed into an "agency" in 1981 and a fully fledged "department" in 1986. At the higher echelons of government administration, the environment has been given added status with the creation on 1 September 1989 of a new Planning, Environment and Lands Branch in the Government Secretariat. Another significant structural change has been the establishment of both the Drainage Services Department and the Planning Department on 1 January 1990.

22. Included major pollution control ordinances such as the Water Pollution Control (1980), Waste Disposal (1980), Air Pollution Control (1983) and Noise Pollution Control (1988).

what extent Hong Kong has conformed with applicable international environmental norms.

2.1 **Sustainable Development**

Hong Kong's response to what has recently[23] been asserted to be the most crucial element of the new international environmental order – namely, "sustainable development" – is particularly significant, given the Territory's vigorous pursuit of economic growth and development. Proclaimed by the World Commission on Environment and Development in 1986,[24] the principle of sustainable development has since been reaffirmed in numerous resolutions and statements by various international bodies.[25] It obliges all nations, regardless of the state of development, to integrate environmental considerations into their development policies and programmes with a view to ensuring long-term economic development while preserving and improving the quality of life of present and future generations.

Hong Kong has not incorporated the concept of sustainable development into its constitutional framework or legal system, nor has a national policy embracing such an aim been adopted.[26] Indeed, a perception that economic growth and the environment are incompatible goals and that

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23. See Communiqué issued by the environmental ministers of 24 nations at an OECD meeting held on 31 January 1990, cited in 14 *Environmental Reporter* (13 February 1991) 87.

24. See WCED, *Legal Principles for Environmental Protection and Sustainable Development*, 25 ILM (1986) 494, also WCED, Our Common Future (Oxford: Oxford University Press, 1987).

25. The WCED's findings and recommendations were endorsed in General Assembly Resolutions 42/186 and 187, 11 December 1987. See also UNEP, Statement by the Governing Council on Sustainable Development, 19 *Environmental Policy and Law* 122-2; Declaration by the seven major industrial nations (G7) at the Summit of the Arch in Paris on 16 July 1989, ibid. at 183; Langkawi Declaration on the Environment made at the Commonwealth Heads of Government Meeting in Kuala Lumpur on 18-24 October 1989, 15 *Commonwealth Law Bulletin* (1989) 1545-47; Communiqué of the OECD Meting of Environmental Ministers on 31 January 1990, *supra* n. 23. At a regional level, see Resolution XLIV adopted by the Economic and Social Commission for Asia and the Pacific [ESCAP] in its April 1988 session, 6 *ESCAP Environmental News* (April-June 1988) 5-6; Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific in ESCAP, *Report of the Ministerial-Level Conference on Environment and Development in Asia and the Pacific*, Bangkok, 15-16 October 1990, IHE/MCED/Rep. (19 November 1990) Annex II.

26. Compare with other countries in the region, e.g., the national policies and measures on environmental development incorporated in the National Development Plan of Thailand; Japan's National Economic and Social Plan embraces the goal of promoting a general environmental policy within the plan (although Japan does not have a national policy of sustainable development as such); in the Philippines the Environmental Policy Presidential Degree (PD 1511) which recognizes the inalienable right of people to a healthy environment is backed up by an Environment Code (PD 1152); Indonesia has promulgated Act No. 4, 1982 which contains Basic Provisions for the Management of the Living Environment and serves as a constitutional yardstick for judging the validity of all legislation related to aspects of the living environment. See ESCAP, *Integration of Environment into Development: Institutional and Legislative Aspects* (Bangkok, 1985).

the former should be accorded priority have characterized many policy debates in Hong Kong and constrained government administrations in tackling the Territory's environmental problems.[27]

Progress towards recognition of the issue is reflected in the Government's White Paper: *Pollution in Hong Kong – a Time to Act*, released on 5 June 1989. Acknowledging that "the main reason why our environment is now in an unsatisfactory state is that in the past the Government and community made choices which gave too little emphasis to the needs of the environment", the Government has undertaken to "give greater emphasis to the environment in the future".[28] To achieve this objective, a new Planning Environment and Land Branch was established "to ensure that due attention is given to environmental aspects and their integration into the planning system".[29]

Yet, the qualifying statement that "the increased emphasis on improving the environment must not ignore the needs of the economy"[30] suggests that the Government continues to view economic and environmental concerns as inherently incompatible, and betrays an attitude far removed from the notion of interdependence and mutual reinforcement which underlies the international concept of "environmentally sound and sustainable development".

Similar conceptual ambivalence is evident in the status envisaged for the environment in the policy matrix of Hong Kong's post-1997 Government. Thus Article 119 of the Basic Law of the Hong Kong Special Administrative Region may provide some basis for concern over the territory's future environment, given the fact that the perfunctory statement that the Government "pay regard to the protection of the environment" is loosely appended to an explicit directive to the Government of the SAR to "formulate appropriate policies to promote and coordinate the development of various trades such as manufacturing, commerce, tourism, real estate,

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27. See, *e.g.*, Legislative Council's [LegCo] debates that preceded the passing of the Water Pollution Ordinance in 1980 (resulting in a diluted form of the legislation originally proposed as well as in a much delayed declaration of Water Control Zones) and, more recently, the Amendment to the same Ordinance, *infra* n. 39. It may be interesting to quote a member of the Legislative Council who put forward the "industrial standpoint" as follows: "We support the environmental protection policies. On the other hand, we are obliged to remind the Government that environmental protection policies on the principle of 'killing the hens to get the eggs' would not be in favour of our economic development". *Hong Kong Hansard, Reports of the Sittings of the Legislate Council of Hong Kong*, Session 1990/91 at 143 (24 October 1990). See also the insignificant place accorded to environment-based considerations in LegCo debates concerning the Government's massive Port and Airport Development Strategy [PADS] announced in October 1989.

28. Para. 1.5.

29. Para. 1.8.

30. Para. 1.7.

transport, public utilities, services, agriculture and fisheries" and features at the end of a detailed chapter entitled: Economy.

It is also evident that in the absence of clear priorities for the allocation of Government resources, implementation of policies and programmes rides on the vagaries of whichever forces are ascendant when budget allocations are made.[31] Hong Kong, in common with other countries in the Asia Pacific region, has displayed considerable weakness in implementation and enforcement of environmental policies.[32] While such weakness is rooted largely in inadequate financial, technological and administrative resources, it may also be induced by the low public demand for environmental quality and the limited leverage of concerned interest groups.[33]

2.2 **Pollution Control**

Although no binding international rules are imposed with respect to the pollution control techniques to be adopted by States, prescriptions regarding environmental impact assessments [EIAs][34] and OECD recommendations pertaining to the "Polluter-Pay Principle" [PPP][35] have been widely accepted as authoritative in the context of environmental manage-

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31. While the Government of the day has placed the environment, along with education, public health and security, as priority programmes that will be spared from the worst cuts in a time of austerity, preferences may be reconsidered to accommodate the Port and Airport Strategy on which its reputation is staked. It has been suggested that there are already signs that notwithstanding "political" assertions of commitment, environment does not feature prominently on the "administrative" agenda, as demonstrated, for example, by the Government's decision to grant the Environmental Protection Department only a quarter of the extra 371 staff it has requested to help enforce toughened legislation. See Editorial, 'Keep Priority Status for the Environment", SCMP 2 March 1991, at 12.

32. Note, *e.g.*, that although Hong Kong is divided into 10 Water Control Zones [WCZs] – in respect of which the Government has declared Water Quality Objectives as specified in the Water Pollution Control Ordinance – enforcement measures have been undertaken so far only in relation to four such zones (leaving the most polluted local body of water, Victoria Harbour, without protection under any environmental legislation). Lack of manpower has been cited by officials as the reason for phased introduction of WCZs, but observers have suggested that sufficient resources are not forthcoming because the Hong Kong Government which "traditionally has close relationship with industry" is "unwilling to force the territory's thousands of polluting factories to comply with the Water Pollution Control simultaneously". See *Hong Kong's Environmental Challenge. Moving from Grey to Green* (Hong Kong: Business International Asia/Pacific Ltd., 1991) at p. 58.

33. Notwithstanding the proliferation in recent years of environmental pressure groups (e.g., Green Power, Friends of the Earth, the Conservancy Association, Elefriends HK, the Friends of Black River) such organizations have tended to coalesce around single issues on an *ad hoc* basis and have had a rather modest effect of governmental policies. It may be noted that some acknowledgment of the need to promote public awareness and support for environmental protection is reflected in the Government's White Paper. Observing that "environmental awareness and general appreciation of environmental issues in Hong Kong are still well below that in most developed countries", the Government has stated its overall objective for environmental education and set out plans for expansion of training and awareness programmes.

ment. The Hong Kong Government, while recognizing the "need for planning activities to give due consideration to environmental factors",[36] has not formally incorporated EIAs as prerequisites in all planning processes.[37] Instead, informal EIAs procedures are followed which are confined to major private and public sector development projects.[38] By the same token, the principle that costs of pollution be borne by the polluter is yet to be adopted by the Government. The administration's choice of a "permit system", rather than the recommended PPP or some form of economic sanction, may illustrate the desire, reflected in the various local pollution control measures, not to impose an undue burden on the manufacturing sector.[39] Nor has the Government opted to follow an increasingly preferred[40] integrated legislative environmental protection system and continues to rely extensively on "non-legal devices".[41] As noted

34. See, *e.g.*, ESCAP, *Guidelines for Planners and Decision Makers* (1985). The Economic Commission for Europe has recently (26 February 1991) adopted a convention requiring all (26) signing nations (including the US, Canada and Eastern European countries) to establish an environmental impact assessment process and allow other nations the right to participate in that process.

35. See Recommendation of the Council of 26 May 1972 on Guiding Principles concerning the International Economic Aspects of Environmental Policies, C(72)128, 14 ILM (1975) 236; Recommendation of the Council of 14 November 1974 on the Implementation of Polluters-Pay Principle, C(74)223, ibid. at 234. The principle means that the polluter should bear the expense of carrying out measures drawn up by public authorities to ensure that the environment is in an acceptable state. Disincentives commonly take the form of user and pollution taxes.

36. White Paper: *Pollution in Hong Kong – a Time to Act, supra* text at n. 28, para. 6.14.

37. Assessments are thus not required by law and their findings do not have to be heeded even if they cause severe pollution or other problems.

38. It should be noted, though, that the Government announced recently, in a "radical" policy reversal, that it would publish and make available to the public environmental impact assessments of significant development projects. See J. ALLEN, ' 'Green' Reports to be Made Public', SCMP 18 December 1990, at 2. Whether the Government would necessarily use such assessments as "blue-prints for action" has nonetheless been questioned. See Editorial 'Testing Hong Kong's Environmental Resolve', SCMP 27 May 1991, at 18 (in connection with a report highlighting health hazards of a land reclamation scheme said to be regarded by the Government as a *fait accompli* project). Proposals are being prepared, however, by the Environmental Protection Department for legislative means to enforce private developers' duty to provide environmental impact assessments. See K. GRIFFIN, Environmental Law to Enforce Reports.', SCMP 4 June 1991, at 2.

39. New Air Pollution Control (Fuel Restriction) Regulations 1990, introducing sulphur emission controls, were nonetheless approved by the Legislative Council despite pressure from the industrial lobby concerned with rising fuel costs. (Yet the Government has decided not to phase out diesel-powered vehicles – notwithstanding health risks posed by the emission of sulphur and particulates from diesel engines – for fear of "fueling" the current high inflation rate. See K. GRIFFIN, 'Inflation Fears Stop Fuel Switch', SCMP 24 June 1991, at 1). Another piece of legislation long resisted by industrialists – the Water Pollution Control (Amendment) Ordinance – has also been brought into operation (on December 1990), imposing stricter controls and new standards on industrial discharges. (The Government did back down, however, in face of industry opposition in requiring toxic metal discharges to be reduced by 94 percent rather than 97 percent as proposed earlier). It is also reported that legislation is being drafted to require factories to pay for some of the polluted water they discharge. See K. GRIFFIN, 'Factories set to Pay for Discharge of Pollutants.', SCMP 18 June 1991, at 3.

40. See, *e.g.*, UK Environmental Protection Act 1990.

above,[42] several ordinances and regulations have been enacted which regulate specific sectors and, while generally tightening control, the legislation falls short of establishing a legal "duty of [environmental] care" which would facilitate effective redress for affected persons.[43]

At the same time, Hong Kong has sought to implement its international duties of pollution control by the incorporation of relevant conventions into the domestic law. Most notably, the Government has enacted the Ozone Layer Protection Ordinance 1989 to give effect to obligations under the 1985 Vienna Convention for the Protection of Ozone Layer[44] and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer,[45] to freeze its consumption of chlorofluorocarbons [CFCs] at 1986 levels from 1 July 1990.[46] Accordingly, the Ordinance controls – through a registration and licensing scheme – the import and export of "scheduled substances" which deplete the ozone layer. It prohibits the manufacture of these substances, and prescribes heavy fines for non-compliance.[47]

International obligations pertaining to marine pollution control have also found local legislative expression. Thus, Hong Kong's Merchant Ship-

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41. Such as "codes of practice", "technical memoranda", Governor's Directions and Departmental Practices. A detailed discussion is provided in an unpublished paper by M. J. DOWNEY, *Non-Legal Devices and the Legislative Control of the Environment* (1990). The author concludes, that while the use of non-legal devices allows for a degree of flexibility, it is not consistent with the "Rule of Law" principle.

42. See *supra*, n. 22.

43. Note, in particular, that under the various pollution control ordinances the Crown is exempted from criminal liability for non-compliance and is further protected from any other proceedings (including civil proceedings or applications for judicial review). An individual may not be able, therefore, to compel the Government to either perform its statutory duties or, alternatively, comply with the relevant statutory prohibitions. It has also been argued that fines stipulated in the relevant statues, as well as court-inflicted penalties, are far too low to deter polluters. Calls have been made, for example, for the imposition of stiffer sentences on repeat offenders. See 'Campaign Sputters as Priorities Change in Hong Kong', 24 *Business Asia* (17 June 1991) 208.

44. 26 ILM (1987) 1516.

45. Ibid., at 1541.

46. It may be noted that further legislation is contemplated to take account of changes agreed upon at the second meeting of the parties to the Montreal Protocol (see Helsinki Declaration on the Protection of the Ozone Layer, 2 May 1989, 28 ILM (1989) 1335, namely to allow 100 percent of the 1986 levels until 1 January 1995 and then a progressive decrease to zero on and after 1 January 2000 to require the decrease of non-essential halons progressively from 1 July 1995 to zero on and after January 2000. The Hong Kong administration is also assuming that the recommended Adjustments and Amendments to the Montreal Protocol Concerning the Control of Other CFCs and Carbon Tetrachloride (30 ILM (1991) 537) would be adopted (following ratifications by 20 or more parties) and is preparing the necessary legislation. See *Hong Kong Hansard* 1990, (14 November 1990) pp. 429-30.

47. A licensee who contravenes conditions of his licence is liable to a one million [HK] dollars fine and two years imprisonment. Note that a Tsuen Wan magistrate recently increased a fine to about ten percent of the value of CFCs imported without a licence, following submission by the Environmental Protection Department that the original fine was too small given (a) the seriousness of the ozone layer problem; (b) that penalties had deliberately set up to deter; and (c) Hong Kong's obligations under international accords. Reported in SCMP 10 May 1990.

ping (Prevention and Control of Pollution) Ordinance 1989 seeks to incorporate two major international conventions that are applicable to the Territory, namely the 1969 International Convention Relating to the Intervention on the High Seas in Cases of Oil Pollution Casualties,[48] supplemented by the 1973 Protocol to that Convention,[49] and the 1973 International Convention for the Prevention of Pollution from Ships [MARPOL],[50] including additional protocols and annexes.[51] Two other international conventions pertaining to oil pollution – the 1969 International Convention on Civil Liability for Oil Pollution Damage[52] and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage[53] – have also been sought to be implemented locally by means of Hong Kong legislation,[54] the Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance 1990. The Territory's international obligations with respect to the curbing of ocean dumping of toxic wastes are discharged (pending "localisation"[55]) under the Dumping Sea Act (Overseas Territories) Order 1975 which gives effect to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters[56] and the 1978 Amendments to Annexes I and II of the Convention which have been extended to Hong Kong.

2.3 **Conservation of Nature**

The Territory's input into the world's conservation strategy[57] has been through enforcement of its international obligations under the 1973 Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES).[58] Consistent with such obligations, the Government has prohibited import and export of rhino horn-powder, extending con-

48. 9 ILM (1969) 25.

49. 68 AJIL (1973) 577.

50. 12 ILM (1973) 1319.

51. Ibid., at 1439 et seq.

52. 8 ILM (1969) 453.

53. 11 ILM (1972) 284.

54. Previously, the conventions had been in force in Hong Kong by virtue of UK Orders in Council.

55. Since British Acts applicable to Hong Kong would fall away as the Hong Kong Special Administrative Region comes into being on 1 July 1997, relevant laws need to be passed by the local legislature in order to survive the transition to Chinese sovereignty.

56. 11 ILM (1972) 262.

57. In 1980 the International Union for the Conservation of Nature and Natural Resources (IUCN) with the World Wildlife Fund International (WWFI) and the United Nations Environmental Programme (UNEP) published proposals for international action under the title "World Conservation Strategy". See 6 *Environmental Policy and Law* (1980) 77, 102.

trols – under the Animals and Plants (Protection of Endangered Species) Amendment 1989 – to any substance containing rhinoceros ingredients.

More controversial has been Hong Kong's commitment to ban all trade in raw ivory in accordance with the upgrading by CITES of the African elephant to fully protected species (under Appendix I).[59] Described as a "major blow to the industry" in the Territory which has the world's largest stockpile of ivory,[60] the move naturally triggered fierce protests from local traders.[61] In fact, economic expediency has triumphed, at least temporarily, over conservation considerations as the United Kingdom agreed to enter a reservation for Hong Kong to be exempted from the world-wide ban on ivory trading for six months (until 18 July 1990). Doubts have been cast besides on the ability of the authorities (more specifically the Agriculture and Fisheries Department) to enforce the ban, given "the Department's poor record on conservation and pollution issues".[62]

Conservationists have also criticized the inadequate implementation of another international convention applicable to Hong Kong, namely the 1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat.[63] The Government is yet to designate a wetland in the Territory for inclusion in a list of Wetlands of International Importance, as required under the Convention, although the Mai Po marshes would be ideally suited.[64]

2.4 **Nuclear Safety**

Although Hong Kong itself does not operate a nuclear power plant, the construction of such a plant by the People's Republic of China [PRC] in Daya Bay, about fifty kilometres from Hong Kong's urban area, makes it an indirect party in a scheme involving international obligations. Arguably, given the magnitude of the environmental risk posed, the Hong Kong Gov-

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58. 12 ILM (1973) 1088. The Convention provides for total trade bans in species threatened with extinction (as listed in Appendix I) and the strict regulation of species (listed in Appendix II) which, although not necessarily threatened now with extinction, may become so unless regulated.

59. See Report in 19 *Environmental Policy and Law* (1989) 215.

60. J. ALLEN, 'CITES Bans Sale of Old Ivory Stocks', SCMP 18 October 1989, at 3.

61. See E. FITZPATRICK and J. S. WONG, 'Ivory Traders to Seek Compensation', SCMP 19 October 1989, at 7; E. FITZPATRICK, 'Threat to Retaliate over Ivory Protests', SCMP 1 November 1989, at 7.

62. See Editorial, 'Money Talks in Ivory Trade Ban Climbdown', SCMP 20 January 1990, at 18.

63. 11 ILM (1972) 963.

64. The "China/1997 factor" has been invoked to explain the Government's inaction; the PRC is not a party to the Convention.

ernment should not assume a passive position, but implement appropriate preventive measures. Such measures, moreover, need not be viewed as infringement of Chinese sovereignty or interference in the PRC's internal affairs for they would be grounded in rights arising from "impact territoriality".[65] Indeed, relevant initiatives by Hong Kong would be consistent with the contemporary trend of vesting States with greater powers to control external sources of environmental hazards.[66]

At the same time, Hong Kong as the "exposed State" is entitled to insist on a cross-boundary environmental cooperation agreement which would enable the local authorities to ensure that the plant operators are maintaining appropriate safety standards, to monitor radioactivity at close range, to exchange information and to coordinate contingency planning for the Territory. Such an agreement should require the PRC to share technical information with Hong Kong, to cooperate in implementing any quality standards stipulated in the treaty, to notify Hong Kong of known potential environmental hazards, to combine technical resources, to abate any existing pollution-generating nuisance, to coordinate relevant national policies, and to prepare transnational environmental impact statements. Lastly, the agreement should require the Chinese Government to continue consulting with the local Government for the purpose of suppressing environmental risk and to prepare contingency plans which may be acted upon if an environmental harm within the ambit of the treaty occurs. In addition to establishing obligations and standards of conduct, the agreement should set up administrative machinery (e.g. a joint commission) for the enforcement of the rules and standards prescribed by the instrument. Finally, a comprehensive agreement could also indicate the remedies available to victims of transboundary harm emanating from the Daya Bay nuclear plant. To guarantee that these remedies will be effective, the agreement should establish a compensation fund for

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65. For a discussion of the concept of "impact territoriality", see M.S. MCDOUGAL and J. SCHNEIDER, 'The Protection of the Environment and World Public Order: some Recent Developments', 45 *Mississippi Law Journal* (1974) 1085, 1112.

66. As evidenced, e.g., by the oil pollution damage conventions, such as the 1969 Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, *supra* n. 48, which authorizes parties to take such measures as may be necessary "to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences"; and the 1969 Bonn Agreement concerning Pollution of the North Sea by Oil, 9 ILM (1970) 539. See also the 1982 Convention on the Law of the Sea, 21 ILM (1982) 1261. States have also assumed extraterritorial powers to protect their environmental integrity by municipal legislation. See, e.g., the American Water Quality Improvement Act, Pub. L. 91-224, sec. 11, 84 Stat. 91 (1970); Australian Navigation Act 1912-1973, 8 Austl. Acts P; Australian Protection of the Sea (Powers of Intervention) Act 1981; Canadian Arctic Waters Pollution Prevention Act, Can. Rev. Stat. Ch., A-12 (1985) (by which Canada claimed jurisdiction over an extensive area of the sea for anti-pollution measures) and the Oil in Navigable Waters Act, Ch. 21 (1971).

victim relief or a compulsory third-party insurance scheme on the risk-creator side.

2.5 **Duty to Cooperate**

In general, to conform with the duty to cooperate in good faith in matters concerning the protection and improvement of the environment,[67] the Hong Kong Government should seek to forge bilateral pacts with the PRC.[68] Cooperation may be particularly applicable with respect to the maintenance of transboundary natural resources, such as the Pearl River Delta, and the prevention and abatement of transboundary environmental interference, such as in the Daya Bay nuclear plant context. Recent experience may also suggest that, notwithstanding Hong Kong's most charitable reaction to China's environmental calamities,[69] both parties may benefit from a joint effort to explore in a pro-active fashion[70] possible means of abatement.

3. CONCLUDING OBSERVATIONS

Hong Kong's remarkable economic progress and the relative prominence which it enjoys in international affairs arguably impose on the Territory considerable responsibilities in the environmental domain. An affluent and outward-looking community cannot remain oblivious to normative developments which reflect universal concerns about the growing imbalance between resource utilization and environmental preservation.

Hong Kong has responded to the challenge inherent in reconciling these two imperatives by constructing a fairly elaborate legislative and institutional framework in an attempt to minimize damage to the environment. Given the low-level of grass-root's environmental activism, and the

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67. See the Stockholm Declaration, *supra* n.3.

68. Some informal cooperative arrangements are already in place, e.g., the Hong Kong-Guandong Environmental Protection Liaison Group. The group has recently received for consideration a report by its technical sub-group identifying certain key areas for future cooperation, including the preservation of the Mai Po marshes [*supra* n. 64], fisheries, human health, navigation & development and land use. See K. GRIFFIN, 'Pollution Group Identifies Five Problem Areas', SCMP 3 June 1991, at 5.

69. China's disastrous flooding has been attributed, *inter alia*, to climate changes brought about by continuing accumulation of greenhouse gases. See C. TAM, 'Floods Triggered by a Mystery Phenomenon', *The HK Standard*, 19 July 1991, at 8 (citing TU QIPU, Vice-President of the Nanjing Institute of Meteorology who identifies four contributing factors: greenhouse effect, sunspots, volcanic eruptions and El Nino Phenomenon).

70. Whether through the creation of research and information centres, monitoring, transfer of technology or funding.

cultural predisposition towards utilitarian values, the Territory's achievements in this sphere are by no means negligible.

Be it as it may, local performance falls in some respects short of international expectations. Environmental and natural resource management still ranks low on the Government's priority list,[71] implementation is slow,[72] the approach to the problem is characterized by preoccupation with short-term economic and political crises, and is biased towards remedial – as distinct from preventive – measures. In the absence of determined action to place environmental decision-making on a firmer footing, promote environmental causes at the community level (through, *inter alia*, non-governmental organizations), and forge closer links with other countries/international agencies in the region, the quality of environmental life in Hong Kong will continue to lag behind that enjoyed by people in the developed part of the world.

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71. The share of public expenditure allocated by the Government for environmental protection and improvement in 1991-1995 is as follows: 90/91 – 1.8%; 91/92 –3.1%; 92/93 – 3.5%; 93/94 – 2.9%; 94/95 – 2.5%. See Sir PIERS JACOBS, *1991-1992 Budget Speech* (March 1991), Appendix B. Note, however, that in real terms, the percentage change (comparing 1990/91 and 1994/95) in spending on environmental programmes is 61%, ibid., at 24.

72. See *Campaign Sputters as Priorities Change in Hong Kong, supra,* n. 43, for a list of major projects lagging behind their original target (including building of a chemical treatment plant, legislation to control handling of asbestos and noise on construction sites, plans to amend air pollution laws to increase penalties).

PHILIPPINE MARINE RESOURCES POLICY IN THE EXCLUSIVE ECONOMIC ZONE

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INTRODUCTION

As part of its overall constitutional policy on natural resources, the Philippines reserves the use and enjoyment of its marine wealth in the Exclusive Economic Zone exclusively to Filipino citizens.[1] This specific constitutional mandate is a new one which finds no precedent either in previous constitutional policies on natural resources[2] or in State legislative practice. While the review and reorientation of Philippine laws are being undertaken to implement this mandate,[3] its implications for marine resources development have necessarily been explored. Inasmuch as this particular policy directly implicates the institution of the Exclusive Economic Zone, a novel and innovative legal regime in the contemporary law of the sea, it is perhaps inevitable that attention be also given to its international legal aspects.[4] The object of this paper is to examine the Philippine Constitutional policy on the EEZ, mentioned above, in the light of the

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1. Para. 2, Sec. 2 of Art. XII of the 1987 Philippine Constitution states: 'The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens."

2. No mention of maritime zones of special jurisdiction is found in the national economy provisions of the 1935 and 1973 Constitutions. Both Constitutions, however, make reference to a broadly stated policy on natural resources, the parallel of which is found in the 1987 Constitution.

3. The Fisheries Code of 1974, the basic law on Philippine fisheries, is currently under review for revision or amendment in the two houses of Congress.

4. The only comment which has been made on this dimension of constitutional policy in question, suggests the conclusion that the 1982 Convention on the Law of the Sea collides with the 1987 Philippine Constitution in the matter of its EEZ Policy. See P. LOTILLA, 'Developing the Law on Fisheries and Living Aquatic Resources", 10 *Philippine Law Gazette* No. 3 (Jan. 1989) p. 1.

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, Volume 2, 127-161

relevant provisions of the 1982 Convention on the Law of the Sea. Specifically, it would attempt an elaboration of the legal status of this constitutional policy under international law and make a contribution to the discussion on the issue concerning the juridical nature and validity of a policy which reserves exclusively to Filipino citizens the use and enjoyment of marine resources in the Philippine EEZ. This paper will thus address the following questions:

1. What is the background and the intent of the Philippine constitutional policy which provides that the State reserves the use and enjoyment of the nation's marine wealth in its Exclusive Economic Zone exclusively to Filipino citizens?

2. How can this constitutional policy be correlated with the regime of the Exclusive Economic Zone in the new law of the sea, particularly with respect to the principle of foreign access in the EEZ?

3. What is the status of the Exclusive Economic Zone and its various regimes in the 1982 Convention on the Law of the Sea with respect to the Philippines as a coastal State?

4. Does the policy effect a breach of or compliance with any obligation assumed by the Philippines under international law, particularly with reference to the 1982 Convention on the Law of the Sea? and

5. In what way does the policy affect the promotion and realization of the objectives of the EEZ regime in the 1982 Convention on the Law of the Sea?

2. MUNICIPAL LAW SETTING

Before an examination of the EEZ regime[5] in the law of the sea is made, it will be useful to trace the evolution of the Philippine policy concerning resources in its marine waters, generally, and in the EEZ, specifically. This will provide a historical backdrop in appreciating the issue of the intent of EEZ policy in the 1987 Constitution and the legal relationship between this Constitutional policy and the 1982 Law of the Sea Convention (hereafter, CLOS). Focus will likewise be given to the important question of foreign participation in the exploration and exploitation of the country's marine resources.

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5. "Regime" is here understood and employed as simply a system of rules and regulations. *Black's Law Dictionary* (5th edn.) at 1153.

2.1 **Fisheries Decree of 1975**

Presidential Decree No. 704 of 1975 consolidates all laws affecting fishing and fisheries in the Philippines and declares as its primary policy objective the acceleration and promotion of the integrated development of the fishing industry and the keeping of fisheries resources of the country in optimum production condition through proper conservation and protection. The enforcement and application of this law is confined within "Philippine waters" which is expansively described as

> all bodies of water within the Philippine territory... and the sea or fresh water around, between, and connecting each of the islands of the archipelago ... and all other waters belonging to the Philippines by historic right or legal title, including the territorial sea, the seabed, the insular shelves and other submarine areas over which the Philippines has sovereignty or jurisdiction.[6]

By including in this definition "seabed" and "insular shelves" there is apparently an implied reference to the maritime territorial space covered by Presidential Proclamation No. 370 of 1968 proclaiming the Philippine continental shelf. This proclamation states that all the mineral and other natural resources in the seabed and subsoil of the continental shelf adjacent to the Philippines, but outside the area of its territorial sea to where the depth of the superjacent waters admits of exploitation of such resources including living organisms belonging to sedentary species appertain to the Philippines and are subject to its exclusive jurisdiction and control for purposes of exploitation.

The Fisheries Decree implements the provision on natural resources in the 1973 Constitution limiting the exploitation of fisheries resources to Filipino citizens and corporations or associations at least 60% of whose capital is owned by Filipino citizens.[7] The Code provides that only these persons may be eligible to obtain commercial fishing boat licenses.[8] Under certain conditions, however, foreign persons may participate in offshore fishing be entering into charter contracts, lease or lease-purchase agreements, or contracts for financial, technical or other forms of assistance with Filipino citizens or qualified corporations.[9] The possibility of

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6. Sec. 3 (r), Pres. Decree 704, as amended. This definition of Philippine waters is consistent with the 1935 and 1973 Constitutional provisions declaring the Philippine National Territory, and Act No. 4003 – the Fisheries Act of 1932.

7. A parallel provision is found in the 1935 Constitution.

8. Sec. 20, Pres. Decree 704, under the title "Utilization and Exploitation of Fishery/Aquatic Resources" with subtitle "Deep Sea or Offshore Fishing". Commercial fishing is fishing for commercial purposes in waters more than seven fathoms deep with the use of fishing boats more than three gross tons. Sec. 3 (c), Pres. Decree 704.

foreign engagement in the direct exploitation and utilization of aquatic resources is thus acknowledged in this legislation.

2.2 **Presidential Decree No. 1599**

The adoption of an Exclusive Economic Zone by the Philippines in 1978, through Presidential Decree No. 1599, was part of the widespread trend in State practice since 1975[10] of extended maritime claims for fisheries and other economic purposes by coastal States. The international developments connected with this event were triggered by the contemporaneous negotiations in the Third United Nations Conference on the Law of the Sea (hereafter, UNCLOS III) giving motivation to a considerable number of States to declare their EEZs. The Philippines patterned its EEZ claim after the EEZ model embodied in the 1977 Informal Composite Negotiation Text of the UNCLOS III,[11] whose fundamental provisions on the EEZ were eventually reproduced in the 1982 CLOS.

A notable feature of Presidential Decree No. 1599 is the provision which conceives of access by foreign nationals or corporations in the Philippine EEZ for the purpose of exploration and exploitation of resources therein. Section 3 of the Decree provides:

> 'Sec. 3. Except in accordance with the terms of any agreement entered into with the Republic of the Philippines or of any license granted by it or under authority by the Republic of the Philippines, no person, shall, in relation to the Exclusive Economic Zone:

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9. Sec. 21, Pres. Decree 704, in part, provides: 'Charter Contracts, Lease or Lease-Purchase Agreements and Contracts for Assistance. – Citizens of the Philippines and qualified corporations or associations engaged in commercial fishing may, subject to the approval of the Secretary, enter into charter contracts, lease or lease-purchase agreements of fishing boats, or contracts for financial, technical or other forms of assistance with any foreign person, corporation or entity for the production, storage, marketing and processing of fish and fishery/aquatic products; Provided, that the foreign crew members of the foreign fishing boat who shall not exceed seventy-five per cent (75%) of the complement of the boat may be issued fishermen's licenses subject to scrutiny clearance by the Philippine Coast Guard and to the rules, regulations and guidelines to be promulgated by the Council; Provided further, that it shall be a condition in all charter contracts, lease or lease-purchase agreements that Filipino seamen and fishermen shall be given instruction and training by the foreign crew members in the operation of the fishing boat and the use of fishing gears and, after two years, shall replace all foreign crew members."
The 1932 Fisheries Act, *supra* n.6, recognizes reciprocity as a modality of foreign access to Philippine fisheries.

10. 1975 coincides with the preparation of the Informal Single Negotiating Text of the Third United Nations Conference on the Law of the Sea (UNCLOS III) which incorporated draft provisions for the new institution of the Exclusive Economic Zone.

11. J. COQUIA, 'Development and Significance of the 200 Mile Exclusive Economic Zone', 54 Phil. LJ (1979) 440, 443-444; D. J. ATTARD, *The Exclusive Economic Zone in International Law* (Oxford, 1987) 50.

a. *explore or exploit natural resources*;
b. carry out any search, excavation or drilling operation;
c. conduct any research;
d. construct, maintain, or operate any artificial island, off-shore terminal, installation or other structure or device; or
e. perform any act or engage in any activity which is contrary to, or in derogation of, the sovereign rights and jurisdiction here provided.

Nothing herein shall be deemed a prohibition on a citizen of the Philippines, whether natural or juridical against the performance of any of the foregoing acts, if allowed under existing laws.' (*Underscoring supplied*).

No subsequent legislation or administrative regulation has further elaborated the substantive provisions of Presidential Decree No. 1599. References have been made, however, to a "marine economic zone", distinct from "territorial waters", in other laws on aquatic resources. For instance, Presidential Decree No. 1219 (or Presidential Decree No. 1698), which governs the exploitation of corals, mentions in its "whereas" clauses the law's applicability in a "marine economic zone". Presumably, the phrase is equivalent to the notion of "Exclusive Economic Zone" declared in Presidential Decree No. 1599.

2.3 The 1987 Philippine Constitution

Unlike the previous Constitutions of the Philippines, the 1987 Constitution which was ratified on 2 February 1987 articulates a marine resources development policy in a fairly specific manner. Two provisions of the new Constitution directly relate to aquatic resources/fisheries, which are worth quoting in full:

ARTICLE XII

NATIONAL ECONOMY AND PATRIMONY

. . . .

Sec. 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whole capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be pro-

vided by law. In cases of water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and Exclusive Economic Zone, and reserve its use and enjoyment exclusively to Filipino citizens.

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens as well as cooperative fish farming, with priority to subsistence fishermen and fishworkers in rivers, lakes, bays, and lagoons.

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical assistance.

ARTICLE XIII

SOCIAL JUSTICE AND HUMAN RIGHTS

Agrarian and Natural Resources Reform

. . . .

Sec. 7. The State shall protect the rights of subsistence fishermen, especially of local communities, to the preferential use of the communal marine and fishing resources, both inland and offshore. It shall provide support to such fishermen through appropriate technology and research, adequate financial, production, and marketing assistance, and other services. The State shall also protect, develop, and conserve such resources. The protection shall extend to offshore fishing grounds of subsistence fishermen against foreign intrusion. Fishworkers shall receive a just share from their labour in the utilization of marine and fishing resources.'

As has been pointed out,[12] significant departures have been made in the 1987 Constitution from the previous Constitutions regarding the policy on natural resources. Under the former Constitutions, citizens or qualified corporations could directly exploit these resources. The exploration, development, and utilization of natural resources, which includes aquatic resources are now under the "full control and supervi-

12. LOTILLA, loc.cit n. 4, at 2.

sion of the State." Fisheries, as a non-alienable natural resource, may now be explored, developed, and utilized in three ways:[13]

1. The State may directly undertake such activities;
2. The State may enter into co-production, joint venture, or production sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens; or
3. Congress may, by law, allow small-scale utilization by Filipino citizens and by cooperative fish farming.

It is, of course, understood that in the case of other marine or sea resources, consisting of minerals, petroleum, and other mineral oils, their exploration, development and utilization may also be effected through agreements entered into by the President and foreign-owned corporations.[14] The directive for the State to protect the nation's marine wealth in, among other marine areas, its Exclusive Economic Zone, and reserve the use and enjoyment thereof to Filipino citizens[15] conceives of a situation involving the exploration, development and utilization of "marine wealth" *other than* minerals, petroleum, and other mineral oils in the Philippine Exclusive Economic Zone. The modalities for this exploration, development and utilization are: (1) by direct undertaking of the State and (2) by the State entering into co-production, joint venture or production sharing agreements with Filipino citizens only. Hence, it seems apparent that even at the level of technical and financial assistance for the exploration, development and utilization of the includible "marine wealth" for exclusive use and enjoyment of citizens, international agreements on these matters with foreign-owned corporation under the fourth paragraph of Sec. 2, Article XII of the Constitution are prohibited.

The exclusion of any and all foreign participation in the use and enjoyment of the appertained EEZ resources is made complete and definitive by Section 7, Article XIII of the Constitution aforequoted. As stated therein, the mandate of protection of "communal marine and fishing resources" extends to offshore fishing grounds of subsistence fishermen against foreign intrusion.

Without doubt, the provisions in Presidential Decrees No. 704 and 1599, allowing for the possibility and feasibility of exploration, development and utilization of the nation's marine wealth in the EEZ by non-citi-

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13. This is an exclusive or exhaustive enumeration, according to LOTILLA, loc.cit. n. 4, at 2, citing deliberations of the 1986 Constitutional Commission.

14. Para 5, Sec. 2, Art. XII, Const.

15. "Filipino citizens" in this context also includes corporations or associations, at least 60% of whose capital is owned by Filipino citizens. LOTILLA, loc.cit. n. 4, at 3 making reference to 3 *Record of the Constitutional Commission* 56.

zens, e.g., foreign nations' fishing rights, have been effectively nullified by the 1987 Constitution. This exclusive reservation rule in the Constitution, hereafter referred to as the "EEZ policy" in the Philippine Constitution, will now be scrutinized from the viewpoint of the international law of the sea.

3. THE RESOURCES REGIME[16] OF THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW

The 1982 Convention on the Law of the Sea establishes a comprehensive legal framework respecting the various uses of the world's seas and oceans by reference to which rights and obligations of States are allocated and defined. The Exclusive Economic Zone concept embraced in the Convention spells out an area of rights and duties for States, including criteria for the determination of their existence, scope and enforcement. From a general assessment of these rights and duties was derived the conclusion that the EEZ is a *sui generis* institution in contemporary international law.[17] This general view that the EEZ *ratione materiae* is *sui generis* will be adopted here.

The attribution of rights and duties effected under the EEZ regime in the CLOS appertains to coastal States, other States and the international community as a whole. The whole matrix of rights, powers and obligations for States envisioned in the CLOS in fact reflects the delicately balanced compromises made during the UNCLOS III. In this sense, the formal doctrine and specific regimes and sub-regimes of the EEZ can only be appreciated with reference to the nature of these compromises, essentially political in character, achieved and embedded in the CLOS provisions on the EEZ.

The EEZ Policy of the Philippines will be evaluated according to the stipulation of rights, freedoms and duties of a coastal State in the 1982 CLOS. Keeping in mind the multifunctional assumption[18] in the elaboration of the EEZ, attention will be particularly laid on the coastal State's rights and obligations in regard to the resource bounty in the EEZ. More narrowly, what deserves emphasis is the nature of the rights and duties of a coastal State on the appropriation and allocation of these resources.

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16. I introduce the term "resources regime" which will be employed in this paper instead of the usual "fisheries regime". Resources would include not only fisheries (i.e., living) resources but also non-living resources. Both categories of resources are suggested in the CLOS and the EEZ Policy of the Philippines.

17. O. VICUNA, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (Cambridge, 1989)

The question, therefore, turns on the characterization under the CLOS of the Philippine constitutional policy which reserves a substantial portion of the Philippine EEZ resources, labelled as "marine wealth", for the exclusive enjoyment and use of Filipino citizens.

3.1 Basic Freedoms, Rights and Duties of Coastal States in Regard to Resources in the EEZ

Article 56 of the CLOS provides for the general basis of a coastal State's competence in the EEZ as a zone of extended maritime jurisdiction:

> ARTICLE 56
>
> RIGHTS, JURISDICTION AND DUTIES OF THE COASTAL STATE IN THE EXCLUSIVE ECONOMIC ZONE
>
> 1. In the Exclusive Economic Zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds;
> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
> (i) the establishment and use of artificial islands, installations and structures;
> (ii) marine scientific research;
> (iii) the protection and preservation of the marine environment;
> (c) other rights and duties provided for in this Convention.
>
> 2. In exercising its rights and performing its duties under this Convention in the Exclusive Economic Zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

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18. Dr. Barbara KWIATKOWSKA characterizes the EEZ as a "multifunctional resource zone" and defines it as follows: 'The exclusive economic zone is an area beyond and adjacent to the territorial sea that extends up to 200 miles from the TS baselines, in which the coastal State has sovereign rights with regard to all natural resources and other activities for economic exploitation and exploration, as well as jurisdiction with regard to artificial islands, scientific research, and the marine environment protection, and other rights and duties provided for in the LOS Convention. All States enjoy in the EEZ navigational and other communications freedoms, and the land-locked and other geographically disadvantaged States – specific rights of participation in fisheries and marine scientific research.' B. KWIATKOWSKA, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (Martinus Nijhoff, 1989) at 4.

3. The rights set out in this Article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

Two broad regimes of the EEZ are discernible from this CLOS provision, specifying the potential of the EEZ as an institution of international law while at the same time pointing out to the problems and difficulties which arise from its appreciation as a legal concept. These are: (1) the regime of resources and (2) the regime of activities. The interface or relationship between these two regimes is admittedly problematic in itself. The distinction will, however, be assumed in this paper for the sake of simplicity. The regime of activities within the EEZ regime which is essentially non-resource oriented is generally stated in Article 56 (1) (b). This will not be dwelt upon in the present study.

The regime of resources in the EEZ is expressed in paragraphs 1(a) and 3 of Article 56. What comes out as immediately evident from these provisions is the wide latitude of freedoms and powers vested in the coastal State with regard to the resources localized in the EEZ. "Sovereign rights" is the generalized formula conveying this latitude. Most notably, the resources over which sovereign rights of a coastal State extend are denominated as "living" and non-living" resources. This indicates the reality of two different specific regimes associated with the resources of the EEZ.[19] These regimes and their more specific sub-regimes are defined according to the location or situs of the specific resources involved. Rules on a coastal State's rights and duties are thus dictated, by and large, according to the particular situs or "localization" of resources in the EEZ, a feature of the resources regime of the CLOS which justifies a "situs" or "theater" approach in the analysis and elaboration of the legal content of the "sovereign rights" entitlement of the coastal State in the law of the sea.

A note on the "theater" approach to the understanding of the EEZ as a multifunctional resource zone

The "situs" or "theater" approach proposed here assumes the obvious point that the EEZ is first of all a *zone*. The debate on the "exclusive" character of this zone, and the issue of whether this zone is purely "economic" in nature, bear little relevance in this discussion. What is being suggested is that the EEZ, *ratione loci*, is a physical zone with a horizontal and a vertical dimension. The horizontal or "breadth" dimension of the zone is defined as maximum 200 n.m. range, prescribed in the CLOS,[20]

19. O. VICUNA, op.cit. n. 17, at 50.
20. Art. 57, CLOS.

susceptible to the requirements of the law on maritime limits and maritime delimitation.[21] On the other hand, the vertical or "depth" dimension focuses on the EEZ as a "belt of sea" which may be analyzed as consisting of layers or "theaters" within which marine resources are situated.[22] [23]

Article 56(1)(a) of the CLOS already gives an indication of these layers or phases when it states that sovereign rights extend to natural resources "of the waters superjacent to the seabed and of the seabed and its subsoil". An examination of the EEZ regime, *ratione materiae*, which is done below, will reveal that the functional jurisdictional competence of the coastal State over the zone's natural resources is defined according to the layer or phase where particular resources may be found. Thus, the attribution of rights and duties of States in the EEZ may be done on the basis of "jurisdictional theaters" in the zone itself! Evidently, this approach complements, if not systematizes, the typical analysis of the EEZ regime according to the type of resources within the horizontal reach of the zone. Understanding the EEZ as illustrative of functional sovereignty[24] may as well proceed along this "vertical-theaters" line of doctrinal elaboration.

Article 56(1)(a) in fact spells out four theaters of the EEZ within which natural resources may be situated. In a literally descending order, these "theaters" are as follows:

1. surface of the waters of the zone;
2. water column beneath the water surface, but above the seabed;
3. seabed; and
4. subsoil.

Within and throughout these theaters are the maritime resources, consisting of (a) living and (b) non-living resources, over which "sovereign rights" extend.

The determination of rights and duties according to the above matrix of "theaters" and "resources" of the EEZ will provide the conceptual framework for the analysis of the EEZ regime of the CLOS and, afterwards, the Philippine EEZ policy.

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21. For a discussion of the issues on this aspect, see P. WEIL, The Law of Maritime Delimitation – Reflections (Cambridge, 1989); VICUNA, op.cit., at 188-227; ATTARD, op.cit. n. 11, at 43-36.

22. In his assessment of the validity of functional claims beyond the 12-mile limit, one author employs a similar approach by subdividing functional claims into (i) claims to jurisdiction over the seabed and subsoil and (ii) claims to jurisdiction over the superjacent waters. See W. C. EXTAVOUR, *The Exclusive Economic Zone* (Geneva, 1981) 289 et seq.

23. See Art. 56 (1) (a), CLOS.

24. "The thrust of the EEZ is functional rather than territorial in respect to the nature of the jurisdiction which is purports to confer upon the coastal State." EXTAVOUR, op.cit. n. 22 at 176.

3.1.1 *Regime of Non-living Resources*

The non-living resources regime of the EEZ may be analyzed according to three convergent groups of rules (or sub-regimes) corresponding to the location or "theater" of these resources within the zone. These are the rules applicable to (1) non-living resources on the water surface, or near-water surface of the EEZ, (2) non-living resources in the waters below the sea surface and superjacent to the seabed covered by the EEZ, and (3) non-living resources on the seabed and in the subsoil of the EEZ.

3.1.1.1 Non-living resources on the surface of the EEZ waters

The economic exploration and exploitation of the zone's water-surface or near-surface domain is illustrated by Article 56(1)(a) which mentions that production of energy from the winds is warranted as one among many aspects of a coastal State's sovereign rights. Energy production from tides or waves – water surface phenomena which may be considered as natural resources in themselves – may also be included.

There is no qualification or limitation of the State's jurisdiction over the economic exploitation and exploration of these resources on the EEZ's waters in any part of the CLOS. It can therefore be asserted as conclusive that the coastal State's competence over this type of resource in the Exclusive Economic Zone is legally exclusive[25] and unrestricted.

3.1.1.2 Non-living resources in the waters of the EEZ

With respect to the non-living resources in the waters superjacent to the seabed covered by the EEZ, Article 56(1)(a) likewise indicates the unqualified and absolute nature of the coastal State's jurisdiction. These resources include, for instance, water currents or minerals dissolved in sea water, or the ocean's thermal gradient used in the production of energy. "The coastal State's sovereign rights in this respect are complete and exclusive inasmuch as the Convention neither qualifies, nor conditions them in any way."[26]

3.1.1.3 Non-living resources on the seabed and in the subsoil

Article 56(3) makes reference to the applicability of another part of the Convention insofar as the rights of the coastal State with respect to the seabed and subsoil of the EEZ are concerned. This is a reference to the regime of the Continental Shelf in the CLOS, indicating the equally absolute or exclusive and unqualified rights of the coastal State in the matter

25. "Exclusive" as defined in Art. 77 (2), CLOS.

26. VICUNA, op.cit., *supra* n. 17.

of exploring or exploiting these resources.[27] The rule on non-living resources on the seabed and subsoil is firmly established in customary law and is consistent with the continental shelf doctrine pronounced by the International Court in the *North Sea Continental Shelf cases*:

> The rights of a coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land-territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.[28]

This is also the sense conveyed by the concept of "exclusivity" of a coastal State's sovereign rights in Article 77(2) of the CLOS by stating that "if the coastal State does not explore the continental shelf or exploit its natural resources, none may undertake these activities without the express consent of the coastal State." The juridical result of applying the continental shelf regime to the question of resources in the EEZ raises the issue of simultaneous application of two legal regimes involving the same maritime space – a problematic legal situation[29] – and has led to the view that the EEZ regime is an extension of the continental shelf regime and accounts for the parallelism between the rules governing the EEZ and the inner continental shelf.[30]

3.1.1.3 Some conclusions on the regime of non-living resources in the EEZ

The convergence of the results of coastal State's rights and freedoms concerning the non-living resources on the water surface, in the superjacent waters to the seabed, and the seabed and subsoil affirms the exclusive character of the coastal State's jurisdiction or its "sovereign rights" in the EEZ, insofar as this "exclusive" feature is defined in Article 77(2) of the CLOS. This vindicates whatever policy is adopted by the coastal State with reference to these non-living resources, the only possible qualification being a general one to the effect that a coastal State shall exercise these sovereign rights in a manner which would not constitute an abuse of right.[31]

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27. Art. 77, CLOS.

28. ICJ Rep. 1969, para. 19, at 22.

29. KWIATKOWSKA, op.cit. n. 18, at 9.

30. See KWIATKOWSKA, op.cit. at 6-7. Another author describes the situation as involving a "duality of regimes with integrating results". VICUNA, op.cit. n. 17, at 9.

31. Art. 300, CLOS. Accommodation of the rights of other States in the EEZ, stated in Art. 58 of the CLOS, may arguably set indirect limitations on the exercise of the coastal State of its sovereign rights over EEZ resources.

3.1.2 *Regime of Living Resources in the EEZ*

The regime of living resources of the EEZ is often referred to as the "fisheries regime" of the CLOS. "Fisheries", in a broad sense, covers both aquatic flora and fauna, thus comprehending the most relevant resources which can be subsumed under the term "living resources". The "theater" approach may again be employed to analyze the different sub-regimes on living resources in the EEZ, always keeping in mind the need to clarify the limitations or qualifications on coastal State's rights and duties in regard to these resources.

The "fisheries regime" proper of the EEZ, i.e., rules concerning the living resources situated in the waters superjacent to the seabed and living resources on the seabed and in the subsoil of the zone has proved to be the subject of difficult negotiations[32] during the UNCLOS III: For this reason, an additional nuance in methodology is introduced: reference is made not only to the "situs" or "theater" of living resources but also, and more importantly, to the kind or type of living resource/fishery involved. With this postulation, it can be said that three fisheries regimes are contemplated by the Convention's regime on living resources. These regimes correspond to the biological nature of the living resources themselves, each dictating the nature and scope of a coastal State's rights and obligations regarding fisheries.[33] These are, (1) regime of sedentary species, (2) regime of species found solely within the coastal State's EEZ, hereafter called the regime of "coastal species", and (3) regime of particular species covering highly migratory species, marine mammals, anadromous stocks and catadromous species. Described forthrightly, rights and obligations of a coastal State in relation to EEZ fisheries depend not only where the fish may be found but also on what kind of fish is being talked about.

3.1.2.1 Living resources on the surface of EEZ waters

Arguably, although the CLOS in Article 56 does not expressly mention sovereign rights of a coastal State over living resources on the water surface of the EEZ, this may be implied from the text of this provision itself. The indication of the nature and kinds of activities for the economic exploitation and exploration of the zone in Article 56(1)(a), as mentioned earlier, is illustrative and therefore non-exhaustive, as evidenced by the use of the terms "such as" in the provision. The coastal State would,

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32. See VICUNA, op.cit. n. 17, at 50.

33. M. DAHMANI, The Fisheries Regime of the Exclusive Economic Zone (Martinus Nijhoff, 1987) 42.

hence, have "sovereign rights" with regard to these living resources, e.g., ducks and other fauna or flora like floating micro-organisms. The matter of appropriation or allocation of these resources did not figure out in the UNCLOS III obviously because of the uncontroversial character of the issue, if this is to be regarded as an issue at all. Formally, however, the legal regime governing these resources is contemplated by Article 56 of the CLOS.

The analysis and conclusions concerning the regime of non-living resources on the water-surface of the EEZ apply *mutatis mutandis* in the case of living resources in this theater of the zone. Inasmuch as no other provision in the CLOS expressly qualifies the jurisdiction of the coastal State over these resources, and in view of the absence of any implied substantive limitations in its exercise by the coastal State, the sovereign rights of the coastal State are again reiterated and their "exclusive" character affirmed.

3.1.2.2 Living resources on the seabed and in the subsoil: The Regime of Sedentary Species

The next theater of resources to be considered, the seabed and subsoil, uniquely describe a regime for a specific type of living resource or fishery – the regime of sedentary species. Sedentary species are defined in Article 77(4) as "organisms which, at their harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or subsoil". Article 68 provides that the regime of the Exclusive Economic Zone does not apply to these sedentary species. Instead, the Continental Shelf Regime under part VI of the CLOS applies,[34] implying that the doctrine of exclusivity in sovereign rights of a coastal State with respect to its continental shelf takes full effect.[35] This result is the same as the outcome achieved in the regime of non-living resources in the EEZ.

What the CLOS undoubtedly achieves is the similarity of juridical treatment between, or the coincidence of regimes accorded to, living (i.e., sedentary species) and non-living resources in the theater of the EEZ's seabed and subsoil. In this theater, the rule on exclusivity and complete sovereign rights applies unconditionally. Coastal State action that translates this untethered freedom into a policy of reserved use of the resources therein for the sole benefit of the coastal State's nationals is consistent with the logic of the regime. Thus, the legal notion of "foreign access" to the resources of the seabed or subsoil of the EEZ is truly a for-

34. Art. 77 (4), CLOS.
35. Art. 77 (1), (2) and (3).

eign concept under the regime of resources[36] in the EEZ which imports unto itself the Regime of the Continental Shelf.

3.1.2.3 Regime of Coastal Species

In the theater of the EEZ's superjacent waters, two categories of living resources, which dictate the applicable rules on rights and duties, are identified: "Coastal species" and "particular species".

A definitely narrower concept of "sovereign rights" for the coastal State is discernible under the regime of fisheries resources consisting of stocks found solely within the EEZ,[37] or, more accurately, in the waters superjacent to the seabed of the EEZ (hereafter, "coastal species"). Articles 61, 62, 69, 70, 71 and 72 of the CLOS provide in relative detail the legal content of the regime herein considered. They clarify, to a certain degree, some qualifications on the sovereign right of a coastal State to appropriate and allocate fisheries resources within the zone. But sovereign rights over fisheries is still the pervasive rule to contend with.[38]

Authors, who have written on the particular doctrines projected by this regime, have diverging opinions on the interpretation and application of the relevant provisions of the CLOS. Nevertheless, what emerges as a consensus among authorities is the vindication of coastal State sovereignty in the matter of these coastal fisheries.

3.1.2.3.1 Rules and Principles of the Regime

Understanding the exact meaning of "sovereign rights" in the context of coastal fisheries is rendered complicated by the introduction of scientific and technical principles or concepts into the analytic calculation of coastal State's rights and obligations. The formulation of the provisions in Articles 61 and 62, by making reference to standards couched in scientific jargon, illustrates the difficulties involved. The task of legal interpretation must therefore be to unburden these provisions of the intricacies attendant in the application of these scientific and technical concepts and extract in simple terms the concrete rights and obligations of the coastal State.

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36. See M. DAHMANI, op.cit. n. 33, at 42.

37. DAHMANI, op.cit. n. 33, at 42.

38. W. BURKE, 'The Law of the Sea Convention and Fishing Practices of Non-signatories with Special Reference to the United States', in VAN DYKE (ed.), *Consensus and Confrontation – the United States and the Law of the Sea Convention* (Hawaii, 1985) at 316: 'What limitations on coastal State authority to exercise its discretion in managing fisheries can be derived from other provisions of this Treaty? As a general proposition, it is safe to say that such limitations are few. This treaty delegates virtually complete authority for managing fisheries, including conservation, utilization, and allocation, to the coastal States of the world.'

The 1984 *Gulf of Maine* judgement of the International Court proposes an approach for the intelligible understanding of the CLOS provisions on coastal State fisheries, taking as a point of departure the postulation of a crucial distinction between "rules of law" and what may be termed as "rules of prudence". In the language of the International Court, the distinction must be made between:

> what are principles and rules of international law governing the matter and what could be better described as the various equitable criteria and practical methods that may be used to ensure *in concreto* that a particular situation is dealt with in accordance with the principles and rules in question.[39]

A distinction is thus made between rules and principles of law, on the one hand, and, on the other, criteria or practical methods, often technical in nature. The latter are used to attain an essential objective and cannot be generalized as norms of law, are incapable of impacting upon the formation of principles and rules of customary law and cannot be ascribed the character of potentially norm-creating principles and rules.[40] This approach will be followed in the analysis of the coastal fisheries regime of the EEZ.

The adoption of this approach reveals that there are, in reality, only two broad principles or legal rules encompassed in the regime of coastal species, appropriately qualifying the "sovereign rights" thesis in Article 56(1)(a): (1) The principle of coastal State's competence in the conservation and management of this type of fishery, and, (2) the principle of optimum utilization of these living resources in the EEZ. These principles of conservation, management and optimum utilization[41] necessarily suggest qualifications or limitations, by way of obligatory norms, on the "sovereign rights" of a coastal State in the EEZ.

3.1.2.3.2 Coastal State's Rights and Obligations of Conservation and Management of Coastal Fisheries

The fundamental rights and obligations of a coastal State pertaining to its jurisdiction to conserve and manage the living resources of the EEZ are inferable, not only from Article 56(1)(a) (sovereign rights for the purpose of conserving and managing living resources in the zone) and Article 61 (on conservation of living resources), but also from Article 123 (on the requirement for cooperation among States bordering enclosed and semi-enclosed areas) and Articles 192, 193, and 194(5) (on the protection and

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39. ICJ Rep. 1984, para. 80, at 290. Cited in B. KWIATKOWSKA, op.cit. n. 18, at 46.

40. KWIATKOWSKA, op.cit. n. 18, at 47-48, using the terminology of the ICJ in the *Gulf of Maine Area* case.

41. Ibid.

preservation of the marine environment) of the CLOS.[42] To carry out the generalized obligation of conservation and management, the CLOS provides for the technical criteria or standards or methods which States may conform with in the fulfilment of this obligation. These criteria and standards, to reiterate, are not obligatory, but are only guidelines or rules of prudence which coastal States take into account in the responsible exercise of their sovereign rights over resources of the EEZ.

The most important guideline[43] under this obligation to conserve and manage is the determination and maintenance of a Maximum Sustainable Yield (MSY).[44] Under Article 61(3) of the CLOS, the MSY[45] is qualified by certain "relevant economic and environmental factors" (e.g., economic needs of coastal fishing communities, or the special requirements of developing States) making the MSY concept more than a bio-physical concept. Indeed, these factors give to the coastal State the widest possible discretion and flexibility in the determination of the MSY.[46]

Admittedly, the MSY notion is simply a means of ensuring that fish stocks are not endangered by over-exploitation.[47] This concept could be deemed as the Convention's best recommendation to coastal States at the time of the negotiations in UNCLOS III as the most appropriate modality to implement the duty to conserve and manage living resources of the EEZ. In its impact on the meaning of "sovereign rights", the outcome is the unequivocal right of a coastal State to allocate coastal fisheries according to its own defined motivations and objectives based on[48] bio-ecological, economic or political considerations. This may take the form of restricting or controlling fishing effort in the EEZ.

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42. Ibid.

43. KWIATKOWSKA, op.cit. n. 18, at 48 et seq.

44. ATTARD lists the MSY as one conservation goal of the CLOS: 'In sum, *the main conservation goals* of the 1982 Convention are to ensure (1) the determination of the allowable catch; (2) that the maintenance of the living resources in the Exclusive Economic Zone is not endangered by over-exploitation; (3) *that the populations of harvested species are maintained or restored at levels which can produce the maximum sustainable yield*; and (4) that associated or dependent species are maintained above levels at which their reproduction may become seriously threatened.' ATTARD, op.cit n. 11, at 154.

45. MSY is not defined in the CLOS, but is widely understood to mean, in its biological sense, the maximum amount of fish that can be taken on a sustained basis without diminishing the species' reproductive capacity or adversely affecting associated or dependent species, KWIATKOWSKA, op.cit. n. 18, at 48 citing A. W. KOERS, 'The International Regulation of Marine Fisheries: Some Problems and Proposals', 4 *Annals of International Studies* (1973); or simply a yield that can be taken, year after year, without depleting stocks, GULLAND, *The Concept of MSY and Fishery Management* (FAO Fisheries Technical Paper No. 70), cited in ATTARD, op.cit. n. 11, at 153.

46. See KWIATKOWSKA, op.cit. n. 18, at 49.

47. Art. 61 (2), CLOS.

48. See DAHMANI, op.cit. n. 33, at 43.

3.1.2.3.3 Coastal State's Obligation of Optimum Utilization

The general duty of optimum utilization is embodied in Article 62(1) of the CLOS. Under this provision, the promotion of the duty is "without prejudice" to the competence of a coastal State to manage and conserve coastal fisheries, immediately indicating the priority of the latter obligation in the event of competing or conflicting modes of realization of these coastal State obligations. The duty of optimum utilization is crucial, however, because it highlights an important aspect of the regime of coastal fisheries by making reference to the concept of "access" by third States to coastal fisheries, a concept unique to this regime under the EEZ model in the CLOS. From the standpoint of the initial assessment made on the duty of optimum utilization, i.e., that it cannot be without prejudice to the discretion of a coastal State to manage and conserve the living resources of the EEZ, the notion of foreign access to the fisheries resources of the EEZ, which on a first impression account of Article 62(2) calls for mandatory action on the part of a coastal State, cannot be spelled out as commanding a specific legal obligation by that coastal State. The reputed obligation of a coastal State to give access, or the rationale therefor, has been a subject of intense controversy during UNCLOS III:

> The idea of emphasizing optimum utilization of the available fish stocks was first suggested by the major fishing States, and, particularly, the USSR, who sought to develop an argument aimed at securing participation in the fisheries exploitation of the Exclusive Economic Zone by States other than the coastal State and, particularly by the distant-water fishing nations. The argument which was advanced by these States was that many of these countries which would benefit by the establishment of an Exclusive Economic Zone, particularly the developing countries among them, would not dispose of the capacity to derive full benefit from the exploitation of the living resources on account of their undeveloped fishing habits and technologies. The result, the argument continued, would be a waste of valuable resources that could otherwise be harvested by those States possessing the necessary technology.
>
> This argument has been rejected by the developing countries which have stated that they are prepared to accept participation by third States in the exploitation of the living resources of the Exclusive Economic Zone on the basis of licenses which they would issue in return for a fee. Certain countries among them have, however, questioned the very bases upon which this argument has been developed, namely, the concepts of maximum sustainable yield, allowable catch, etc.
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> Under Article 51 [i.e., of the RSNT, Article 62 of the CLOS], however, and consistent always with the concept of the "sovereign rights" which are to be enjoyed by the coastal State in the zone, the latter is further entitled to

> determine what portion of the allowable catch of the living resources of the Exclusive Economic Zone it is capable of harvesting (Paragraph 2). In the event that the coastal State is unable to harvest the entire allowable catch, it is under obligation to permit other States to harvest the remaining portion – the so-called "surplus" – in accordance with the terms, conditions and regulations set forth in Paragraph 4 of Article 51 [i.e., Article 62].[49]

While the obligation to conserve and manage coastal fisheries has for its objective preventing the over-exploitation of these resources, the aim of the obligation of optimum utilization is the rational allocation of coastal fisheries.[50] Under the framework of the Convention, this allocation is effected through the application of the concepts of "allowable catch", "harvesting capacity", and "surplus". These closely interwoven concepts, defining a special feature of the coastal fisheries regime of the CLOS, will be examined to determine whether there is reason to believe that the provision on "foreign access"[51] implies a specific duty of a coastal State to allow or provide for this access.

The essence of the allocation scheme prescribed in Article 62 is said to consist of three "principles":

> (i) The coastal State determines the allowable catch of living resources in the Exclusive Economic Zone, while assuring that there is no threat to the preservation of those resources due to over-exploitation. (ii) The coastal State determines its own capacity to exploit those resources. (iii) As the coastal State may not have a capacity to exploit all the allowable catch it will give other States access to the surplus of the allowable catch, within the general objective of the optimum utilization of the resources.[52]

Within the framework of the regime of coastal species, these "principles" are strictly no more than technical standards or criteria meant to illustrate, not juridically define, the obligation of a coastal State to utilize optimally the fisheries resources of the EEZ. Discrete analysis of these "principles", in the light of the relevant provisions of the CLOS, establishes this inevitable conclusion.

(1) *Allowable Catch* (AC). The FAO defines AC as "that catch which, if taken in any one year will best enable the objectives of fisheries management (e.g., the optimum long-term yield) to be achieved".[53] Judge S. ODA

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49. EXTAVOUR, op.cit. n. 22, at 193-194.

50. DAHMANI, op.cit. n. 33, at 48.

51. Art. 62 (2) and (3), CLOS.

52. VICUNA, op.cit. n. 17, at 50, citing Jean CARROZ. In a more metaphoric description of GARCIA, GULLAND and MILES: "There is a cake of some determined size (the 'allowable catch'), which is then sliced up. The coastal State then takes the slices it wants (its capacity), and the other slices (the surplus) are then theoretically available to be allocated to other States." GARCIA, GULLAND and MILES, 'The New Law of the Sea, and the Access to Surplus Fish Resources', *Marine Policy* (July 1986) at 193.

has aptly summarized the argument against the obligatory character of the determination of AC when he states:

> 'It is not appropriate for the coastal State always to be required to determine the allowable catch of the living resources in the EEZ and... it is extremely difficult to perform this obligation properly.'[54]

Elaborating on this interpretation, another author makes the same conclusion:

> In any case, determining the allowable catch of a particular fish-stock is not an easy task. It requires a body of detailed information and data on the condition of the fish-stocks, as well as experienced scientific and managerial personnel to analyze the collected data and thereupon determine the allowable catch. Thus, even [where] the Convention implies an obligation upon coastal States to base their decision on allowable catches upon best scientific evidence, not every State will be able to do so, for lack of expertise or experience and scientific personnel, at least in a manner consistent with the management and conservation objectives laid down in Article 62(2) and (3). To overcome this difficulty, Article 61(2) provides that "as appropriate" the coastal State and relevant sub-regional, regional and global organizations "shall cooperate to ensure that the living resources are not endangered by over-exploitation. The requirement, however, of such an obligation appears, as Professor William T. Burke put it: "to be no more than prudent policy would dictate with regard to any policy matter..."[55]

On the technical level, a similar finding emerges:

> The requirement in Article 61(1), that the coastal State shall determine the allowable catch, needs to be carefully considered. Those originally drafting this paragraph may have had the hope that it would be possible to set some figure as the proper value for the allowable catch, on some objective scientific grounds (e.g., MSY), and that policy questions should be taken, including the question of the possible allocation of a surplus to foreign fleets. It is almost true to say that the reverse holds good. Important policy matters have to be settled first, which must include definite and explicit recognition of the newly acquired right by all concerned, decisions on the relative importance of high total catch vis-à-vis high catch rates, or stability of the system as well as, where appropriate, on the rate at which depleted stocks should be rebuilt. Only then, and after collecting informa-

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53. Cited in DAHMANI, op.cit. n.33, at 51. DAHMANI, however, equates AC with MSY. See Ibid.

54. S. ODA, 'Fisheries under the United Nations Convention on the Law of the Sea', 77 AJIL (1983) 743, cited in KWIATKOWSKA, op.cit. n. 18, at 49. The problem involved, using the metaphor of GARCIA, GULLAND and MILES, *supra* n. 52, at 193, is described thus: 'The basic cake is not fixed in size, nor, at a given moment or under given conditions, is its size easy to determine. The slices are not independent, so that whether or not the surplus slices are taken can affect the size and tastiness of the slices taken by the coastal State.'

55. DAHMANI, op.cit. n. 33, at 51-52.

> tion about the current stock abundance, is it possible for scientists to calculate the magnitude of the allowable catch of the forthcoming season.[56]

In the final analysis, therefore, there is no doubt that the coastal State is left with the full discretion to set the metes and bounds of the allowable catch, if it agrees with this criterion at all, depending on its subjective judgement about its needs and interests.

(2) *Harvesting Capacity* (HC). As in the case of the "allowable catch" concept, the determination of HC by the coastal State is more an entitlement than a duty. The dimensions of HC are wholly within the discretion of the coastal State because the Convention does not provide specific guidelines for the identification and application.[57] "The coastal State's right in this matter is the essence of its sovereignty, which is why it is of a discretionary nature."[58]

(3) *Access of Third States to Coastal Fisheries Surplus.* Two mechanisms of access are envisioned in the CLOS: General access[59] and access by land-locked and geographically disadvantaged States.[60] However, although access by land-locked and geographically disadvantaged States is labelled as a "right" in Articles 69, 70 and 72 of the CLOS, considerable flexibility is in reality vested in the coastal State regarding the choice of States to be given access.[61] This freedom to allocate among third States being assumed, two questions may then be asked: (1) What is the nature of the "surplus" to which third States may participate in exploitation and harvesting? and (2) Is the coastal State obliged to permit third State access to the surplus after it has been determined to exist?

For an assessment of the concepts of MSY, AC and HC, it is perhaps safe to conclude that the determination and existence of a surplus is essentially a political decision on the part of the coastal State,[62] although the process of its determination may be initiated by the legal requirement[63] that a third State requests the determination by a coastal State of the AC and its HC. Bearing in mind that the surplus is the theoretical difference between allowable catch and harvesting capacity, the "surplus"

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56. GARCIA, GULLAND and MILES, op.cit. n. 52, at 197.

57. DAHMANI, op.cit. n. 33, at 52-53.

58. VICUNA, op.cit. n. 17, at 53.

59. Art. 62 (2) and (3), CLOS.

60. Arts. 69 and 70, CLOS.

61. See S. C. VASCIANNIE, *Land-locked and Geographically Disadvantaged States in the International Law of the Sea* (Oxford, 1990); GARCIA, GULLAND and MILES, op.cit. n. 52, at 198; DAHMANI, op.cit. n. 33, at 56; BURKE, op.cit. n. 38, at 322 et seq.

62. BURKE, op.cit. n. 38, at 320, states: "It is accurate to say that under the Treaty the coastal State is obliged to share a surplus if it is in its interest to do so."

63. See Art. 197 (3) (b) (ii), CLOS.

would indeed depend on the economic, environmental and go-political aims and objectives of the coastal State, which go into the calculation of the AC and HC variables. This is the consequence of the absence of any objective and binding standards in the determination of the hypothetical quantities involved.[64]

Assuming, however, *argumenti gratia*, that a surplus exists, access by third States is not automatic but depends on the conclusion of an "agreement or other arrangements".[65]

> The words "shall through agreement or other arrangements" do not seem to suggest that an obligation to enter into agreement is cast upon the coastal State, but represents only a requirement that the coastal State should negotiate to its satisfaction "access agreements" with other States wishing to fish for the surplus (if any). This does not mean that the coastal State should actually reach agreement. It is worth mentioning in this respect that the EEC proposal advocating a compulsory settlement of disputes procedure in case of disagreement or where a State regards itself as unfairly treated was rejected at the outset and severely criticized and so was the US proposal which also envisaged a compulsory dispute settlement procedure. Nonetheless, it would be inconsistent with the provisions of the Convention for a coastal State to impose terms and conditions in order to deny access or make access impractical or impossible for foreign fishermen once it has declared that a surplus exists. Such action will certainly offend the requirement in Article 300 which provides that States parties to the Convention undertake to discharge in good faith the obligation entered into in conformity with the Convention and to exercise their rights, jurisdiction and freedoms recognized in the Convention in a manner which would not constitute an abuse of rights.[66]

From the viewpoint of the dispute-settlement procedure of the CLOS, however, it could be argued that no *mala fides* can be imputed against a coastal State which refuses to allocate a previously determined surplus provided that the coastal State submits to compulsory conciliation processes, which anyway will not entail binding outcomes insofar as the coastal State is involved.[67]

Overall, the access of third States to the "surplus" stock of coastal fisheries could be made illusory by the coastal State. The sovereign right to appropriate and allocate coastal fisheries thus remains intact.[68] It is, therefore, not quite accurate to maintain, as some authorities do,[69] that

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64. DAHMANI, op.cit. n. 33, at 54.

65. Art. 62 (2), CLOS.

66. DAHMANI, op.cit. n. 33, at 55.

67. See Art. 297 (3) (c); DAHMANI, op.cit. n.33, at 53.

the CLOS provision, allowing access, reflects a rule of customary international law.

3.1.2.3.4 Dispute Settlement on Coastal Fisheries

The pre-eminence of coastal State jurisdiction over coastal fisheries is strengthened by the provisions in Article 297(3) of the CLOS. The only mechanism for dispute settlement is compulsory conciliation, which does not result in binding decisions because the conciliation commission shall in no case substitute its discretion for that of the coastal State. The "arbitrary" refusal of a coastal State to determine the AC or its HC or its refusal to allocate a declared surplus remains precisely that – arbitrary, in the sense that no legal modality is afterwards available to rectify or reverse it. This confirms that the principles of AC, HC and surplus are simply guidelines, standards or technical means of achieving the untethered obligation of the coastal State of optimum utilization.

3.1.2.4 Regime of Particular Species

During the UNCLOS III, the US advocated a "species approach" to coastal State fisheries management: extended jurisdiction based on species rather than on a fixed distance from the coast.[70] Although the zonal approach proposed by the developing countries prevailed, which is not expressed in the CLOS provisions in Part 5, the species approach made its imprint in the CLOS as well. A departure from the zonal "sovereign rights" framework for the management of EEZ living resources makes its way into the regime covering certain stocks – Highly Migratory Species (HMS), Anadromous Species (AS), Catadromous Stocks (CS), and Marine Mammals (MM). Articles 64 to 67 of the CLOS spell out the discrete regimes for these species.[71]

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68. Dr. KWIATKOWSKA re-states this conclusion in these words: 'Consequently, in view of the individual character of fisheries management and the primary importance of the coastal State obtaining greater advantages from those resources, one cannot ascertain more than the *obligatio imperfecta* of the coastal State to grant foreign access to its zone, an obligation which cannot generate rules capable of impacting upon customary law and which, consequently, does not involve any legal right of access on the part of third States. The coastal State may grant foreign access if it conforms with and on conditions which conform with its own fisheries policy determined according to its economic and other interests and in conformity with the requirements of conservation, rational management, and optimum utilization.' KWIATKOWSKA, op.cit. n. 18, at 60.

69. See ATTARD, op.cit. n. 11, at 166.

70. EXTAVOUR, op.cit. n. 22, at 191. Three approaches to coastal State fisheries rights were advanced during the UNCLOS: Economic Zone, Species Approach, and Preferential Rights. See DAHMANI, op.cit. n. 33, at 38-42.

71. There is a general agreement among authorities that in the case of shared living resources provided in Article 63, the sovereign rights framework in the analysis of coastal State rights and duties obtains. KWIATKOWSKA, op.cit. n. 18, at 78; ATTARD, op.cit. n. 11, at 183; VICUNA, op.cit. n. 17, at 61.

Uniformly in all these regimes covering particular species, there is the requirement of a more rigorous conservation and management duty on the part of the coastal State imposed by the CLOS. It may then be asked whether, as a consequence of the new requirements on the duty of conservation and management with respect to particular species, the power of a coastal State to appropriate and allocate these EEZ resources becomes restricted. A brief review of these "particular-species" regimes will show that such is not the case and the power of the coastal State to appropriate and allocate these fisheries, while these are within its EEZ, is basically the same as its rights, freedom and power to appropriate and allocate coastal species.

3.1.2.4.1 Highly Migratory Species (HMS)

HMS, or "oceanodromous" fish, are those which occur widely throughout the world's oceans and live and migrate wholly in the sea. Annex I of the CLOS makes a definite listing of HMS for the purpose of the application of Article 64. Tuna is the most commercially important and legally significant among HMS.[72]

Article 64(2) implies that the regime of HMS adds a new element to the regime of coastal fisheries comprehended in Articles 56, 61 and 62. HMS are still fully subject to this latter regime[73] but a new requirement to promote the objectives mentioned in Article 64(1) (i.e., conservation and optimum utilization) is added: the condition of cooperation by the coastal State and the other States in the region whose nationals fish HMS. The requirement or duty to cooperate[74] means that the CLOS conceived some form of international management for HMS[75] and is a logical one in view of the transoceanic mobility of HMS.

Considering that the regime of coastal fisheries still applies, *in toto*, to the regime of HMS, it is not difficult to imagine that the act of the State in allocating HMS in its EEZ in any way it deems proper is part of the overall discretion it has with respect to coastal species. The putative right of access of third States to these resources are still subject to the precondition of an agreement with the coastal State under the procedure found in Article 62[76] What the obligation to cooperate simply means is that "decisions relating to the species conservation and utilization cannot exclusively reflect the coastal State's interest."[77] Even if cooperation fails to

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72. W. T. BURKE, 'Highly Migratory Species in the New Law of the Sea'. 14 *Ocean Development and International Law,* 273, 274; DAHMANI, op.cit. n.33, at 106; ATTARD, op.cit. n.11, at 184.

73. BURKE, ibid. at 280, 309; VICUNA, op.cit. n. 17, at 62.

74. The duty to cooperate in regard to HMS is explored in BURKE, op.cit., n. 72.

75. DAHMANI, op.cit. n. 33, at 106.

76. ATTARD, op.cit. n. 11, at 185.

produce conservation and allocation measures among all States concerned, notwithstanding good faith efforts, fishing States seeking access in the EEZ of a coastal State must still submit to the decisions of the coastal State.[78]

3.1.2.4.2 Anadromous Species (AS)

Anadromous stocks, of which salmon is the most important, refer to species that live in the sea for most of their mature life, but spawn or breed in fresh or estuarine waters. Under Article 66 of the CLOS, the State in whose rivers AS originate shall have the primary interest in and responsibility for such stocks. By providing for the general rule that AS will be fished solely in waters landward of the outer limits of the EEZ,[79] the sovereign right of the State of origin is confirmed[80] with respect to the management and allocation of AS.[81]

The regime resolves the problem of AS migrating to other States' EEZ by providing for the duty of cooperation on the part of these States with the State of origin.[82] This duty to cooperate does not, however, deprive the other States from establishing their own rules and regulations on, for instance, the allocation of AS in their EEZs.[83] Access to AS in the EEZ of any particular State is, thus, always to be worked out by agreements or appropriate arrangements,[84] without losing sight of the primary interest in, and responsibility for, such stocks by the State of origin.

3.1.2.4.3 Catadromous Species (CS)

The conservation regime of catadromous species[85] is similar to that of AS[86] and recognizes the responsibility for the management of these species of the coastal State in whose waters CS spend the greater part of their life cycle.[87] The situs of harvesting CS is the same as that in the general rule of the AS regime, but this time without exceptions. The coastal State's discretion to manage AS is qualified solely by its obligation to

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77. Id., at 186.

78. BURKE, op.cit. n. 72, at 284.

79. Art. 66 (3) (a). The exception to this general rule is the "economic dislocation" situation defined in the same provision.

80. VICUNA, op.cit. n. 17, at 63.

81. DAHMANI, op.cit. n. 33, at 94.

82. Art. 66 (4).

83. KWIATKOWSKA, op.cit. n. 18, at 84.

84. DAHMANI, op.cit. n. 33, at 97.

85. CS spend most of their lives in fresh water, then migrate to the sea to breed, e.g., eel.

86. See EXTAVOUR, op.cit. n. 22, at 196.

87. Art. 67 (1), CLOS.

ensure the ingress and egress of migrating AS. Sovereign rights of allocation is again upheld in the case of CS found in the EEZ of a coastal State.

When CS migrate to the EEZ of another State, the applicable rule is found in Article 67(3). In this case, management of CS shall be regulated by agreement between the States concerned, which takes into consideration the responsibility and interest of the coastal State in whose waters the CS spend the greater part of their life cycle. This could mean that the State of destination may be given preferential treatment in these agreements in the allocation of stock.[88] Once, again, allocation questions are left to be ultimately decided by the discrete policies of coastal States which negotiate an agreement concerning CS.

3.1.2.4.4 Marine Mammals (MM)

The regulation, limitation, or prohibition of exploitation of MM, like whales,[89] is defined in Article 65 of the CLOS. Taken in relation to Article 120 of the CLOS, on marine mammals in the high seas, a single uniform management regime on MM is made applicable in the EEZ and the high seas.[90] The regime covering the EEZ provides for the power of a coastal State or the appropriate international organization (the International Whaling Commission) to adopt more strict policies on the prohibition, limitation or regulation of exploitation of MM. The objective of this authorization is conservation of MM, which is consistent with the duty to cooperate, found in Article 65. Conceivably, a coastal State can, therefore, totally refuse to allocate these species in the EEZ to implement the right and the duty granted it under the regime of MM.

3.2 Legal Status of the Resources Regime of the EEZ in Relation to the Philippines as a Coastal State

The appraisal of the standing of the EEZ policy of the Philippines in international law is set against the background of the CLOS and its EEZ regime. Before the EEZ policy can be assessed from the principles and standards of the more particular regimes of the EEZ embodied in the CLOS, it is appropriate to resolve the threshold question of the status of these regimes in international law. After all, the extent to which these regimes authoritatively specify rights and duties for coastal States clarifies the impact of the Philippine EEZ policy on international law. The

88. DAHMANI, op.cit. n. 33, at 104.

89. Some marine mammals are listed as HMS in Annex I of the CLOS. An observation made in this regard is that the regime of marine mammals is an exception to the regime of HMS. VICUNA, op.cit. n. 17, at 63.

90. DAHMANI, op.cit. n. 33, at 111.

question is all the more significant because the 1982 CLOS has not entered into force. Whether or not the Philippines is liable for a breach of or is to be commended for its compliance with its international obligations is a problem that inquires into the nature of the normative prescriptions upon which these obligations are based.

Two approaches are imaginable in order to establish the binding nature of the regimes examined above with respect to the Philippines as a coastal State. The first is to elicit the customary law character of the specific regimes subsumed under the resources regime of the EEZ. Although the EEZ, as a general institution in international law has become part of the customary law[91] its refinements, its more detailed regimes, and their corresponding elements must still have to be developed into binding customary norms.[92] If, for instance, a particular regime, e.g., HMS, has become part of the corpus of customary law, then a valid basis for evaluating the Philippine EEZ policy exists with respect to this regime. Admittedly, this approach is cumbersome, if not extremely intricate and would require extended doctrinal elaboration of the legal regimes involved.[93] The difficulties are compounded by conflicting doctrinal views on the nature of certain principles in the resources regime of the EEZ.[94]

The complexities of pursuing this first approach is obviated by the fact that the Philippines has already signed and ratified the 1982 CLOS. This suggests the second approach towards validating the binding nature of the EEZ-related regimes in relation to the Philippines. Article 18 of the Vienna Convention on the Law of Treaties obliges the Philippines to refrain from acts which would defeat the object and purpose of the CLOS before it has entered into force. Hence, the CLOS provisions or its conventional regimes are binding on the Philippines in this sense, and may provide the framework to justify or condemn its EEZ policy. If this analytic

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91. *Tunisia/Libya Case*, ICJ Rep. 1982, para. 100, at 74; *Libya/Malta Case*, ICJ Rep. 1985, para. 34, at 33.

92. Dr. KWIATKOWSKA, for instance, favours the emergence of a customary rule on the primary interest in and responsibility of a State of origin of anadromous species, but she cites opposing authority. Op. cit. n. 18, at 85.

93. On this point, BURKE, op.cit. n. 38, at 332-333, has this to say: '[S]tate practice provides no basis for inferring general acceptance of any customary law concerning the following: allowable catch, determination of harvesting capacity, access to a surplus, endangering a target species, safeguarding associated or dependent species, identification of such species, prohibiting the initiation of a high seas fishery on anadromous species, a requirement that high seas fishing States recognize or defer to coastal States rights, duties and interests concerning highly migratory species or straddling stocks, or a requirement that coastal States cooperate with high seas fishing States in utilization and conservation of highly migratory species within a coastal State's EEZ. Nor can one find national legislation that recognizes obligations regarding [land-locked and geographically disadvantaged States].'

94. For instance, ATTARD, op.cit. n. 11, at 166, asserts that the access principle in the CLOS reflects the position under customary law, but KWIATKOWSKA, op.cit. n. 18, at 60 et seq., has a contrary view.

path is accepted, moreover, the operation of Article 300[95] of the CLOS immediately imposes a significant qualification on the exercise of valid policy choices by the Philippines as a coastal State under the CLOS. The result does point out to the need for a more intensive and comprehensive appraisal of the Philippine EEZ policy.

4. THE PHILIPPINE EEZ POLICY AND THE RESOURCES REGIME OF THE EEZ UNDER THE 1982 CONVENTION

4.1 **Note on the "Exclusive Use and Enjoyment" Clause of the EEZ Policy**

The meaning and scope of the term "use and enjoyment" in the Philippine EEZ policy has not been sufficiently elaborated during the deliberations of the Constitutional Commission. But, if it is not to be absurdly interpreted in the light of the CLOS, the clause makes particular reference to the activities of exploration and exploitation or harvesting of certain resources within the zone by Filipino citizens, by reference to which an exclusive reservation was made in their favour. "Exclusive use and enjoyment" cannot, therefore, imply an exclusive jurisdiction to conserve and manage the resources of the zone by Filipino citizens alone. Long-established State practice proves a global, rather than a national approach to Philippine marine resources conservation and management issues. This is evidence that conservation and management of marine resources are not within the purview of the clause.[96]

Nor can the clause be interpreted as "marine scientific research" activities reserved exclusively for citizens under the terms of the CLOS *eo nomine*.[97] This inference is plain from a reading of the natural resources provisions of the Constitution in relation to its provisions on Science and Technology.[98]

In the context of its usage in the Constitution and in relation to the overall natural resources and fisheries development policy of the State

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95. "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."

96. For instance, the Philippines is a signatory to the International Whaling Commission Convention of 1946; a member of the 1948 Indo-Pacific Fisheries Commission; and signatory to the 1983 ASEAN Understanding on Fisheries Cooperation. These instruments mandate cooperation in the field of conservation and management of marine resources.

97. Marine Scientific Research and the related Transfer of Technology regimes under the CLOS may instead be analyzed in relation to a different constitutional policy on Science and Technology. See Art. XIV on Science and Technology, and Sec. 7, Art. XIII, Const., *supra*, text at n. 12.

mandated therein, the "exclusive use and enjoyment" clause really addresses the question of foreign participation or intrusion in the exploration and exploitation or harvesting of marine resources.[99] The motivation for the clause was the felt need to exclude foreign nationals from these activities in waters under Philippine jurisdiction. This constitutional intent of excluding foreign States and their nationals from the exploration and exploitation of EEZ resources, particularly living resources, is the gist of the policy and makes it susceptible to evaluation from the standpoint of the resource regime in the CLOS. Given these premises, the regularity and propriety of the Philippine EEZ policy is a foregone conclusion.

4.2 The EEZ Policy and the Regime of Non-living Resources

The Constitution excluded from the "exclusive use and enjoyment" clause minerals, petroleum and other mineral oils[100] in the EEZ. All other non-living resources in the zone are therefore covered by the policy. Considering the unqualified and exclusive sovereign rights of a coastal State over these resources, whether found above the EEZ waters, in the superjacent waters to the seabed, or on the seabed or in the subsoil, the constitutional policy is warranted as a legitimate expression of these sovereign rights.

4.3 The EEZ Policy and the Regime of Fisheries/Living Resources

4.3.1 *The EEZ Policy and the Regime of Sedentary Species*

The rule of exclusivity applies to sedentary stocks.[101] This means that commercially important demersal (bottom living) or sedentary fish like slipmouths, lizard fish, caeso and cavalla found in Philippine waters[102] fall within the sovereign rights discretion of the Philippines, and their appropriation or allocation may be subject to the rule on full discretion

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98. Thus, Sec. 12 of Art. XIV of the Constitution on Science and Technology provides: 'The State shall regulate the transfer and promote the adaptation of technology from *all* sources for the national benefit. It shall encourage the *widest participation* of private groups, local governments and community based organizations in the generation and utilization of science and technology.' (*Underscoring supplied*)

99. See Art. XIII, Sec. 7, fourth sentence, Const.

100. See Art. XII, Sec. 2, para. 4, Const.

101. This same rule applies to the regime of living resources above the waters of the EEZ, which need not be elaborated further.

102. I. A. RONQUILLO. 'The Impact of the Law of the Sea on Philippine Fisheries', 3 Phil YIL (1974) 144, 149.

by a coastal State. Foreign access to these resources may definitely be barred.

4.3.2 *The EEZ Policy and the Regime of Coastal Fisheries*

The general obligations of the Philippines of conservation and management and optimum utilization, with respect to coastal fisheries in the EEZ, does not involve any specific duty to allow foreign access to these resources. An added significance of the EEZ policy is, in fact, its reflection of the relatively permanent decisions already taken by the Philippine fisheries manager regarding the "allowable catch" or the "harvesting capacity" of the country. The application of a surplus scheme or the possibility of foreign access is thus, *ab initio,* precluded at the level of constitutional policy. Surely, this State attitude cannot be effectively contested under the existing rules of international law. It may be fitting to add that this policy has already indirectly determined the MSY, the AC, the HC. Interestingly, the absence of a surplus is consistent with the actual state of Philippine fisheries: "[T]he Philippines is fishing to the limit the available resources within the area of its EEZ which are most productive".[103]

4.3.3 *The EEZ Policy and the Regime of Particular Species*

4.3.3.1 Highly Migratory Species and the EEZ Policy

The HMS regime is significant to the Philippines because of the large quantity of tunas which migrate from the Philippines to Japan, to the Palau and then return to the Philippines; these are the skipjack, yellowfin and big-eye tunas, listed among the HMS in Annex I of the CLOS.[104] From the legal standpoint, these tunas are part of the "marine wealth" contemplated by the constitutional policy. Logically, while these are within the zone of the Philippines, the policy applies[105] and no duty could be imputed to the Philippines to allocate these tunas in its EEZ in favour of foreign nationals under any circumstance. The duty of the Philippines, with respect to HMS under the CLOS, is to cooperate[106] with the other States fishing these resources which need not necessitate giving access to

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103. I.A. RONQUILLO, 'The Law of the Sea Convention: Its Significance to the Philippine Fishing Industry', 2 *Batasan Committee Quarterly* (1984), Vol. II, No. 1, 30-31. Ronquillo notes the paradox, proving without doubt the absence of a surplus, that although "the Philippines possesses one of the most advanced fishing fleets in Southeast Asia, it could not meet the fish requirements of its people". Ibid., at 33.

104. RONQUILLO, loc. cit. n. 103 at 33; loc. cit. n. 102 at 152.

105. BURKE, op.cit. n. 38, at 330.

106. Art. 64, CLOS.

foreigners. Thus, in State practice, the Philippines has pursued initiatives to comply with the duty to cooperate without necessarily giving third State access to tunas.[107]

The same tunas in the Philippine EEZ also abound in other Philippine waters, like internal waters, archipelagic waters and the Philippine territorial sea.[108] It may be argued that the duty to cooperate does not extent to the HMS in these waters. However, cooperation may extend to these maritime spaces as well in respect of the management of HMS:

> 'Accordingly, the archipelagic State has no legal obligation to cooperate with fishing States regarding the conservation and utilization of HMS stocks in these waters, although in a practical sense, the necessities of providing for efficient harvesting in the EEZ and high seas do not permit wholly separate treatment of the fishing that could transpire in archipelagic waters.'[109]

4.3.3.2 Catadromous species and the EEZ Policy

Anadromous stocks, being temperate zone fisheries, are insignificant in Philippine waters; the relationship of the AS regime and the EEZ policy is thus an academic subject for elaboration. However, significant catadromous species of economic importance are recorded as extant in Philippine waters.[110] The principle of sovereign rights unqualified by any duty to cooperate applies in regard to these stocks. Consequently, foreign access to these fish resources may be absolutely prohibited by policy. This is what the constitutional policy on the EEZ achieves.

4.3.3.3 Marine Mammals and the EEZ Policy

The Philippines is a member of the International Whaling Commission.[111] Through this membership, the Philippines has subscribed to the IWC's numerous recommendations on the conservation and global man-

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107. The 1983 ASEAN Ministerial Understanding on Fishery Cooperation, which sought cooperation in fishery conservation and management, provided for exchange of information and expertise, coordination of fishery researches, *action with regard to straddling and migratory stocks*, sharing of technology. No provision for access is mentioned here. The 1985 ASEAN Bangkok Agreement on Conservation of Nature and Natural Resources subjects fisheries cooperation to the principle of sustainable development. The establishment of a Fish Development Center by ASEAN in 1986 did not likewise provide for foreign access to coastal State fisheries. See KWIATKOWSKA, op.cit. n. 18, at 55. The initiatives of the Philippines to cooperate on an inter-regional basis has lead to the creation of a Western Pacific Fisheries Consultative Committee (WPFCC) after the Manila Conference of ASEAN countries and Pacific Islands States in 1987. The expanding scope of cooperation by the Philippines with other States on fisheries is beyond cavil. See G. R. MUNRO, "International Cooperation for Resource Management: Fisheries", 4 *Foreign Relations Journal* (1989), No. 4.

108. Skipjack and yellowfin tunas breed in Philippine archipelagic waters. RONQUILLO, op.cit. ns. 102 and 103.

109. BURKE, op.cit. n.38 at 300.

110. Catadromous species like the bangos, fresh-water eel, and banak are plentiful in the Philippines. RONQUILLO, op.cit. n. 102, at 156.

agement of marine mammals. With the assumed commitments of the Philippines as member of this international organization, it is justified to consider marine mammals in the Philippine EEZ as not included in the notion of "marine wealth" in its EEZ policy which the State can appropriate or allocate according to its sovereign-rights discretion.

The obligations of the Philippines, under the 1946 Whaling Regulation Convention, may be deemed as constituting a distinct State Policy separate from the EEZ policy under consideration. From a legal standpoint, the binding recommendations of the IWC should be viewed as an integral part of Philippine marine resources development policy by virtue of the operation of Article II, Section 2 of the Constitution which states that the Philippines adopts the generally accepted principles of international law (i.e., including treaty obligations through the IWC) as part of the law of the land. The EEZ policy and the regime of marine mammals are therefore two separate policy mandates for the Philippine Government which are important ingredients of the larger marine resources development policy of the Philippines.

5. CONCLUDING OBSERVATIONS

An appraisal of the resources regime of the EEZ, under the 1982 CLOS, supports a conviction that the constitutional policy reserving to Filipino citizens the exclusive use and enjoyment of marine wealth in the EEZ is wholly consistent with the rights and obligations of coastal States envisioned by this regime. On the surface, the contradiction between this constitutional policy and the CLOS is suspected, especially in relation to the "foreign access" principle for coastal fisheries or the principle of cooperation concerning particular species of living resources. But the principle of sovereign rights is paramount and upholds the Philippine EEZ policy which effectively prohibits third States and their nationals from participation in the exploration and exploitation of the EEZ's living resources. Surely, it is even quite possible to consider the policy as the mode of compliance by the Philippines of its obligations under the conventional regimes of the EEZ.

Notice may also be given to the harmonization effected by the Philippine Declaration made during the occasion of the signing of the CLOS in 1982 and the provisions of the Convention[112] in relation to this constitu-

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111. The Commission is established by the International Convention for the Regulation of Whaling of 1946, 161 UNTS 72.

112. See Art. 310, CLOS.

tional policy on the EEZ. The Declaration is regarded by some observers as an unauthorized reservation under Article 309 of the CLOS.[113] But if the Declaration is viewed in the light of the EEZ policy of the Philippines, the following points made in the Declaration are warranted:

> 1. The signing of the Convention by the Government of the Republic of the Philippines shall not in any manner impair or prejudice the sovereign rights of the Republic of the Philippines under and arising from the Constitution of the Philippines.
>
> .....
>
> 8. The agreement of the Republic of the Philippines to the submission for peaceful resolution, under any of the procedures provided in the Convention, of disputes under Article 298 shall not be considered as a derogation of Philippine sovereignty.

The *mare clausum* thesis is indeed affirmed by the Philippine EEZ policy.

To be sure, the wisdom of the Constitutional policy may be doubted. Precedent has shown that developing countries have often been able to extract valuable information and various forms of compensation for their granting of foreign access which they have used to develop their own conservation and management responsibilities.[114] Moreover, joint-venture and other cooperation arrangements with other States and foreign entities have proved beneficial to developing countries.[115] Providing access to developing countries, particularly to land-locked and geographically disadvantaged States may also prove the political sense of solidarity of the Philippines with the developing world. Nevertheless, it may be assumed that the Constitutional Commission of 1986 has taken all competing interests into consideration and decided on a choice that is now expressed in Article XII, Section 2 of the Constitution. The choice consists, in the first instance, of investing the State with full control and supervision in the exploration, development and utilization of the marine resources in the Philippines. Coupled with this mandate is the policy of reserving the exclusive use and enjoyment of an overwhelming portion of these resources to Filipino citizens. A resulting static element in the evolution of policy and legal instruments for the marine resources develop-

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113. See J. INGLES, 'The UN Convention on the Law of the Sea: Implications of Philippine Ratification', Phil. YIL (1983) at 47.

114. KWIATKOWSKA, op.cit. n. 18, at 63.

115. Id. at 64, citing CHRISTY and MOORE, *Forms of Foreign Participation in Fisheries: Coastal State Practice* (FAO Fisheries Report No. 493, 1983). The 1984 FAO Fisheries Strategy states, that: "Whenever access is granted to foreign fishing vessels, its possible impact on national fishing operations should be assessed. The relevant agreements should include provisions to facilitate cooperation aimed at protecting national operations, promoting the transfer of appropriate technologies and developing national capabilities."

ment program of the country is thus introduced by this choice. But then the impact of this choice in the economic, social, bio-ecological, and foreign policy spheres is yet to be fully ascertained. Especially in today's world where the possibilities of the EEZ are dynamically unfolding in the realm of international law and international organization, the consequences of the constitutional policy choice remains uncharted. What is certain, however, is the unimpeachable validity of this national choice in international law.

LEGAL MATERIALS

STATE PRACTICE OF ASIAN COUNTRIES IN THE FIELD OF INTERNATIONAL LAW*

CHINA

LEGISLATION

Territorial claims

Law on the Territorial Sea and the Contiguous Zone of 25 February 1992[1]

Article 1 This law is enacted for the People's Republic of China to exercise its sovereignty over its territorial sea and the control over its contiguous zone, and to safeguard its national security and its maritime rights and interest.

Article 2 The territorial sea of the People's Republic of China is the sea belt adjacent to the land territory and the internal waters of the People's Republic of China.

The land territory of the People's Republic of China includes the mainland of the People's Republic of China and its coastal islands; Taiwan and all islands appertaining thereto including the Diaoyu Islands; the Penghu Islands; the Dongsha Islands; the Xisha Islands; the Zhongsha Islands and the Nansha Islands; as well as all the other islands belonging to the People's Republic of China.

The waters on the landward side of the baselines of the territorial sea of the People's Republic of China constitute the internal waters of the People's Republic of China.

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* Edited by Ko Swan Sik, General Editor.

1. Adopted at the 24th Meeting of the Standing Committee of the Seventh National People's Congress, promulgated by Order of the President No. 55, 25 Feb. 1992.
Translated and published by the Legislative Affairs Commission of the Standing Committee of the National People's Congress, with following note by the translator: 'In case of discrepancy between the English translation and the original Chinese text, the Chinese text shall prevail.'

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, Volume 2, 165-181

Article 3 The breadth of the territorial sea of the People's Republic of China is twelve nautical miles, measured from the baselines of the territorial sea.

The method of straight baselines composed of all the straight lines joining the adjacent base points shall be employed in drawing the baselines of the territorial sea of the People's Republic of China.

The outer limit of the territorial sea of the People's Republic of China is the line every point of which is at a distance equal to twelve nautical miles from the nearest point of the baseline of the territorial sea.

Article 4 The contiguous zone of the People's Republic of China is the sea belt adjacent to and beyond the territorial sea. The breadth of the contiguous zone is twelve nautical miles.

The outer limit of the contiguous zone of the People's Republic of China is the line every point of which is at a distance equal to twenty four nautical miles from the nearest point of the baseline of the territorial sea.

Article 5 The sovereignty of the People's Republic of China over its territorial sea extends to the air space over the territorial sea as well as to the bed and subsoil of the territorial sea.

Article 6 Foreign ships for non-military purposes shall enjoy the right of innocent passage through the territorial sea of the People's Republic of China in accordance with the law.

Foreign ships for military purposes shall be subject to approval by the Government of the People's Republic of China for entering the territorial sea of the People's Republic of China.

Article 7 Foreign submarines and other underwater vehicles, when passing through the territorial sea of the People's Republic of China, shall navigate on the surface and show their flag.

Article 8 Foreign ships passing through the territorial sea of the People's Republic of China must comply with the laws and regulations of the People's Republic of China and shall not be prejudicial to the peace, security and good order of the People's Republic of China.

Foreign nuclear-powered ships and ships carrying nuclear, noxious or other dangerous substances, when passing through the territorial sea of the People's Republic of China, must carry relevant documents and take special precautionary measures.

The Government of the People's Republic of China shall have the right to take all necessary measures to prevent and stop non-innocent passage through its territorial sea.

Cases of foreign ships violating the laws or regulations of the People's Republic of China shall be handled by the relevant organs of the People's Republic of China in accordance with the law.

Article 9 The Government of the People's Republic of China may, for maintaining the safety of navigation or for other special needs, request foreign

ships passing through the territorial sea of the People's Republic of China to use the designated sea lanes or to navigate according to the prescribed traffic separation schemes. The specific regulations to this effect shall be promulgated by the Government of the People's Republic of China or its competent authorities concerned.

Article 10 In the case of violation of the laws or regulations of the People's Republic of China by a foreign ship for military purposes or a foreign government ship for non-commercial purposes when passing through the territorial sea of the People's Republic of China, the competent authorities of the People's Republic of China shall have the right to order it to leave the territorial sea immediately and the flag state shall bear international responsibility for any loss or damage thus caused.

Article 11 All international organizations, foreign organizations or individuals shall obtain approval from the Government of the People's Republic of China for carrying out scientific research, marine operations or other activities in the territorial sea of the People's Republic of China, and shall comply with the laws and regulations of the People's Republic of China.

All illegal entries into the territorial sea of the People's Republic of China for carrying out scientific research, marine operations or other activities in contravention of the provisions of the preceding paragraph of this Article, shall be dealt with by the relevant organs of the People's Republic of China in accordance with the law.

Article 12 No aircraft of a foreign state may enter the air space over the territorial sea of the People's Republic of China unless there is a relevant protocol or agreement between the Government of that state and the Government of the People's Republic of China, or approval or acceptance by the Government of the People's Republic of China or the competent authorities authorized by it.

Article 13 The People's Republic of China has the right to exercise control in the contiguous zone to prevent and impose penalties for activities infringing the laws or regulations concerning security, the customs, finance, sanitation or entry and exit control within its land territory, internal waters of territorial sea.

Article 14 The competent authorities concerned of the People's Republic of China may, when they have good reasons to believe that a foreign ship has violated the laws or regulations of the People's Republic of China, exercise the right of hot pursuit against the foreign ship.

Such pursuit shall be commenced when the foreign ship or one of its boats or other craft engaged in activities by using the ship pursued as a mother ship is within the internal waters, the territorial sea or the contiguous zone of the People's Republic of China.

If the foreign ship is within the contiguous zone of the People's Republic of China, the pursuit may be undertaken only when there has been a violation of

the rights as provided for in the relevant laws or regulations listed in Article 13 of this Law.

The pursuit, if not interrupted, may be continued outside the territorial sea or the contiguous zone until the ship pursued enters the territorial sea of its own country or of a third State.

The right of hot pursuit provided for in this Article shall be exercised by ships or aircraft of the People's Republic of China for military purposes, or by ships or aircraft on government service authorized by the Government of the People's Republic of China.

Article 15 The baselines of the territorial sea of the People's Republic of China shall be promulgated by the Government of the People's Republic of China.

Article 16 The Government of the People's Republic of China shall formulate the relevant regulations in accordance with this Law.

Article 17 This Law shall come into force on the date of promulgation.

INDONESIA

LEGISLATION

Entry into and departure from the country; status of aliens

Immigration Act (Act No.9/1992 of 31 March 1992)[1]

General features

The Act is the result of an overall-revision of existing pre- and post-independence regulations on a range of related subjects and substitutes these scattered pieces of legislation. It essentially contains rules on entry into and departure from the country, the legal status and supervision of aliens staying in the country, and the determination of the different categories of Indonesian travel documents. The Act also contains provisions on penal and administrative sanctions against violation of the law and consists of 11 chapters and 68 articles.

The 11 chapters deal with: (I)General provisions (Arts. 1-2), (II) Entry into and departure from Indonesian territory (Arts. 3-10), (III)Prevention of departure and preclusion to enter (Arts. 11-23), (IV)Presence of aliens in Indonesian territory (Arts. 24-28), (V)Travel documents (Arts. 29-37), (VI)Supervision of aliens and immigration measures (Arts. 38-46),

1. The Act is to be officially published in the *Lembaran Negara* [State Gazette) 1992 No. 33. Indonesian text of the Act taken from *Business News* (Jakarta) No. 5270 (12 June 1992), courtesy of Kartini Muljadi & Associates, Jakarta. Summarized by Ko Swan Sik, General Editor.

(VII)Investigation (Art. 47), (VIII)Penal provisions (Arts. 48-62), (IX) Transitional provisions (Arts. 63-64), (X)Miscellaneous provisions (Arts. 65-66), (XI)Final provisions (Arts. 67-68).

Entry into and departure from the country

The general rule applicable to nationals is: 'Every Indonesian national is entitled to leave or to enter Indonesian territory.' (Art. 2) However, the exercise of this right is subject to a number of conditions which are elaborated in Articles 3-23 and which also cover the requirements for the entry and departure of aliens.

The main condition for entry is the possession of a travel document (Art. 3) and, in the case of aliens, the additional requirements of a visa (Art. 6)[2] and an entry permit. (Art. 4 para. 2)[3] Under Article 6 para. 2 a visa shall be granted provided 'the alien's presence in the country and his purposes will be beneficial [to the country] and will not disturb national order and security.' But even where the visa requirement is met an entry permit may be denied in several cases, like those of mental illness or contagious diseases endangering public health. (Art. 8)[4] Departure from the country is subject to the issuance of an exit permit in all cases of nationals as well as aliens. (Art. 4 para. 1)

These general rules on entry and departure are complemented by provisions on the possibility of 'preventing' the departure and of 'precluding' the entry of persons for specific reasons (Chapter III, Arts. 11-23). Where a prevention or preclusion measure is in force entry into the country, or departure from the country as the case may be, shall be denied. (Art. 22) Both measures may be taken in respect of aliens as well as nationals. The scope of preventing the departure and of precluding the entry of persons differs according to the underlying reasons and the corresponding competent officials. (Arts. 11 and 13; Arts. 15, 16, 20 and 21) The period of application of a decision to prevent or to preclude runs from 6 months (in the case of prevention) and 1 year (in the case of preclusion) to a discretionary period in cases falling under the jurisdiction of the Supreme Public Prosecutor. (Arts. 13 and 20)

The Act does not distinguish between nationals and aliens so far as the prevention to depart from the country is concerned. Neither does it specify in detail the grounds on which a relevant decision may be taken. In attributing authority to take such a decision the Act (Arts. 11) merely refers to 'immigration matters', 'matters concerning state receivables', the 'maintenance and enforcement of the security and defence of the state' and matters falling within the jurisdiction of the Supreme Public Prosecutor.

With respect to preclusion to enter, however, the Act does distinguish between nationals (Art. 18) and aliens (Art. 17). An alien may be precluded from entering the country:

2. Unless the alien belongs to a category exempted from this requirement, Art. 7.

3. A visa is defined in Art. 1 item 7 as a 'written permit issued by a competent official of an Indonesian representative mission... and containing approval for an alien to travel to and to enter Indonesian territory', while an entry permit refers to the permit issued by the immigration officer at the place of entry. (Art. 1 item 8).

4. Other cases are the non-possession of a re-entry permit for another country and fraud).

(a) if the person is known to be or is suspected of being involved in activities of an international crime syndicate;
(b) if the person has, in his/her or another country, taken a hostile attitude against the government of Indonesia or committed acts tarnishing the good standing of the Indonesian nation and the Indonesian state;
(c) if the person is suspected of having committed acts in violation of security and public order, good morals, religion and traditional customs of Indonesian society;
(d) at the request of another state, in case of a person who is avoiding [prosecution or trial] or the execution of a penal sentence in that country on grounds of having committed a crime which is also subject to penal sanction in Indonesia;
(e) if the person has ever been expelled or deported from Indonesia;
(f) on other grounds relating to immigration as determined by Government Regulations.

In contradistinction to aliens Indonesian nationals may only be precluded to enter the country:
(a) if the person, having left Indonesia long ago, or having settled in or having become a resident of another state, has committed a hostile act or has taken a hostile attitude towards the Indonesian state or the government of the Republic of Indonesia;
(b) if the person's entry into Indonesian territory may disturb development, cause dissension in the Indonesian nation, or disturb national stability; or
(c) if the person's entry into Indonesia may endanger his (or: her) safety or the safety of his/her family.

The presence of aliens in Indonesian territory and their supervision

The Act (Arts. 24-28) distinguishes 4 categories of legally recognized presence of aliens in Indonesia, based on a (1) transit permit, (2) visitor's permit, (3) limited residence permit, or (4) permanent residence permit, respectively. For their elaboration the Act refers to implementing Government Regulations.

The main obligations of aliens on Indonesian territory for purposes of supervision are listed in Article 39 of the Act. These obligations are:
(a) providing all information required pertaining to their identity or that of their family, and changes in their civil status, nationality and place of residence;
(b) showing their travel or immigration documents whenever required for supervision purposes;
(c) registering in case of staying in the country for more than 90 days.

Penal and administrative sanctions

Chapter VIII of the Act contains penal provisions applicable in case of violation of the various obligations included in the Act. Apart from penal sanctions, however, the Act introduces the possibility of an 'immigration measure' which is defined as 'an administrative measure on immigration matters not subject to the jurisdiction of the [common] courts.' (Art. 1 item 14)

According to Article 42 aliens on Indonesian territory who conduct activities which endanger or which could reasonably be suspected to endanger security and public order, or who do not respect or adhere to the law in force may be subjected to immigration measures. These measures may consist of:
(a) a restriction, alteration or cancellation of the permit to stay;
(b) a prohibition to stay in one or more areas of Indonesian territory;
(c) a compulsory abode within a specific area of Indonesian territory;
(d) expulsion or deportation from Indonesian territory or exclusion of entry into Indonesian territory.

Special circumstances

Reference is made in the Act to two cases of special circumstances justifying special regulation. Article 65 recognizes the possibility of a special immigration regime for border traffic under international border-crossing agreements concluded with neighbouring countries. A special regime is also acknowledged for 'aliens who come and stay in Indonesia for the exercise of their diplomatic or other official functions.' The Act (Art. 66) refers this special case to regulation by Government Regulation.

MALAYSIA

INTERNATIONAL STATEMENTS

New World Order; democracy within states and in international relations; the U.N. and its democratization; the poor and the powerful in international relations.

***Statement by the Prime Minister at the plenary of the forty-sixth session of the United Nations General Assembly, 24 September 1991* (excerpts)**[1]

'...

The world has witnessed in the last two years more revolutionary changes than in the preceding hundred years.
... The world is ripe for 'a new world order' but it is hoped that this new world order will not be one that is imposed upon the world by any particular beneficiary of the current revolution. All members of this august body called the United Nations should participate in the shaping of the New World Order if we are to avoid a return of a new colonial era.
When the United Nations was formed after the Second World War, the allied

1. Text from 24 *Foreign Affairs Malaysia* (1991) No. 3, p. 59 et seq. (courtesy Malaysian Embassy, The Hague).

victors assumed the right to create a world order in which each of the five major powers could veto anything that does not serve them. But then the five fell out and the East-West conflict divided the world into two antagonistic camps. The Cold War that followed not only retarded modern civilisation but converted poor countries into pawns and proxies, devastating their territories and economies with confrontations and wars. That they were not fighting their own battles is clear from the outbreak of peace in every continent as soon as the East-West confrontation ended.

With these experiences still fresh in our minds how can we be assured that a new world order formulated by any one country or group of countries will be good for everyone? We are already feeling heavy hands forcing us to do this and not that. In East Asia we are told that we may not call ourselves East Asians as Europeans call themselves Europeans and Americans call themselves Americans. We are told that we must call ourselves Pacific people and align ourselves with people who are only partly Pacific, but more American, Atlantic and European. We may not have an identity that is not permitted, nor may we work together on the basis of that identity. Is this a foretaste of the new world order that we must submit to?

Democracy, and only democracy is legitimate and permissible now. No one really disputes this.

...

But is there only one form of democracy or only one high priest to interpret it?

We see differences in the practice of democracy even among those who are preaching democracy to us. Can only the preachers have the right to interpret democracy and to practise it as they deem fit and to force their interpretations on others? Cannot the converts too interpret the details, if not the basics? If democracy means to carry guns, to flaunt homosexuality, to disregard the institution of marriage, to disrupt and damage the well-being of the community in the name of individual rights, to destroy a particular faith, to have privileged institutions which are sacrosanct even if they indulge in lies and instigations which undermine society, the economy and international relations; to permit foreigners to break national laws; if these are the essential details, cannot the new converts opt to reject them? We, the converts will accept the basics but what is the meaning of democracy if we have no right of choice at all, or if democracy means our people are consistently subjected to instability and disruptions and economic weaknesses which make us subject to manipulation by the powerful democracies of the world? Hegemony by democratic powers is no less oppressive than hegemony by totalitarian states.

...

If democracy is to be the only acceptable system of government within states, shouldn't there be also democracy between the states of the world? In the UN we are equal, but five are more equal than the rest of the 166. Seven countries

on their own lay down the laws which affect adversely the economies of others. A few nations on their own have taken it upon themselves to determine the new world order. Powerful trade blocs demand voluntary restraints and impose laws and rules extra-territorially. Clearly the states of the world are not equal; not in the UN, not anywhere. If democracy is such an equitable concept why must we accept inequality between nations?

...

When the UN was formed in 1945 the victors of World War II arrogated to themselves the right to dictate the roles and the distribution of power between nations. Many things have happened since then. The victors of 1945 are no longer the powerful major players in world affairs. New powerful nations have emerged while some major powers have changed structurally. And new ideas about rights and wrongs and democracy have crystallised. Are we going to be shackled forever to the results of World War II?

...

We need weapons only to fight criminals. If a nation is subjected to armed uprising then the UN should take part in putting it down. Democratic governments should only be brought down by democratic process. Anything that goes beyond democratic processes should merit UN intervention if a request is made. We cannot preside over the disintegration of nations into ethnic communities, particularly if military action had no role on the initial consolidation of a nation.

...

Today individuals in some developed countries consider it their right to tell us how to rule our country. If we don't heed them, then they consider it their right to destroy our economy, impoverish our people and even overthrow our governments. These people latch on to various causes such as human rights and the environment in order to reimpose colonial rule on us. They are helped by the Western media which also consider it their duty to tell us how to run our country. All these combine to make independence almost meaningless. Our only hope lies in the democratisation of the UN, especially as the option to defect to the other side is no longer available to us. We want to remain independent but we also want to conform to international norms as determined not by some NGOs or the so-called advanced democracies, but by all the nations of the world. If we default then it is the UN and not some Robin Hoods which should chastise us.

...

To be heard the poor must band together not to form impoverished trade

blocs but to lend weight to their arguments. And so the East Asia Economic Group or EAEG was proposed, not as a trade bloc, but as a forum for the nations of East Asia to confer with each other in order to reach agreement on a common stand for a common problem caused by the restrictive trade practices of the rich.

We are preplexed to find that this objective merely to have a voice in international affairs is being opposed openly and covertly by the very country which preaches free trade. It is even more surprising that there should be such opposition when NAFTA itself is being formed on the principle of the right of free association of independent countries. Can it be that what is right and proper for the rich and the powerful is not right or proper for the poor?

...'

PAKISTAN

JUDICIAL DECISIONS

Requirement of law sufficiently met in the case of the British-US Extradition Treaty of 22 December 1931 even if not published in the official Gazette (of Pakistan).

Supreme Court, 4 May 1989
PLD 1989 Supreme Court 519*

MUHAMMAD AZIM MALIK– Petitioner. GOVERNMENT OF PAKISTAN and others– Respondents

Civil Petition for Leave to Appeal No.198-R of 1989 (From the judgment of Lahore High Court, Rawalpindi Bench, dated 30-4-1989 passed in Writ Petition No.167 of 1989)

...

JUDGMENT

SHAFIUR RAHMAN, J.–The petitioner, a brother of the fugitive offender Muhammad Saleem Malik detained under a Substituted Warrant of Custody and Removal made out under section 11 of the Extradition Act, 1972 (hereinafter referred to as the Act) seeks leave to appeal against the judgment of the Lahore High Court, Rawalpindi Bench, dated 30-4-1989 whereby his

* Courtesy Mr. Jamshed A. Hamid, Islamabad.

petition under section 12 of the Act** and under section 491, Cr.P.C. read with Article 199 of the Constitution was summarily dismissed.

...

4. Mr Fazle Ghani Khan, Advocate, the learned counsel for the petitioner contended before us that

...

(ii) There existed no extradition treaty between the United States of America and Pakistan to sustain the extradition proceedings at all. ... This ground was expressed [in two earlier petitions, *Ed.*] in the following words:

'That a legally valid Extradition Treaty does not exist between Pakistan and United States. The present document has been validated on 14th August, 1947 by Earl Mountbatten, the then Governor-General of India by way of an order called the Indian Independence (International Arrangements) Order, 1947. This can have no legal effect in Pakistan as on 14 August, 1947 Pakistan had come into existence and only the Governor-General of Pakistan could issue such an order.'

...

8. As regards the existence of the Extradition Treaty, we find on the record the Extradition Treaty itself which is dated 22nd of December, 1931 and it had been ratified by the Government of the United States and Great Britain and in the 'United States Code Annotated, Title 18, Cumulative Annual Pocket Part for Use in 1983' are listed bilateral treaties of extradition between the United States and the other Governments and the following entries exist in respect of Pakistan:-

'Country	Date Signed	Entered into force	Citation
xxxx	xxxx	xxxx	xxxx
Pakistan	Dec. 22, 1931	March 9, 1942	47 Stat. 2122
xxxx	xxxx	xxxx	xxxx'

** [footnote inserted by the Editor] Section 12 of the Act is in the following words:-

'12. *Discharge of person apprehended if not surrendered within two months.*– If a fugative offender who, in pursuance of this Act, has been taken into custody to await his surrender is not conveyed out of Pakistan within two months after such committal, the High Court, upon application made to it by or on behalf of the fugitive offender and upon proof that reasonable notice of the intention to make such application has been given to the Federal Government, may order such prisoner to be discharged unless sufficient cause is shown to the contrary.'

9. Section 3 of the Act requires as hereunder:-
'3. *Treaty State.*-(1) As soon as may be after the commencement of this Act, the Federal Government shall publish in the official Gazette a list of the foreign States with which an extradition treaty is in operation, specifying in respect of each such State the Offences persons accused of which are, under the treaty, to be returned to or from that State.

(2) Whenever there is concluded an extradition treaty between Pakistan and a foreign State, the Federal Government may, by notification in the official Gazette, declare such State to be a treaty State for the purposes of this Act.

(3) A declaration under subsection (2) in relation to a foreign State shall specify the offences persons accused of which are, under the extradition treaty with that State, to be returned to or from that State and may provide that this Act shall apply in relation to that State with such modification as may be set out therein; and the provisions of this Act shall have effect accordingly.'

There is no material placed on the record by the Government to indicate that the treaty has been notified in the Gazette as required by subsection (1) of section 3 of the Act. However, a copy of the treaty being on the record with all the necessary particulars about ratification being available and it also being formally incorporated in the United States Code Annotated, the requirement of law is sufficiently met and even if there be non-publication of it in the Gazette of our country, the existence and the efficacy of the treaty as such, would not in any manner get impaired.

...'

SINGAPORE

JUDICIAL DECISIONS

Whether Australia a 'foreign state' or 'declared Commonwealth country'

Court of Appeal – Civil Appeal No 45 of 1989 **(30 April 1992)**
[1992]2 SLR 280, reported by Mathavan Devadas*

ATTORNEY GENERAL v. ELITE WOOD PRODUCTS (AUSTRALIA) PTY LTD & ANOR

In April 1988, a request to take the evidence of certain persons with addresses in Singapore for use in criminal proceedings in New South Wales was received by the Ministry of Foreign Affairs from its counterpart in Australia. On 23 May 1988, the Minister for Law issued a notice under s 43 of the Extradition Act

* Courtesy Mr. Foo Kim Boon, Singapore.

(Cap 103) ('the Act')* authorizing the senior district judge 'or such other district judge or magistrate as you may nominate' to take the evidence as requested. A district judge was nominated. The respondents, who were defendants in the New South Wales criminal proceedings, challenged the authorization of the Minister for Law and applied by originating motion to have it quashed. The High Court allowed the application (see [1989] 3 MLJ 408). The Attorney General appealed. The issues raised on appeal were: (1) whether the Minister had power to make the authorization under s 43(1) of the Act; and (2) if he did, whether he exceeded his power by reason of delegating the exercise of it to the senior district judge. In relation to the first issue, the court had to consider the question whether Australia is a 'foreign state' for the purpose of s 43(1) of the Act.

Held, dismissing the appeal:

(1) Australia, having been declared a Commonwealth country to which Pt IV of the Act applies, is incapable of being considered a 'foreign state' for the purpose of s 43, any more than it could be considered a foreign state for the purpose of any other provisions of the Act. There is no basis for the suggestion that 'foreign state' in any part of the Act could mean simply any sovereign state outside Singapore, whether Commonwealth or foreign.

(2) The cognition of the status of a country as a Commonwealth country on the intra-Commonwealth level, and in our municipal law for general legislative purposes, must imply with it a degree of permanency, stability and consistency. It would be inconvenient to treat a country as a Commonwealth country for the purpose of one Act and as a foreign state for the purpose of another. This would only lead to unpredictability and incoherence in the law.

(3) The question of the status of a country as a Commonwealth country or otherwise is a matter for the executive. The Minister for Law, acting under s 18 of the Act, declared by gazette notification that Australia is a Commonwealth country for the purpose of Pt IV of the Act. This is evidence, good enough for the courts, that Australia is recognized by the executive as a Commonwealth country, as opposed to a 'foreign state'.

(4) Section 43 does not apply to a Commonwealth country and therefore does not apply to Australia. There is no provision in the Act for the taking of evidence for use in criminal proceedings pending in a Commonwealth country.

---

* [footnote inserted by the Editor] Section 43 (1) of the Act provides as follows:
The minister may, by notice in writing, authorise a Magistrate to take evidence for the purposes of a criminal matter pending in a court or tribunal of a foreign State other than a matter relating to an offence that is, by its nature or by reason of the circumstances in which it is alleged to have been committed, an offence of a political character.

...

Warren LH Khoo J (delivering the judgment of the court):

...

The short point that we have to consider in relation to the first issue is whether Australia is a 'foreign state' for the purpose of s 43(1) of the Act. This is primarily a matter of construction of the Act as a whole and of this particular provision in the context of the Act.

The scheme of the Extradition Act

The Act, which came into force on 1 August 1968, principally deals with the extradition of fugitive offenders. It is divided into five parts. Part I deals with definitions and general matters. Parts II and III deal with extradition to and from foreign states. Part IV deals with extradition to and from declared Commonwealth countries. Part V deals with extradition to and from Malaysia. Part VI provides for miscellaneous matters. It is in Pt VI that s 43 is found.

Definitions

Section 2 provides that unless the context otherwise requires:

- 'foreign State' means a foreign State between which and Singapore an extradition treaty is in force;
- 'extradition treaty' means a treaty or agreement made by Singapore with a foreign State relating to the extradition of fugitives, and includes any treaty or agreement relating to the extradition of fugitives made before 9th August 1965 which extends to, and is binding on, Singapore;
- 'declared Commonwealth country' means a country declared to be a Commonwealth country in relation to which Part IV applies.

It is accepted that Australia is a declared Commonwealth country for the purpose of Pt IV relating to the extradition of fugitives to and from declared Commonwealth countries. It is contended for the appellant that, nevertheless, Australia is a 'foreign state' for the purpose of the evidence-taking provisions of Pt VI.

Appellant's arguments

The argument for the appellant consists of two alternative parts. Firstly, state counsel says that the words 'foreign State' in s 43(1) should be given what he calls its natural meaning, and that means any sovereign state other than Singapore. Alternatively, referring to the definition of 'foreign State' in s 2, he says that if any state has an extradition treaty in force with Singapore, it is a 'foreign State'.

...

First part of appellant's argument

In regard to the first part of the argument, state counsel makes the following submissions. Firstly, state counsel says that the definition of 'foreign State' in s 2 is in terms subject to context. Counsel analyses the provisions of the Act governing the extradition to and from 'foreign States' on the one hand, and to and from 'declared Commonwealth countries' on the other. He says that extradition to a foreign state is based on an antecedent bilateral arrangement with the state concerned, whereas extradition to a declared Commonwealth country is based on the less stringent requirements of the Commonwealth scheme for the rendition of fugitive offenders agreed by Law Ministers of the Commonwealth at their meeting in London in 1966 ('the Commonwealth scheme'). It is absurd, he says, to interpret s 43 in such a way that assistance is given to non-Commonwealth countries, with respect to which the requirements for extradition are more stringent, while being denied to Commonwealth countries. This, he says, could not have been the intention of Parliament when enacting s 43.

Secondly, state counsel says that it is significant that s 43 is found in Pt VI of the Act, and not Pt II, which deals with extradition to foreign states. If the intention was that its provisions were to apply exclusively to 'foreign states' covered by the provisions of Pt II, the section should properly have been enacted as a provision in that part of the Act.

Thirdly, state counsel says that the Act is a consolidating Act, derived from separate sets of enactments.

... He submits that different meanings may properly be attributed to the same words 'foreign State' in different parts of the Act because of their different origins.

...

State counsel submits that the words 'foreign State' in s 43 should be given a wider meaning than the same words in those parts of the Act dealing with extradition. In the Imperial legislation from which s 43 is derived, 'foreign states' referred to states other than 'British possessions'. Substituting Singapore for 'British possessions', counsel says it follows that 'foreign State' in s 43 must mean any sovereign state other than Singapore.

Second part of appellant's argument

The second alternative part of the argument of state counsel is this. Section 2 defines a 'foreign State' as a foreign state with which Singapore has an extradition treaty in force. State counsel submits that if a state has an extradition treaty in force with Singapore, it is by definition a 'foreign State'. Granted that Australia is a declared Commonwealth country, that does not, he says, prevent it from being a foreign state for the purpose of s 43 if, as he

contends is the case, the extradition arrangements between Singapore and Australia in pursuance of the Commonwealth scheme amount to an 'extradition treaty' within the meaning of that term in the Act.

...

Our views

We are of the view that Australia, having been declared a Commonwealth country to which Pt IV of the Act (relating to extradition to and from Commonwealth countries) applies, is incapable of being considered a 'foreign state' for the purpose of s 43, any more than it could be considered a foreign state for the purpose of any other provisions of the Act. Consistent with the simplicity of the structure of the Act, our reasons are short and simple ones. They are as follows.

Firstly, the Act has evolved from certain Imperial statutes made applicable to Singapore when Singapore was a colony. It is a modern adaptation of the regime provided by these Imperial statutes for extradition and return of fugitive offenders and, incidentally, taking of evidence for use in criminal proceedings pending overseas...

In the vocabulary of the draftsmen of the Imperial statutes, a clear distinction was made between 'foreign states' on the one hand and 'British possessions' and 'Her Majesty's dominions' on the other. That structural distinction is retained in the Act, although modern terminology is now used. The term 'foreign State' is used throughout the Act, including in sections within Pt VI immediately preceding s 43, in contradistinction to a 'declared Commonwealth country', just as it was used in contradistinction to 'British possessions' and 'Her Majesty's dominions' by draftsmen of the Imperial statutes. There is no basis, in our view, for the suggestion that 'foreign state' in any part of the Act could mean simply any sovereign state outside Singapore, whether Commonwealth or foreign, any more than a 'foreign state' under the Imperial statues could have meant any country outside any one of the component parts of 'Her Majesty's dominions' as opposed to the dominions as a whole. It is, of course, conceivable that in an Act where the expression 'foreign state' is used in contradistinction to Singapore, a 'foreign state' may well mean any sovereign state outside Singapore. However, where, as in this Act, the expression is used throughout in contrast to a Commonwealth country, we can see no room for such a suggestion.

Secondly, the dichotomy between foreign states and Commonwealth countries is found not only in the Act but also in other legislation, particularly those providing for judicial co-operation. See, for example, the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264) and the Reciprocal Enforcement of Foreign Judgments Act (Cap 265).

... The Interpretation Act (Cap 1) defines a Commonwealth country simply as 'any country recognised by the President as a Commonwealth country'. The recognition of the status of a country as a Commonwealth country on the intra-Commonwealth level, and in our municipal law for general legislative purposes,

must imply with it a degree of permanency, stability and consistency.

...

Thirdly, as the definition in the Interpretation Act shows, the question of the status of a country as a Commonwealth country or otherwise is a matter for the executive; it is rarely, if ever, necessary for the courts to be concerned with the question whether a particular country is a Commonwealth country or a foreign state where such a distinction is material. In the case of the Act, the Minister for Law, acting under s 18 of the Act, declared by gazette notification that Australia is a Commonwealth country for the purpose of Pt IV of the Act. This is evidence, good enough for the courts, that Australia is recognized by the executive as a Commonwealth country, as opposed to a 'foreign state'. In regard to such questions, the view of the executive must be what matters.

Our conclusion, therefore, is that s 43 does not apply to a Commonwealth country and therefore does not apply to Australia, which is a Commonwealth country. It is our view that there is no provision in the Act for the taking of evidence for use in criminal proceedings pending in a Commonwealth country. That appears to be still governed by the Evidence by Commission Act of 1885...

...

In these circumstances, we are not prepared to say that the learned judge was wrong in coming to the decision he did. Indeed, on the wording of the section, we think he was right.

We therefore dismiss the appeal with costs.

Appeal dismissed.

PARTICIPATION IN MULTILATERAL TREATIES*

Editorial introduction

The present section is meant to record the participation of Asian states in open, multilateral law-making treaties which by their nature aim at world-wide adherence. In view of the limited space available a choice is made among the treaties the present status of which is available to the Editors. Others will be included in following volumes of the *Yearbook*. Treaties on which data have been included in a previous volume are referred to, but data once recorded will not be reincluded.

For the purpose of this section states broadly situated west of Iran, north of Mongolia, east of Papua New Guinea and south of Indonesia will not be covered.**

The Editors wish to express their gratitude to all those international organizations which have so kindly responded to our request by making information on the status of various categories of treaties available.

Note:
Where no other reference to specific sources is made, data are derived from *Multilateral Treaties deposited with the Secretary-General - Status as at 31 December 1991* (ST/LEG/SER.E/10).
- No indication is given of reservations and declarations made.
- Sig. - signature; Cons. = consent to be bound.

LAW OF TREATIES

Convention on the Law of Treaties; *see* Vol. 1

* Edited by Ko Swan Sik, General Editor

** Seychelles is usually considered to belong to Africa rather than to Asia and, consequently, will no more be included in future issues of the present section.

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, Volume 2, 183-198

LAW OF THE SEA

United Nations Convention on the Law of the Sea: *see* Vol. 1

Convention on the Territorial Sea and the Contiguous Zone
Geneva, 1958
Entry into force: 10 Sep. 1964

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Afghanistan	30 Oct 58		Nepal	29 Apr 58	
Cambodia		18 Mar 60	Pakistan	31 Oct 58	
Iran	28 May 58		Sri Lanka	30 Oct 58	
Japan		10 Jun 68	Thailand	29 Apr 58	2 Jul 68
Malaysia		21 Dec 60			

Convention on the High Seas
Geneva, 1958
Entry into force: 30 Sep. 62

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Afghanistan	30 Oct 58	28 Apr 59	Mongolia		15 Oct 76
Cambodia		18 Mar 60	Nepal	29 Apr 58	28 Dec 62
Indonesia	8 May 58	10 Aug 61	Pakistan	31 Oct 58	
Iran	28 May 58		Sri Lanka	30 Oct 58	
Japan		10 Jun 68	Thailand	29 Apr 58	2 Jul 68
Malaysia		21 Dec 60			

Convention on Fishing and Conservation of the Living Resources of the High Seas
Geneva, 1958
Entry into force: 20 Mar. 1966

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Afghanistan	30 Oct 58		Nepal	29 Apr 58	
Cambodia		18 Mar 60	Pakistan	31 Oct 58	
Indonesia	8 May 58		Sri Lanka	30 Oct 58	
Iran	28 May 58		Thailand	29 Apr 58	2 Jul 68
Malaysia		21 Dec 60			

Convention on the Continental Shelf
Geneva, 1958
Entry into force: 10 Jun. 1964

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Afghanistan	30 Oct 58		Nepal	29 Apr 58	
Cambodia		18 Mar 60	Pakistan	31 Oct 58	
Indonesia	8 May 58		Sri Lanka	30 Oct 58	
Iran	28 May 58		Thailand	29 Apr 58	2 Jul 68
Malaysia		21 Dec 60			

Optional Protocol of Signature concerning the Compulsory Settlement of Disputes
Geneva, 1958
Entry into force: 30 Sep. 1962

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Cambodia	22 Jan 70		Nepal		29 Apr 58
Indonesia	8 May 58		Pakistan		6 Nov 58
Malaysia		1 May 61	Sri Lanka		30 Oct 58

LAW OF OUTER SPACE

Convention on Registration of Objects launched into Outer Space
New York, 1974
Entry into force: 15 Sep. 1976

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
China		12 Dec 88	Mongolia	30 Oct 75	10 Apr 85
India		18 Jan 82	Pakistan	1 Dec 75	27 Feb 86
Iran	27 May 75		Seychelles		28 Dec 77
Japan		20 Jun 83	Singapore	31 Aug 76	
Korea (Rep.)		14 Oct 81			

Agreement governing the Activities of States on the Moon and other Celestial Bodies
New York, 1979
Entry into force: 11 Jul. 1984

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
India	18 Jan 82		Philippines	23 Apr 80	26 May 81
Pakistan		27 Feb 86			

ENVIRONMENTAL PROTECTION

Convention for the Protection of the Ozone Layer, 1985: *see* Vol. 1

Amendment to the Montreal Protocol, 1990
(Cont'd from Vol. 1)
Entry into force: 10 Aug. 1992
(Status included in UNEP/GC. 17/10)

Protocol on Substances that Deplete the Ozone Layer, 1987
(cont'd from Vol.1)

State	*Sig*	*Cons*
Philippines	14 Sep 88	17 Jul 1991

Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
Basel, 1989
Entry into force: 5 May 1992

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Afghanistan	22 Mar 89		Philippines	22 Mar 89	
China	22 Mar 90		Thailand	22 Mar 90	
India	15 Mar 90				

NUCLEAR MATERIAL

Convention on the Physical Protection of Nuclear Material, 1980: *see* Vol. 1

PRIVILEGES AND IMMUNITIES

Convention on the Privileges and Immunities of the United Nations
New York, 1946
Entry into force: for each State on the date of deposit of its instrument of accession

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Afghanistan		5 Sep 47	Mongolia		31 May 62
Bangladesh		13 Jan 78	Myanmar		25 Jan 55
Cambodia		6 Nov 63	Nepal		28 Sep 65
China		11 Sep 79	Pakistan		22 Sep 48
India		13 May 48	Papua New Guinea		4 Dec 75
Indonesia		8 Mar 72	Philippines		28 Oct 47
Iran		8 May 47	Seychelles		26 Aug 80
Japan		18 Apr 63	Singapore		18 Mar 66
Laos		24 Nov 56	Thailand		30 Mar 56
Malaysia		28 Oct 57	Vietnam		6 Apr 88

Convention on Diplomatic Relations
Vienna, 1961
Entry into force: 24 Apr. 1964

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Afghanistan		6 Oct 65	Malaysia		9 Nov 65
Bangladesh		13 Jan 78	Mongolia		5 Jan 67
Bhutan		7 Dec 72	Myanmar		7 Mar 80
Cambodia		31 Aug 65	Nepal		28 Sep 65
China		25 Nov 75	Pakistan	29 Mar 62	29 Mar 62
India		15 Oct 65	Papua New Guinea		4 Dec 75
Indonesia		4 Jun 82	Philippines	20 Oct 61	15 Nov 65
Iran	27 May 61	3 Feb 65	Seychelles		29 May 79
Japan	26 Mar 62	8 Jun 64	Sri Lanka	18 Apr 61	2 Jun 78
Korea (DPR)		29 Oct 80	Thailand	30 Oct 61	23 Jan 85
Korea (Rep.)	28 Mar 62	28 Dec 70	Vietnam		26 Aug 80
Laos		3 Dec 62			

Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes
Vienna, 1961
Entry into force: 24 Apr. 1964

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Cambodia		31 Aug 65	Malaysia		9 Nov 65
India		15 Oct 65	Nepal		28 Sep 65
Iran	27 May 61	3 Feb 65	Pakistan		29 Mar 76
Japan	26 Mar 62	8 Jun 64	Philippines	20 Oct 61	15 Nov 65
Korea (Rep.)	30 Mar 62	25 Jan 77	Seychelles		29 May 79
Laos		3 Dec 62	Sri Lanka		31 Jul 78

Convention on Consular Relations
Vienna, 1963
Entry into force: 19 Mar. 1967

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Bangladesh		13 Jan 78	Laos		9 Aug 73
Bhutan		28 Jul 81	Malaysia		1 Oct 91
China		2 Jul 79	Mongolia		14 Mar 89
India		28 Nov 77	Nepal		28 Sep 65
Indonesia		4 Jun 82	Pakistan		14 Apr 69
Iran	24 Apr 63	5 Jun 75	Papua New Guinea		4 Dec 75
Japan		3 Oct 83	Philippines	24 Apr 63	15 Nov 65
Korea (DPR)		8 Aug 84	Seychelles		29 May 79
Korea (Rep.)		7 Mar 77			

Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes
Vienna, 1963
Entry into force: 19 Mar. 1967

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
India		28 Nov 77	Nepal		28 Sep 65
Iran		5 Jun 75	Pakistan		29 Mar 76
Japan		3 Oct 83	Philippines	24 Apr 63	15 Nov 65
Korea (Rep.)		7 Mar 77	Seychelles		29 May 79
Laos		9 Aug 73			

Conventions on Special Missions
New York, 1969
Entry into force: 21 Jun. 1985

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Indonesia		4 Jun 82	Philippines	16 Dec 69	26 Nov 76
Iran		5 Jun 75	Seychelles		28 Dec 77
Korea(DPR)		22 May 85			

HUMAN RIGHTS

International Convention on the Elimination of All Forms of Racial Discrimination, 1966; *see* Vol. 1

International Covenant on Economic, Social and Cultural Rights, 1966
(cont'd from Vol.1)
(Status as included in E/CN.4/Sub.2/1992/27)

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Cambodia		26 May 92	Seychelles		5 May 92
Nepal		14 May 91			

International Covenant on Civil and Political Rights, 1966
(cont'd from Vol.1)
(Status as included in E/CN.4/Sub.2/1992/27)

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Cambodia		26 May 92	Seychelles		5 May 92
Nepal		14 May 91			

Optional Protocol to the International Covenant on Civil and Political Rights, 1966
(cont'd from Vol. 1)
(Status as included in E/CN.4/Sub.2/1992/27)

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Mongolia		16 Apr 91	Seychelles	5 May 92	
Nepal		14 May 91			

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
(cont'd from Vol. 1)
(Status as included in E/CN.4/Sub.2/1992/27)

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Indonesia	23 Oct 85	3 Oct 91	Seychelles		5 May 92

WOMEN AND CHILDREN

Convention on the Nationality of Married Women, 1957; *see* Vol. 1

Convention on the Political Rights of Women, 1953
(cont'd from Vol. 1)

State	*Sig*	*Cons*
Nepal		26 Apr 66 (*corrected*)

Convention on the Elimination of All Forms of Discrimination Against Women, 1980
(cont'd from Vol. 1)

State	*Sig*	*Cons*
Nepal	5 Feb 91	22 Apr 91

Convention on the Rights of the Child, 1989
(cont'd from Vol. 1)
(Status as included in E/CN.4/Sub.2/1992/27)

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
China		2 Mar 92	Iran	5 Sep 91	
Indonesia	26 Jan 90 *(corrected)*	5 Sep 90	Thailand		27 Mar 92

REFUGEES

Convention relating to the Status of Refugees, 1951: *see* Vol. 1
Protocol relating to the Status of Refugees, 1967: *see* Vol. 1

NATIONALITY AND STATELESSNESS

Convention relating to the Status of Stateless Persons
New York, 1954
Entry into force: 6 Jun. 1960

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Korea (Rep.)		22 Aug. 62	Philippines	22 Jun 55	

Optional Protocol to the Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality
Vienna, 1961
Entry into force: 24 Apr. 1964

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Cambodia		31 Aug 65	Malaysia		9 Nov 65
India		15 Oct 65	Myanmar		7 Mar 80
Indonesia		4 Jun 82	Nepal		28 Sep 65
Iran	27 May 61	3 Feb 65	Philippines	20 Oct 61	15 Nov 65
Korea (Rep)	30 Mar 62	7 Mar 77	Sri Lanka		31 Jul 78
Laos		3 Dec 62	Thailand	30 Oct 61	23 Jan 85

Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality
Vienna, 1963
Entry into force: 19 Mar. 1967

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
India		28 Nov 77	Laos		9 Aug 73
Indonesia		4 Jun 82	Nepal		28 Sep 65
Iran		5 Jun 75	Philippines		15 Nov 65
Korea (Rep.)		7 Mar 77			

FAMILY LAW

Convention on the Recovery Abroad of Maintenance
New York, 1956
Entry into force: 25 May 1957

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Cambodia	20 Jun 56		Philippines	20 Jun 56	21 Mar 68
Pakistan		14 Jul 59	Sri Lanka	20 Jun 56	7 Aug 58

Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages
New York, 1962
Entry into force: 9 Dec 1964

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Mongolia		6 Jun 91	Sri Lanka	12 Dec 62	
Philippines	5 Feb 63	21 Jan 65			

INTERNATIONAL TRADE LAW AND COMMERCIAL ARBITRATION

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958: *see* Vol. 1
Convention on the Limitation Period in the International Sale of Goods, 1974: *see* Vol. 1
UN Convention on Contracts for the International Sale of Goods, 1980: *see* Vol. 1
UN Convention on the Liability of Operators of Transport Terminals in International Trade, 1991: *see* Vol. 1

SEA TRAFFIC AND TRANSPORT

UN Convention on the Carriage of Goods by Sea, 1978: *see* Vol. 1

Convention on a Code of Conduct for Liner Conferences
Geneva, 1974
Entry into force: 6 Oct. 1983

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
			Korea (Rep.)		11 May 79
Bangladesh		24 Jul 75	Malaysia		27 Aug 82
China		23 Sep 80	Pakistan		27 Jun 75
India	27 Jun 75	14 Feb 78	Philippines	2 Aug 74	2 Mar 76
Indonesia	5 Feb 75	11 Jan 77	Sri Lanka		30 Jun 75
Iran	7 Aug 74				

INTELLECTUAL PROPERTY

Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms
Geneva, 1971
Entry into force: 18 Apr. 1973

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
India	29 Oct 71	1 Nov 74	Korea (Rep.)		1 Jul 87
Iran	29 Oct 71		Philippines	29 Apr 72	
Japan	21 Apr 72	19 Jun 78			

CULTURAL PROPERTY

Convention on the Means of Prohibiting and Preventing the Illicit, Import, Export and Transfer of Ownership of Cultural Property
Paris, 1970
Entry into force: -
(Status as included in A/46/497)

State	*Cons*	*E.i.f.*	*State*	*Cons*	*E.i.f.*
Bangladesh	9 Dec 87	9 Mar 88	Korea (Rep)	14 Feb 83	14 May 83
Cambodia	26 Sep 72	26 Dec 72	Mongolia	23 May 91	23 Aug 91
China	28 Nov 89	28 Feb 90	Nepal	23 Jun 76	23 Sep 76
India	24 Jan 77	24 Apr 77	Pakistan	30 Apr 81	30 Jul 81
Iran	27 Jan 75	27 Apr 75	Sri Lanka	7 Apr 81	7 Jul 81
Korea (DPR)	13 May 83	13 Aug 83			

NARCOTIC DRUGS

Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, 1936 (amended 1946): *see* Vol. 1

International Opium Convention, 1925 and amended by the Protocol of 1946

Geneva, 1925; New York, 1946
Entry into force: 3 Feb. 1948

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Afghanistan		29 Jan 57	Laos		7 Oct 50
Cambodia		3 Oct 51	Malaysia		21 Aug 58
India	11 Dec 46		Papua New Guinea		28 Oct 80
Indonesia		3 Apr 58	Sri Lanka		4 Dec 57
Japan	27 Mar 52		Thailand	27 Oct 47	

Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931 and amended by Protocol, 1946

Geneva, 1931; New York, 1946

State	*Sig**	*Cons*	*State*	*Sig**	*Cons*
Afghanistan	11 Dec 46		Japan	27 Mar 52	
Cambodia		3 Oct 51	Malaysia		21 Aug 58
China	11 Dec 46		Papua New Guinea	28 Oct 80	
India	11 Dec 46		Philippines	25 May 50	
Indonesia		3 Apr 58	Sri Lanka		4 Dec 57
Iran	11 Dec 46		Thailand	27 Oct 47	

Protocol bringing under International Control Drugs Outside the Scope of the Convention of 1931, as amended by the Protocol of 1946

Paris, 1948
Entry into force: 1 Dec. 1949

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Afghanistan		19 Nov 48	Malaysia		21 Aug 58
China		19 Nov 48	Myanmar	19 Nov 48	2 Mar 50
India	19 Nov 48	10 Nov 50	Pakistan	21 Nov 48	27 Aug 52
Indonesia		21 Feb 51	Papua New Guinea		28 Oct 80
Japan		5 May 52	Philippines	10 Mar 49	7 Dec 53
Laos		7 Oct 50	Sri Lanka		17 Jan 49

* Definitive signature or acceptance of the Protocol of 1946, or succession/ratification in respect of the Convention and the Protocol

Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium
New York, 1953
Entry into force: 8 Mar. 1963

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Cambodia	29 Dec 53	22 Mar 57	Korea (Rep.)	23 Jun 53	29 Apr 58
India	23 Jun 53	30 Apr 54	Pakistan	3 Dec 53	10 Mar 55
Indonesia		11 Jul 57	Papua New Guinea		28 Oct 80
Iran	15 Dec 53	30 Dec 59	Sri Lanka		4 Dec 57
Japan	23 Jun 53	21 Jul 54			

Single Convention on Narcotic Drugs, 1961
(cont'd from Vol. 1)

State	*Sig*	*Cons*
Mongolia		6 May 91

Protocol amending the Single Convention on Narcotic Drugs, 1961
Geneva, 1972
Entry into force: 8 Aug. 1975

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Bangladesh		9 May 80	Malaysia		20 Apr 78
Brunei		25 Nov 87	Mongolia		6 May 91
Cambodia	25 Mar 72		Pakistan	29 Dec 72	
India		14 Dec 78	Papua New Guinea		28 Oct 80
Indonesia	25 Mar 72	3 Sep 76	Philippines	25 Mar 72	7 Jun 74
Iran	25 Mar 72		Singapore		9 Jul 75
Japan	15 Dec 72	27 Sep 73	Sri Lanka		29 Jun 81
Korea (Rep.)	29 Dec 72	25 Jan 73	Thailand		9 Jan 75

Single Convention on Narcotic Drugs, 1961, as Amended by the Protocol of 25 March 1972
(cont'd from Vol. 1)

State	*Sig**	*Cons*	*State*	*Sig**	*Cons*
China		23 Aug 85	Japan	27 Sep 73	
India	14 Dec 78		Korea (Rep.)	25 Jan 73	
Indonesia	3 Sep 76		Mongolia	6 May 91	

* Ratification or accession in respect of Protocol 1972 or participation in the Convention after entry into force of Protocol 1972

Convention on Psychotropic Substances
Vienna, 1971
Entry into force: 16 Aug. 1976

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Afghanistan		21 May 85	Korea (Rep.)		12 Jan 78
Bangladesh		11 Oct 90	Malaysia		22 Jul 86
Brunei		24 Nov 87	Pakistan		9 Jun 77
China		23 Aug 85	Papua New Guinea		20 Nov 81
India		23 Apr 75	Philippines		7 Jun 74
Iran	21 Feb 71		Singapore		17 Sep 90
Japan	21 Dec 71	31 Aug 90	Thailand		21 Nov 75

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988
(cont'd from Vol. 1)

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Nepal		24 Jul 91	Sri Lanka		6 Jun 91
Pakistan	20 Dec 89	25 Oct 91			

INTERNATIONAL CRIMES

Convention on the Prevention and Punishment of the Crime of Genocide, 1948; *see* Vol. 1
Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963; *see* Vol. 1
Convention on the Suppression of Unlawful Seisure of Aircraft, 1970: *see* Vol. 1
Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988: *see* Vol. 1
Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988: *see* Vol. 1
Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1988: *see* Vol. 1

Slavery Convention, 1926 and amended by the Protocol of 7 December 1953
New York, 1953
Entry into force: 7 Jul. 1955

State	*Sig**	*Cons*	*State*	*Sig**	*Cons*
Afghanistan	16 Aug 54		Pakistan		30 Sep 55
Bangladesh	7 Jan 85		Papua New Guinea		27 Jan 82
India	12 Mar 54		Philippines		12 Jul 55
Mongolia		20 Dec 68	Sri Lanka		21 Mar 58
Myanmar	29 Apr 57				

* Defitive signature or participation in the Convention of 1926 and in the Protocol of 7 Dec. 1953.

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery
Geneva, 1956
Entry into force: 30 Apr. 1957

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Afghanistan		16 Nov 66	Malaysia		18 Nov 57
Bangladesh		5 Feb 85	Mongolia		20 Dec 68
Cambodia		12 Jun 57	Pakistan	7 Sep 56	20 Mar 58
India	7 Sep 56	23 Jun 60	Philippines		17 Nov 64
Iran		30 Dec 59	Singapore		28 Mar 72
Laos		9 Sep 57	Sri Lanka	5 Jun 57	21 Mar 58

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity
New York, 1968
Entry into force: 11 Nov. 1970

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Afghanistan		22 Jul 83	Mongolia	31 Jan 69	21 May 69
India		12 Jan 71	Philippines		15 May 73
Korea (DPR)		8 Nov 84	Vietnam		6 May 83
Laos		28 Dec 84			

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971
(cont'd from Vol. 1)

State	*Sig*	*Cons*
Malaysia		4 May 85

International Convention Against the Taking of Hostages, 1979
(cont'd from Vol. 1)

State	*Sig*	*Cons*
Nepal		9 Mar 90 (*corrected*)

International Convention against the Recruitment, Use, Financing and Training of Mercenaries
New York, 1989
Entry into force: -

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Maldives	17 Jul 90		Seychelles		12 Mar 90

Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991
(cont'd from Vol. 1)

State	*Sig*	*Cons*
Afghanistan	1 Mar 91	

HUMANITARIAN LAW IN ARMED CONFLICT

International Conventions for the Protection of Victims of War, I-IV, 1949: *see* Vol. 1

Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977
(cont'd from Vol. 1)
(Status as included in E/CN.4/Sub.2/1992/27)

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Brunei		14 Oct 91	Maldives		3 Sep 91

Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977
(cont'd from Vol. 1)
(Status as included in E/CN.4/Sub.2/1992/27)

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Brunei		14 Oct 91	Maldives		3 Sep 91

WEAPONS

Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques

New York, 1976
Entry into force: 5 Oct. 1978

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Afghanistan		22 Oct 85	Laos	13 Apr 78	5 Oct 78
Bangladesh		3 Oct 79	Mongolia	18 May 77	19 May 78
India	15 Dec 77	15 Dec 78	Pakistan		27 Feb 86
Iran	18 May 77		Papua New Guinea		28 Oct 80
Japan		9 Jun 82	Sri Lanka	8 Jun 77	25 Apr 78
Korea (DPR)		8 Nov 84	Vietnam		26 Aug 80
Korea (Rep.)		2 Dec 86			

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to have Indiscriminate Effects, and Protocols

Geneva, 1980
Entry into force: 2 Dec. 1983

State	*Sig*	*Cons*	*State*	*Sig*	*Cons*
Afghanistan	10 Apr 81		Mongolia	10 Apr 81	8 Jun 82
China	14 Sep 81	7 Apr 82	Pakistan	26 Jan 82	1 Apr 85
India	15 May 81	1 Mar 84	Philippines	15 May 81	
Japan	22 Sep 81	9 Jun 82	Vietnam	10 Apr 81	
Laos	2 Nov 82	3 Jan 83			

ASIA AND INTERNATIONAL ORGANIZATIONS

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE* ANNUAL SURVEY OF ACTIVITIES 1992-1992, INCLUDING THE WORK OF ITS THIRTY-FIRST SESSION HELD IN ISLAMABAD, 25 JANUARY-1 FEBRUARY 1992**

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* Edited by M.C.W. Pinto, General Editor.

** The account of the main activities of the Committee, and the main views expressed during or in connection with the Committee's thirty-first session, has been adapted from the Secretariat's *Report of the Thirty-First Session* (*Report*).

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, Volume 2, 201-253

1. MEMBERSHIP AND ORGANIZATION

1. There were forty-two Members of the Committee at 31 December 1992:[1] Egypt, Bangladesh, China, Cyprus, Gambia, Ghana, India, Indonesia, Iran, Iraq, Japan, Jordan, Kenya, Democratic People's Republic of Korea, Republic of Korea, Kuwait, Libya, Malaysia, Mauritius, Mongolia, Nepal, Nigeria, Oman, Pakistan, Palestine, Philippines, Qatar, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, Sri Lanka, Sudan, Syria, Tanzania, Thailand, Turkey, Uganda, United Arab Emirates, and Yemen Arab Republic. Botswana was an Associate Member.

2. The thirty-first session of the Commitee was held at Islamabad from 25 January to 1 February 1992 at the invitation of the Government of Pakistan. Mr. AZIZ A. MUNSHI, Attorney-General of Pakistan, was elected *President*, and Mr. ABDUL KOROMA, Ambassador of Sierra Leone to the OAU, was elected *Vice-President*. Mr. MOHAMED MOSTAFA KAMAL (Arab Republic of Egypt) was elected Chairman of the *Sub-Committee on International Trade Law Matters*, and Mr. WON SOO KIM (Republic of Korea) was elected Rapporteur of the Sub-Committee. The Rapporteurs of the *Special Meeting on Environment and Development* were Mr. JAMSHED A. HAMID (Pakistan) and Mr. AMRIT ROHAN PERERA (Sri Lanka). The Secretary-General of the Committee, Mr. FRANK X. NJENGA, and members of the AALCC Secretariat were responsible for the organization of the session.

3. The Committee decided to accept the invitation of the Government of Uganda to hold its thirty-second session at Kampala (*Report*, p. 177).

2. QUESTIONS UNDER CONSIDERATION BY THE INTERNATIONAL LAW COMMISSION[2]

4. The Committee had before it a Secretariat document entitled *Report of the Work of the International Law Commission at its Forty-Third Session* (Doc. No. AALCC/XXXI/ISLAMABAD/92/4) containing surveys of the Commission's work on three topics on which it had completed phases of its work, viz. Jurisdictional immunities of States and their property, Non-navigational uses of international watercourses, and Draft code of crimes against the peace and security of mankind; as well as notes on progress made on three other topics: International liability for injurious consequences arising out of acts not prohibited by international law, Relations between States and international organizations (second part of the topic), and State responsibility. On the topic Non-navigational uses of international watercourses the Committee

1. No changes in membership took place during the period covered by the present survey. The number of members of the Committee remained 42 (see 1 AsYIL (1991) 200).
2. Cf. 1 AsYIL 201.

also had before it a Secretariat document entitled 'The Law of International Rivers' (Doc. No. AALCC/XXXI/92/5) prepared for use in connection with the Committee's consideration of a separate item bearing that title (reported on below, at paragraphs 17–20), and containing a detailed account of the work of the International Law Commission on international watercourses.

2.1. Jurisdictional Immunities of States and their Property

5. The delegate of *Japan*, noting that some States continued to subscribe to the theory of absolute State immunity, while others felt that absolute or unlimited State immunity should not be granted in cases where a State engaged in commercial activity, called for early conclusion of a Convention containing internationally unified rules on the subject acceptable to all States (*Report*, pp. 153–155). The delegate of *Turkey* supported the Commission's suggestion to convene a diplomatic conference with a view to elaborating a convention on the topic on the basis of the Commission's draft articles. He proposed that the Commission's draft article entitled 'Contracts of employment', which allowed such contracts concluded on behalf of States to benefit from jurisdictional immunity if the employee concerned had been recruited to perform services associated with the exercise of governmental authority, should be amended. He said that the criterion to be applied here should not be the 'exercise of governmental authority', but rather the nature of the understanding as an 'administrative contract', allowed under the legal systems of some States to benefit from jurisdictional immunity even if not strictly concluded for services associated with the exercise of governmental authority. Conceding that some States granted immunity only in respect of State contracts for services associated with the exercise of governmental authority, he thought the Commission's draft article in its present form could create contradictions between the two types of State practice (*Report*, pp. 155–156).

6. Observing that the draft articles that were the result of the Commission's second reading still left room for improvement, the delegate of *China* said that entities which are established by a State to engage in commercial transactions, and which have the capacity independently to assume civil liabilities and the right to own and dispose of property, should not be included within the definition of the term 'State'. State enterprises and corporations engaging in economic and trade activities had legal personalities distinct from that of the State, and inclusion by the Special Rapporteur of a provision that made that distinction explicit had marked a major improvement on the draft articles adopted on first reading. As to the core article of the draft entitled 'State immunity', he favoured deletion of the words at the end of the text placed in square brackets, which would subject immunity not only to the provisions of the present articles but also to '[the relevant rules of general international law]', since they could give rise to a one-sided and unduly liberal interpretation of the draft article. He also favoured deletion from the draft of articles entitled 'Fiscal matters' and 'Case of nationalization', which, in his view, dealt with matters falling within the prerogatives of sovereign States. Similar considerations led him to object to retention of the

draft article entitled 'Personal injuries and damage to property', which would allow the courts of one State to determine whether or not an act or omission was 'attributable' to another State, and would, thus, in his view, be inconsistent with principles of State sovereignty and sovereign equality. Relief for such physical injury or damage to tangible property was to be sought entirely through diplomatic channels or insurance. Finally, as to part IV of the draft on State immunity from measures of constraint in connection with court proceedings, he said that immunity of State property from execution had long been established and recognized in international law and international relations. He could support the basic principle of the draft i.e. waiver of State immunity from jurisdiction does not mean waiver of State immunity from measures of constraint. Attachment or arrest could only be executed against State property with the express consent of the State concerned (*Report*, pp. 160–162).

2.2. Law of the Non-Navigational Uses of International Watercourses

7. The delegate of *India* said that the needs of a State through which an international river flowed should not be ignored. However, recognition of the needs of riparian States did not vitiate the need for co-operation among them. Shared interest, rather than legal obligation should, in his view, be the basis of such co-operation (*Report*, p. 163).

8. The delegate of *Turkey*, welcoming inclusion in the draft of a provision requiring Watercourse States to 'utilize an international watercourse in an equitable and reasonable manner . . . In particular . . . with a view to attaining optimum utilization thereof', said that, in his view, not all the draft articles were consistent with it. His main criticism, however, was that the draft articles seemed to emphasize the 'environmental damage' aspect of the topic far more than the development needs of States, which, since the 1972 Stockholm Conference, had been the priority issue for the developing countries. He felt that definition of the term 'watercourse' so as to include not only surface water but also ground water, was likely to make the task of the Commission unduly complicated (*Report*, pp. 156–157).

9. The delegate of *Syria* made specific proposals for amendment of draft articles dealing with the general obligation to co-operate, regular exchange of data and information and the obligation not to cause appreciable harm, while the delegate of *Jordan* said that the diversion of the waters of the River Jordan by Israel contravened specific provisions of the draft articles (*Report*, pp. 158–159, 164).

2.3. Draft Code of Crimes Against the Peace and Security of Mankind

10. The delegate of *Kuwait* called for the establishment of an independent international tribunal that would deal with crimes committed by a person in a foreign country, and urged that war crimes such as the killing and violation

of human rights of innocent civilians, as well as damage to the infrastructure of a State and other injurious consequences of an invasion of foreign territory, should be subject to special punishment, including partial or complete confiscation of wealth taken unlawfully (*Report*, p. 152). Welcoming completion by the Commission of its first reading of the Draft Code, the delegate of *Japan* urged Member States to submit comments and indicate guidelines to the Commission keeping in view what he considered to be three goals of the international community, viz. (i) to define in a clear and detailed manner, in a Convention or other document, what constitutes a crime and criminal responsibility; (ii) to establish a mechanism, such as an international criminal court, which would have jurisdiction over the prosecution and punishment of such crimes and which would apply substantive and procedural rules to the prosecution of individuals; and (iii) to ensure wide acceptance of such a mechanism by the international community as a whole (*Report*, p. 155).

11. The delegate of *Turkey*, emphasizing that categories of crimes to be covered by the Code should be both recognized as such by the entire international community, and clearly defined so as to leave no room for subjective or politically motivated interpretations of terms, doubted that the draft as it stood satisfied those criteria (*Report*, p. 157). The delegate of *Sudan* said that acts of rebel movements, such as recruitment of children of tender years for military duty, were crimes against humanity and should be covered by the Code, while the delegate of *Sri Lanka* called for recognition of 'narco-terrorism' and illicit arms transfers as crimes punishable under the Code, and the delegate of the *United Arab Emirates* proposed that 'deportation' be expressly included in the article of the Code enumerating acts comprised in the crime of apartheid. The delegate of *India* said that the Code should contain provision for exemplary punishment of individuals found guilty of offences against the peace and security of mankind (*Report*, pp. 163–165).

2.4. International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law

12. The delegate of *Kuwait* noted that the topic had gained significantly in importance through its links with questions relating to environmental damage (*Report*, p. 151). The delegate of *Turkey*, expressing his preference for giving the draft articles the form of a framework Convention, noted the need for appropriate provisions concerning dangerous substances, disposal of hazardous waste and injurious consequences arising from nuclear activities. The articles should, in his view, contain a general definition of dangerous substances, rather than a list of them (*Report*, pp. 157–158).

Decision 1 of the Committee

13. Having noted the recommendations of the International Law Commission on topics which it might be asked to take up for consideration in the

future (Doc. No. AALCC/XXXI/ISLAMABAD/92/4, at page 3) the Committee, *inter alia*, decided to request the Commission to take up as a priority item the topic 'Legal aspects of the protection of the environment of areas not subject to national jurisdiction (global commons)' (*Report*, pp. 105–106).

3. LEGAL PROBLEMS REFERRED TO THE COMMITTEE BY PARTICIPATING STATES

3.1. Status and Treatment of Refugees[3]

14. The Committee had before it the following documents prepared by the Secretariat: 'Rights and duties of a refugee in the first country of asylum: principle of non-refoulement' (Doc. No. AALCC/XXXI/ISLAMABAD/92/7), which discusses the latter principle as a generally recognized principle of law and its application in State practice; 'Status and treatment of refugees: a note on the establishment of a safety zone in the country of origin for displaced persons' (Doc. No. AALCC/XXXI/92/8), which analyses the status of persons seeking asylum in such a safety zone, the issue of domestic jurisdiction over such a zone, the status of the zone and its operation; and 'Report on the AALCC-UNHCR Workshop on international refugee and humanitarian law in the Asian-African region, held in New Delhi from 24 to 26 October 1991' (Doc. No. AALCC/XXXI/ISLAMABAD/92/9).

15. The report on the AALCC-UNHCR Workshop lists the following points as having emerged from its discussions:

'THE WORKSHOP
- Recalled the contributions made by the Asian-African Legal Consultative Committee to the development of International Refugee Law, particularly its Bangkok Principles of 1966.
- Reiterated that the Bangkok Principles though recommendatory in nature have become the cornerstone of the State Practice of Member States in the Asian-African Region.
- Noted that the Bangkok Principles do not have legal enforceability, yet they have guided States in responding to the refugee problem in the Asian-African Region.
- Urged the Asian-African States to move a step forward by considering adherence to the 1951 Convention relating to the Status of Refugees and/or the 1967 Protocol.
- Noted with concern the magnitude and complexity of the contemporary refugee problem and recognised the challenges which needed innovative solutions and concerted efforts both at international and regional levels.
- Reaffirmed the importance of international cooperation and solidarity through the Burden Sharing Principles as adopted at the 26th Session of the Asian African Legal Consultative Committee at Bangkok in 1987 and of prompt inter-national assistance to relieve the burden of States faced with large scale influx of refugees.

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3. Cf. 1 AsYIL (1991) 202.

- Recognised that voluntary repatriation of refugees to their countries of origin when the situation so warrants, is the most desirable and durable solution to the refugee problem.
- Emphasised the importance of reintegration assistance in the country of origin to ensure that voluntary repatriation would be effective and that refugees who have returned home are not compelled to leave again because of deprivation.
- Stressed that most of the refugee problems are closely linked with the violation of human rights and, to some extent, economic deprivation in the countries of origin and, therefore, urged those countries to take concrete measures to prevent any refugee outflow.
- Reaffirmed the responsibility of the receiving countries to provide security and protection to the refugees including adherence to the universal principle of *non-refoulement*.
- Reaffirmed also the responsibility of the countries of origin to provide security and safety to their citizens on their return.
- In particular stressed the importance for the countries of origin to accept the responsibility to receive their citizens as soon as the conditions that created the refugee situation cease.
- Stressed the need to further develop international law relating to refugees taking into account the particularity of the Asian-African region in order to resolve the current problems by granting maximum civil, political, economic, social and cultural rights to all refugees without discrimination on the grounds of sex, colour, race, religion, nationality, etc.
- Recognised in particular the vulnerability of refugee women and children, whether accompanied or not, and the need for special measures to ensure improvement of their situation and the promotion of their family unity.
- Recognised the role of UNHCR in the quest for durable solutions to the refugee problem and called upon the Member States of the Asian-African Legal Consultative Committee to extend their fullest cooperation in all respects.
- Expressed grave concern about the situation of internally displaced persons who are in a refugee like situation, and thus not covered by the protection of any regional and international legal instruments and stressed the necessity that the State of origin should extend all possible humanitarian assistance to such persons and that international humanitarian organisations with the consent and collaboration of the States of origin be enabled to extend their help to such persons.
- Recommended the Asian-African Legal Consultative Committee to consider the possibility of preparation of model legislation with the objective of assisting Member States in the enactment of national laws on refugees.'

Decision 2 of the Committee

16. Following a discussion of the item during which several delegates described the experience gained in their countries in dealing with and caring for refugees (*Report*, pp. 188–195), the Committee decided, *inter alia*, to endorse the recommendations adopted by the AALCC-UNHCR New Delhi Workshop; to approve the suggestion to prepare model legislation in co-operation with the Office of the United Nations High Commission for Refugees with the objective of assisting Member States in enacting appropriate national legislation on refugees; and to place an item entitled 'Safety Zones for Refugees' on the agenda of its thirty-second session, directing the Secretariat to update its study on the subject, and to cover as well the question how to minimize and remove the causes of flows of refugees. The Com-

mittee expressed the hope that Member States of the AALCC would adhere to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (*Report*, p. 107).

3.2. Law of International Rivers[4]

17. The Committee had before it a Secretariat document entitled 'The law of international rivers' (Doc. No. AALCC/XXXI/ISLAMABAD/92/5). Referred to the Committee in 1966 by Iraq (concerned with defining the term 'international river', and clarifying rules relating to the utilization of the waters of such rivers for purposes not connected with navigation) and by Pakistan (concerned with clarifying the rights of lower riparian States), this item serves (1) to focus discussion on areas of importance to Member States that are not likely to be covered by the International Law Commission's work on 'The law of the non-navigational uses of international watercourses' (e.g. the five areas noted at p. 7 of the Secretariat document), as well as (2) to assist Members to monitor and formulate their views concerning progress of the work of the International Law Commission (summarized on pp 7 ff. of the Secretariat document).

18. The delegate of *Turkey* expressed concern that the concept 'watercourse' currently used in drafts before the International Law Commission to mean a 'system of interrelated hydrological components' might be too broad, as it included glaciers, canals and, in particular, groundwaters. As to the last, which could be categorized as 'free groundwaters' and 'confined groundwaters', not only would the collection and application of data be difficult and time-consuming, but also the absence of State practice regarding them could make identification of the applicable legal principles impossible. Moreover, a concept that could imply international regulation of all components of a 'watercourse' merely on the basis of the physical relationship between them, and even if one or more of them were within the territory of a sovereign State, could be seen as contradicting the accepted principle of international law concerning permanent sovereignty of States over their natural resources, and inconsistent with the rights of States to use their resources in accordance with their national priorities and interests (*Report*, pp. 166–167).

19. The delegate of *Jordan*, emphasizing the need of the peoples of the Middle East in relation to underground waters, said that the harm being caused to the sources of those waters through their indiscriminate use had become a major cause of differences in the occupied Arab territories. Accordingly, he urged that the Committee adopt an appropriate definition of the term 'underground watercourse' in anticipation of a diplomatic conference that might be convened to deal with the topic currently under consideration by the International Law Commission. The delegate of *Syria*, observing that in the Middle East some 71 per cent of the rivers had under-

4. Cf. 1 AsYIL (1991) 205.

ground water sources, supported the views expressed by the delegate of *Jordan*, and recalled the proposals he had made for amendment of the draft articles being considered by the International Law Commission (above, para. 9) (*Report*, pp. 168–169).

20. The delegate of *Sierra Leone*, noting that only 2 per cent of fresh water resources were available for utilization, and only 1 per cent of such resources were really harnessable for the whole of humanity, said that 40 per cent of the world's population stood in dire need of fresh water. He emphasized the need for co-operation with a view to effective utilization of water resources and preventing pollution (*Report*, p. 169).

Decision 3 of the Committee

21. After delegations had expressed different views on whether, in view of the International Law Commission's parallel consideration of the law of the non-navigational uses of international watercourses, the Committee should maintain the item 'Law of international rivers' on its agenda in future, the Committee decided 'to inscribe the item on the agenda of its next session to facilitate substantive discussion on the topic', and recommended that Member States utilize the Secretariat document which was before them in preparing comments and observations to be taken into account by the Commission when it engaged in a second reading of its draft articles (*Report*, p. 108).

3.3. Law of the Sea[5]

22. The Committee had before it a Secretariat document entitled 'Law of the sea' (Doc. No. AALCC/XXXI/92/ISLAMABAD/10) containing a summary of the work of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea (Prepcom) at its ninth session (Kingston, Jamaica, 25 January – 22 March 1991; New York, 12–30 August 1991).

23. In an introductory statement the *Assistant Secretary-General of AALCC* observed that although the target date approved at the seventh session of the Commission (1989) for completion of its work, viz. summer 1991, had not been met, important steps had been taken toward that end. Two new pioneer investors had been registered (China, and Interoceanmetal Joint Organization, an entity established by inter-governmental agreement among Bulgaria, Cuba, Czechoslovakia, German Democratic Republic, Poland, Soviet Union and Vietnam), and a Training Panel (21 experts in appropriate fields drawn from different geographical regions) had been established and begun work on a training schedule, taking into account, in particular, the man-power requirements of the Enterprise. He noted that the developing countries were not satisfied with the progress of work in the Prepcom. The

5. Cf. 1 AsYIL (1991) 206.

protracted series of Prepcom sessions had placed an intolerable financial burden on the developing countries, many of whom had stopped sending representatives to meetings, a feature which would merely have the effect of weakening their bargaining position (*Report*, pp. 197–198).

24. The following summary of the Assistant Secretary-General's statement appearing in the *Report* (pp. 198–201) mentions important aspects of the work of the Prepcom at its ninth session in 1991:

. . .

(5) The Plenary dealt with a draft Agreement concerning the relationship between the United Nations and the International Sea-Bed Authority and considered a working paper on "Administrative Arrangements Structure and Financial Implications of the Authority". Another area of activity of the Plenary, he said, was related to implementation of Resolution II. Under this general heading the obligations of pioneer investors, registration of China as pioneer investor, application of East European States and Cuba and also the establishment of the training panel and its first report had been discussed.

(6) Special Commission I, in charge of problems which would be encountered by developing landbased producer States, continued consideration of the provisional conclusions of this Commission which will form the basis of its recommendations to the Authority. Many issues remained unsettled and according to the Chairman of this Commission, deliberations had come to a stage where most delegations tended to re-affirm only their respective positions. It was decided to refer the unresolved issues, to a negotiating group of 13 members presided over by the Chairman. Unfortunately certain countries persisted in reopening debate on some issues that had been completed in previous sessions and thus made the finalization of work even more difficult.

(7) In Special Commission 2 the structure of the Enterprise, transitional arrangements and rules applicable during this period were considered. The main work was concentrated on operational options with special reference to the joint venture which is considered to be the best norm for the operation of the Enterprise. It was the accepted view that in the initial stage, the joint venture offered clear advantages with respect to the transfer of technology, training, finance, processing and marketing.

(8) An important point raised in this Commission was the initiative of the Secretary General of the United Nations to convene informal consultations aimed at achieving "universality" of the Convention. The Secretary General had conducted several informal consultations with some invited States to address the problems of developed countries which have reservations on certain aspects of the deep sea-bed mining provisions of the Convention. He pointed out that many countries, some of which had ratified the Convention, and organizations including the AALCC which had contributed significantly to the work of UNCLOS III and the PREPCOM, had been marginalized in these consultations.

(9) The issues under consideration in these consultations were vast and covered the question of the Enterprise; transfer of technology; production policy; compensation fund; decision making; environmental aspects and the review Conference. These were issues on which considerable time and energy had been spent during the negotiations of UNCLOS III. All these issues were then resolved on the basis of consensus.

(10) Turning to Special Commission 3 on Sea-bed Mining Code, he said that it was able to complete a first reading of Part VIII of the draft on prospecting, exploration

and exploitation of polymetallic nodules in the Area, dealing with protection and preservation of the marine environment from the activities in the Area. During the Summer Session this Commission had concentrated on Part X of the same draft on accounting principles and procedures.

(11) Special Commission 4 continued consideration of administrative arrangements, structure and financial implications of the International Tribunal for the Law of the Sea. There was agreement on the need for maximum economy in the establishment of the Tribunal while maintaining the highest level of its efficiency. The seat of the Tribunal remained a very important issue, as the Group of 77 held the view that if, at the latest by the receipt of the 60th instrument of ratification the Government of Germany did not accede to the Convention, the Prepcom should make arrangements for the establishment of the Tribunal in a State that has ratified or acceded to the Convention.

(12) Referring to the message of the Special Representative of the U.N. Secretary-General, he said the main themes thereof were the political and economic changes that had directly or indirectly affected deep sea-bed mining since the adoption of the Convention in 1982, and the renewed efforts to achieve universal participation in the Convention.

(13) The Secretariat of the AALCC, while appreciating the efforts made toward "universality" of the Convention was of the view that this process should not be designed to amend the Convention before it comes into force and that that forum should not become a substitute for the Preparatory Commission for the Law of the Sea. He also cautioned that while the goal of universality was one that the international community shared, apart from the Charter of the United Nations and perhaps the 1949 Geneva Conventions relating to armed conflicts, there were hardly any conventions which had achieved universality. The package deal nature of the LOS Convention should be kept in mind in this regard. Besides Part XI of the Convention which deals with deep sea-bed mining in the distant future should not in any way erode the significance of the more important and immediate aspects of the Convention (*Report*, pp. 198–201).

. . .

25. Continuing, the Assistant Secretary-General recalled that the Secretary-General of AALCC had participated in *Pacem in Maribus XIX* held by the International Ocean Institute in Lisbon in November 1991. The main objective of that meeting had been to examine the institutional mechanisms needed for sustainable development of the ocean and its resources. It had been generally acknowledged there that ocean governance as provided under the Convention should be considered as a possible model for governance in other spheres of global concern, such as energy, food and the environment.

26. The delegate of *Japan* said that the reason for the reluctance of many developed countries, including his own, to ratify the 1982 UN Convention on the Law of the Sea was their dissatisfaction with its provisions regulating sea-bed mining. Recalling that the resolution on the law of the sea adopted by the UN General Assembly at its 46th session (1991) had recognized that 'political and economic changes, including particularly a growing reliance on market principles, underscore the need to re-evaluate . . . matters in the regime to be applied to the Area and its resources', he said that such developments seemed to reflect an increasing awareness of States of the need to

adjust the Convention's deep sea-bed regime to reality. However, his Government was resolved to support the Convention against any abuses of its provisions. He felt that AALCC had an important role to play in assisting Member States in the preparation of relevant domestic legislation in conformity with the Convention' (*Report*, pp. 203–204).

27. The delegate of *Thailand* recalled that the concept of the Exclusive Economic Zone equitably balanced the rights and obligations of coastal States with those of other States in the zone. He observed that although coastal States too had obligations with respect to the zone, not many of them had indicated what fish stocks were reserved for their use, nor allowed access by other States to the surplus stocks in their Exclusive Economic Zones. Coastal States thus tended to monopolise the resources of their zones without regard to their harvesting capacities, to the detriment of mankind as a whole. As to ways and means of promoting the 'universality' of the regime established by the 1982 Convention, he proposed that the AALCC Secretariat be asked (1) to study and report on non-conformity of national legislation with the Convention; and (2) to prepare model legislation on fisheries (*Report*, p. 204).

28. The delegate of *Republic of Korea* said that his Government was giving serious consideration to the matter of ratifying the 1982 Convention. As to the informal consultations presided over by the Secretary-General of the United Nations, the latter should make every effort to dispel any misgivings expressed by some participants, thereby promoting the universality of the Convention and its entry into force (*Report*, p. 205). The delegate of *Sri Lanka*, while expressing the hope that the industrialised countries would show flexibility and ratify the Convention, so as to facilitate its entry into force, urged that fundamental issues that had been agreed upon should not be reopened (*Report*, p. 207).

29. The delegate of *China* emphasized the need to safeguard the principle of 'the common heritage of mankind' established by the Convention with the support of the developing countries, and called for the formulation of appropriate, feasible and concrete measures through consultations and negotiations, that would ensure its implementation under conditions whereby both the investor and the international community would benefit (*Report*, p. 205).

30. The delegate of *Sierra Leone*, while declaring that his Government supported the efforts being made to bring about the universality of the Convention, said that it should not be implied that the reason for failure of some countries to ratify was the existence of imbalances in the Convention. The Convention had been painstakingly negotiated over many years on the basis of reliable information supplied by reputed institutions. Progress in science and technology since then had challenged not only part XI, but also other provisions of the Convention. While no one was opposed to taking market forces into account, if those forces were not to be utilized for the benefit of the developing countries as well, the concept of the 'common heritage of mankind' could be rendered meaningless. In his view, changes to the

Convention should be considered after it had entered into force (*Report*, pp. 206–207). The delegate of *India*, endorsing the views of the delegate of *Sierra Leone*, said that the 1982 Convention represented the best possible compromise that could be achieved. Observing that the Convention represented a package deal, and that no Member of AALCC wanted to change the basic principles of the Convention, he appealed for its early ratification (*Report*, p. 207).

31. The delegate of *Turkey* wished to be recorded as reserving his position in relation to the UN Convention on the Law of the Sea, and to the work of the AALCC on the subject (*Report*, p. 206).

Decision 4 of the Committee

32. In its decision[6] on this item (*Report*, pp. 108–110), the Committee, *inter alia*:

'. . .

3. Urges the Secretariat to continue its efforts to promote and ensure the entry into force of the Convention on the Law of the Sea as soon as possible particularly by Member States of the AALCC, and to continue monitoring the work of the Prepcom for International Sea-Bed Authority and for the International Tribunal of the Law of the Sea.

4. Urges the full and effective participation of the Member States in the Prepcom so as to ensure and safeguard the legitimate interests of the developing countries.

5. Reminds Member States to give timely consideration to the need for adopting a common policy and strategy for the period between the sixtieth ratification and the coming into force of the Convention in the early years of the Convention regime.

6. While appreciating the efforts for the universal acceptance of the Convention urges the Member States to guard against any premature amendment of the Convention on the Law of the Sea.

7. Decides to urge Member States to take steps to inscribe in the agenda of the forty-seventh session of the U.N. an item entitled "Establishment of a forum within the General Assembly of the United Nations for Member States to discuss matters relating to Ocean Space as a whole with a view to framing an integrated ocean policy" and further directs the Secretary General to carry out preliminary studies on the above item.

8. Urges the International Law Commission to consider inclusion in its programme of work an item entitled "Progressive development of the concept of reservation for peaceful purposes with regard to High Seas, the International Sea-bed Area, and Marine Scientific Research . . .".

. . .'

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6. The delegate of *Japan* 'reserved [his] Government's position as a whole' in regard to this decision.

3.4. Deportation of Palestinians as a Violation of International Law, particularly the 1949 Geneva Convention and the Massive Immigration and Settlement of Jews in the Occupied Territory[7]

33. The Committee had before it a Secretariat document entitled 'Deportation of Palestinians in violation of international law, particularly the Geneva Convention of 1949 and the massive immigration and settlement of Jews from the Soviet Union in the occupied territory' (Doc. No. AALCC/XXXI/ISLAMABAD/92/11), which, having recalled that the item had been referred to the Committee by the Islamic Republic of Iran at its twenty-seventh session, summarized discussion of the topic at the Committee's sessions thereafter, and provides information on the policy of establishing Jewish settlements in the Arab occupied territories, the emigration of Soviet Jews to Israel, the convening of the International Peace Conference on the Middle East under the auspices of the United Nations pursuant to General Assembly resolution 45/68 adopted on 6 December 1990, the *intifadah*, and the Conference on Palestine held in Tehran from 19–22 October 1991 at the initiative of the Government of the Islamic Republic of Iran.

34. The delegate of *Palestine* describing in detail the sufferings of the Palestinian people, made special reference to (i) acts of deportation of Palestinians in violation of all norms of international law, (ii) confiscation of their property, and (iii) settling of emigrating Russian Jews in the occupied territory, as manifestations of Zionist oppression comparable to the crimes of the Nazis, and emphasized that their continuance hindered the current peace talks. Declaring that the *intifadah* would continue, he urged, *inter alia*, that the Committee (a) request the Secretary-General to follow up on, and expand, the Secretariat study so as to draw attention to the negative consequences of the facts presented, and reach a just solution, (b) study and consider the issue of deportation in the context of human rights, and (c) adopt a declaration affirming the legitimate cause and struggle of the Palestinians and denouncing the oppressive policies of the Israeli regime (*Report*, pp. 179–181).

35. The delegate of *Iran* said that deportation of Palestinians from their homeland contravened the Hague Conventions of 1907 on the laws of war, the Charter of the United Nations and the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War. He emphasized the negative consequences of the establishment of Jewish settlements particularly in the West Bank of the River Jordan and the Gaza Strip, including demographic alteration, the prohibition of which was gradually being accepted as a principle of international law. Noting that such acts had been dealt with by the United Nations, most recently in General Assembly resolutions 45/73 E and G, and 45/74 A, B, E and F, and in Security Council resolution 726 of 6 January 1992 condemning the expulsion of twelve

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7. Cf. 1 AsYIL (1991) 213.

Palestinians from their homeland, and demanding that the occupying power ensure their safe and immediate return, he recalled similar action taken in international and regional organizations (e.g. the Organisation of African Unity, the League of Arab States and the Non-Aligned Movement) as well as at the Conference on Palestine held in Tehran in October 1991 (*Report*, pp. 182–183).

36. The delegate of *Syria* condemned the policies of Israel, especially in the south of Lebanon. He called on Russia, taking into account the changed international circumstances, to take steps to restrict the immigration of Russian Jews, declaring that it resulted in violation of the human rights of the Palestinians (*Report*, p. 183).

37. The delegate of *Pakistan* said his Government condemned the deportation of Palestinians in violation of international law and specifically of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War; Israel's policy of expansion and annexation of the occupied Arab territories including Gaza, the West Bank of the River Jordan, and the Golan heights, in particular through the establishment of new Jewish settlements; the continued occupation of the southern territories of Lebanon; the repressive measures adopted against the population of the Arab occupied territories; the persistent violation of Israel of the four Geneva Conventions of 1949 and the Hague Conventions of 1907; the desecration of Holy Places, especially the excavation adjacent to the Dome of the Rock which threatens the Holy Al-Aqsa Mosque; and forcible expulsion of Arabs from the occupied territories (*Report*, pp. 184–185).

38. The delegates of *Sudan*, *Libya*, *China*, *Egypt*, *Indonesia*, *Iraq*, *Yemen*, *India*, *Uganda*, the *Democratic People's Republic of Korea*, *Japan*, *Sierra Leone*, *Sri Lanka*, *Ghana*, and *Jordan*, and the Observer from *Algeria*, condemned or deplored general or specific policies or actions of Israel in regard to the Palestinians and the occupied Arab territories (*Report*, pp. 183–188).

39. The Observer from *Russia* explained that emigration of Jews from Russia had two aspects, viz. emigration of the Jewish people from Russia to Israel; and the question of settlement of those people on their arrival in Israel. He said that, as to the first aspect, emigration of Jews from Russia was in full conformity with existing international law, especially the law of human rights, which included the right of a person to leave his/her country. As to the second aspect, he emphasized that the Russian Government issued exist visas to Jews to move to Israel, not to any specific part thereof such as the occupied territories. When issuing such exit visas his Government was careful to inform emigrants of the international community's non-recognition of Israel's occupation of Arab territories, warning them that it would be illegal and dangerous to settle there (*Report*, pp. 186–187).

Decision 5 of the Committee

40. In its decision on this item (*Report*, pp. 110–112), the Committee, *inter alia*:

'. . .

Expresses its concern at the continuing denial and deprivation of the inalienable human rights of the Palestinian people including *inter alia* the right of self-determination and right to return and the establishment of their independent State on their national soil;

. . .

Requests the Secretary-General of the Committee to continue to monitor the events and developments in the occupied territories of Palestine;

Decides to convene an inter-sessional meeting of the Committee to consider Israel's policies of immigration and settlement, if financially feasible or if an invitation to host such a meeting is received from a Member State;

Supports the just cause of the Palestinian people and the national, political and inalienable human rights of the Palestinian people;

Condemns Israeli policy in the occupied territories and the deportation of Palestinians and annexation of the Palestinian lands against the rights of Palestinian people;

Strongly condemns Israel's policy of immigration and settlement of Jews in Palestinian and other Arab occupied territories and Southern Lebanon and Syrian Golan Heights in flagrant violation and contravention of human rights;[8]

Demands that Israel respect the principles of international law and all international conventions which have a bearing on the matter;

Condemns also Israel's policy of appropriation and illegal exploitation of the natural resources of the occupied territories in contravention of the Principles of Permanent Sovereignty over Natural Resources;

Requests the Secretary General to study the question of the forced changes in the demographic composition of the occupied territories including Jerusalem, West Bank and the Gaza Strip;

Urges ECOSOC to request the International Court of Justice to give an Advisory Opinion on the legality of Israel's actions and policy of settlement in the occupied territories in violation of International Law and consequences of violations of U.N. Security Council Resolutions No. 242 and 338 and legal obligations of member countries of the United Nations in this matter;[9]

Requests the Russian Government to take appropriate measures which the Russian Government deems just to discourage the Settlement of the Russian Jewish immigrants in the occupied territories in violation of international law.[10]

. . .'

3.5. Responsibility and Accountability of Former Colonial Powers[11]

41. This item was included on the agenda of the Committee's Twenty-Ninth session in March 1990 at the request of the Libyan Arab Jamahiriya (Doc. No. AALCC/XXIX/90/8). At that session, the delegate of *Libya*

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8. The delegation of *Japan* expressed reservations with respect to this paragraph, since in its view southern Lebanon could not be regarded as 'occupied territory'.

9. The delegate of *Japan* expressed reservations with respect to this paragraph.

10. The observer from *Russia* expressed reservations with respect to this paragraph as it could be understood to imply restriction of emigration in violation of human rights.

11. Cf. 1 AsYIL (1991) 229.

requested the Secretariat to examine the legal principles establishing the liability of the colonial powers, payment of compensation for the damage caused to the Libyan people and restoration of historical monuments and cultural property. The request had the support of the delegates of *Sudan*, *Syria*, *Palestine*, *Kuwait*, *Saudi Arabia*, *Yemen Arab Republic* and *Egypt*, the last proposing, in addition, that AALCC undertake a programme on the topic in co-operation with UNEP. The delegate of *Japan* doubted that the item was an appropriate one for consideration by the Committee, and expressed the view that it concerned matters of a political nature best dealt with bilaterally or multilaterally among the States concerned. The observer from *Italy*, while rejecting any obligation of his government on the basis of international law, expressed his government's readiness to co-operate with the Libyan Government in dealing with the problems arising out of mines that were the remnants of war. The Committee then requested the Secretariat to prepare a study on the subject, and Libya to extend all necessary assistance for the purpose.

42. The Secretariat study prepared for the Committee's Thirtieth session but not discussed then for lack of time, was before the Committee's Thirty-First session as Doc. No. AALCC/XXXXI/92/12. The study contains an account of the problem of the remnants of war with special reference to the situation in Libya, commencing with deportation after 1911 of several thousands of Libyans under the Italian colonial regime, and covering the period of military operations of Libya by Axis and Allied Powers during the Second World War involving extensive mine- and booby-trap-laying; treatment of the problem by the United Nations since it was first referred to the General Assembly in 1948 (see e.g. General Assembly resolution No. 529 (V) of 29 January 1952) up to its weakened response in 1987 attributed to lack of information (see General Assembly resolution A/42/514), including its consideration in the context of environmental protection by UNEP's Governing Council (see e.g. UN General Assembly document A/31/210); support for the Libyan initiative at meetings of the Non-aligned Movement, the Islamic Conference, the OAU and the League of Arab States; the applicability of the laws of war to the issues involved; and the relevance to those issues of the work of the International Law Commission on the topic of State responsibility.

43. Under the heading 'General Observations', the Secretariat study concludes, *inter alia* that there are some developing countries whose economies and national development plans have been crippled by the continued existence of the remnants of war, especially abandoned mines, and that the colonial powers should not evade their accountability under existing international law for dealing with those problems, including their duty to co-operate with the States concerned and responsibility for the provision of technical and financial assistance. The study considers a bilateral approach to be the best means of initiating negotiations with a view to arriving at viable solutions. The study mentions, by way of example, agreements between Libya and Italy (text reproduced in *The Great Jamahiriya*, 1 September 1989, p. 15), and between the United States of America and Vietnam concluded on 27 January 1973 which includes a Protocol on removal, permanent de-activation or destruction of mines in the territorial waters, ports, harbours and waterways of Vietnam (text reproduced in 12 ILM (1973) 91-93).

44. The delegate of *Libya* emphasized the need for recognition of the right of colonized countries to receive compensation from the former colonial powers and urged that the Committee adopt a resolution incorporating the legal principles relevant to the subject. The delegates of the *Democratic People's Republic of Korea*, *Uganda*, *Palestine*, *Ghana*, *Egypt* and *Sierra Leone* acknowledged the importance of the subject and the need for further work on it by the Committee (*Report*, pp. 174–176).

45. The delegate of *Japan*, recalling his delegation's intervention at the Committee's Twenty-Ninth session, expressed reservations regarding the subject, indicating that in his view it was of a highly political nature and not appropriate to be dealt with in a multilateral forum like the Committee (*Report*, p. 176).

46. The observer from *Italy*, recalling his delegation's intervention at the Committee's Twenty-Ninth session, said that his government rejected the position that any obligation of the type referred to in the discussion could arise on the basis of existing rules of international law (*Report*, p. 175).

Decision 6 of the Committee

47. In its decision on this item (*Report*, p. 113), the Committee, *inter alia*:

'. . .

Reaffirms the right to self-determination of countries and peoples under colonial rule;

Further reaffirms the right of all peoples formerly under colonial rule to receive compensation for damage suffered as a result of colonial rule;

Calls on former colonial powers to fully and effectively cooperate with the former colonial people in eliminating the consequences of colonial rule and providing information on those exiled or detained during the colonial era.

Further calls upon the colonial powers to return to their rightful owners the cultural heritage which was illegally plundered and removed by colonial powers;

Requests the Secretary General to continue his detailed study to enable the Committee to take a definitive decision on the matter.

. . .'[12]

12. The delegate of *Japan* expressed reservations with respect to this decision, declaring that the subject was of a highly political nature and was not appropriate to be dealt with in a multilateral forum like AALCC.

4. MATTERS OF COMMON CONCERN HAVING LEGAL IMPLICATIONS

4.1. Preparation for the United Nations Conference on Environment and Development[13]

48. The Committee had before it the following three documents prepared by the Secretariat: 'Notes on Major Agenda Items of Working Group III of the Preparatory Committee for the United Nations Conference on Environment and Development'[14] (Doc. No. AALCC/XXXI/ISLAMABAD/92/1), 'Framework Convention on Climate Change: An Overview' (Doc No. AALCC/XXXI/ISLAMABAD/92/2), and 'Development of a Global Convention on Biodiversity' (Doc. No. AALCC/XXXI/ISLAMABAD/92/3).

49. Document AALCC/XXXI/ISLAMABAD/92/1 contains notes by the AALCC Secretariat on *progress in drafting* the 'Earth Charter/Rio Declaration' on environment and development by Working Group III of the Prepcom; as well as on a *survey* of existing agreements and instruments and the further development of international environmental law and on *institutional issues.*

50. To the note on *progress in drafting* are attached as annexes a draft proposal submitted to Working Group III of the Prepcom by Ghana on behalf of the Group of 77, entitled 'Principles on General Rights and Obligations',[15] and a Consolidated Draft of the same title containing proposals received from participating delegations.

51. The AALCC Secretariat's note on the Prepcom's *survey* of existing agreements and instruments and the further development of international environmental law contains comments and recommendations on the purpose of the survey, the range of agreements and instruments to be covered and the basis for according priority to certain agreements or instruments, the criteria for evaluating the effectiveness of existing agreements and instruments and their overall contribution to sustainable development, and possible areas to be examined in connection with the further development of international environmental law. Annexed to this note is a draft decision for adoption by AALCC on the agenda item as a whole. Subsequently adopted, it is reproduced, in part, in paragraph 75 below.

52. The AALCC Secretariat note on *institutional issues*, having outlined consideration of the subject by Working Group III of the Prepcom, lists the then-existing proposals before it with regard to institutional mechanisms

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13. Cf. 1 AsYIL (1991) 216.
14. Hereinafter: Prepcom.
15. The draft proposal was originally submitted in August-September 1991, and was re-submitted in revised form in March 1992 as UN doc. A/CONF.151/PC/WG.III/L.20/Rev. 1. See below, Selected Documents.

(part II)[16] and suggests areas for consideration by Member States when preparing for future sessions of the Prepcom (part III).[17] These parts of the note are reproduced in full below:

"...

II. EXISTING PROPOSALS ON INSTITUTIONAL MECHANISMS

Since the beginning of the preparatory process for UNCED, there have been advanced a number of proposals on the institutional mechanisms for the need to integrate environment and development. Most of them have concentrated on the intergovernmental mechanisms. The following is a summary of the main proposals contained in PC/80, which the Prepcom may wish to consider:

- The establishment of a "Sustainable Development Commission" to which all United Nations bodies, agencies and programmes as well as "treaty" Secretariats involved in the area of environment and development would be accountable. It would meet annually and examine policies and programmes for promoting global action on environment and development and would be both a political deliberative body and co-ordinating mechanism for the UN system's activities in this area.
- The establishment of a high-level deliberative body at the political level which would provide a forum for overview and policy co-ordination of environmental issues and their integration with other major issues to which they relate in the security, economic, social, humanitarian and common areas. Some suggest that this be done through establishment of an "Environmental Security Council" or a Committee of the General Assembly, supplemented, perhaps, by a special committee of the Security Council to deal with the issues which are security related. It is also suggested that these functions could be performed according to the Trusteeship Council a new mandate as the forum in which member states exercise their trusteeship for the integrity of the global environment and commons.
- The creation of an "Economic Security Council" composed of around 24 members, representing all groups of member states, as the centrepiece of the "Economic United Nations" parallel and equal to the "Political United Nations". The Council would be supported by an interdisciplinary central Secretariat with a large number of highly qualified experts and a number of smaller sectoral Secretariats maintained at the level of each of the agencies. The Council would bring together the competent ministers, depending on the problems on the agenda, and central Secretariat would be led by a group of independent persons (commissioners).
- The creation of an "International Development Council" within the United Nations to meet for a high-level forum for member states to discuss development issues and give overall policy guidance for UN operational activities for development.
- The revitalization of the Economic and Social Council. It is suggested that, in principle, most of the functions envisaged for the proposed new inter-governmental mechanisms referred to above could be undertaken by ECOSOC. In order to do so there would have to be a very significant improvement in its credibilities and strengthening of its effectiveness. The subject of restructuring and revitalization of ECOSOC is now on the agenda of the General Assembly.
- The convening of a world Summit on Global Governance similar to the meeting in San Francisco and at Bretton Woods in the 1940s. To prepare the ground for such a Summit, it was suggested to establish an independent international commission

16. AALCC/XXXI/ISLAMABAD/92/1 pp. 25-28.
17. Ibid. 29-38.

on global governance, composed of individuals functioning in their personal capacities.

In addition to the above-mentioned proposals, there are a number of proposals related to the constructive changes of the Secretariat of the United Nations itself and those of its agencies and programmes. The report of the World Commission on Environment and Development, "Our Common Future", points to the need for a high-level centre of leadership for the United Nations system as a whole with capacity to assess, advise, assist and report on progress made and needed for sustainable development. That leadership should be provided by Secretary General of the United Nations . . . who should constitute under his chairmanship a special United Nations Board for sustainable Development. The principal function of the Board would be to agree on continued tasks to be undertaken by the agencies to deal effectively with many critical issues of sustainable development that cut across agency and national boundaries. In this context proposals have also been made for the revitalization of the Environmental Co-ordinating Board.

During the last August Session, a few more concrete proposals were brought out, and attracted the attention of many delegations. They called for the institutional adjustments, including:

- A possible combination of existing ECOSOC Committees into a single intergovernmental Committee to deal in a comprehensive way with the more political aspects of environment and development;
- An annual joint (or combined) UNDP-UNEP Session on Environment and development as part of the UNDP Council's agenda;
- A high-level effective coordinating mechanism for UN and related agencies and programmes, co-chaired by the UNDP Administrator and the UNEP Executive Director;
- Regionally and nationally focused efforts built around or based on the existing UNDP Round table/World Bank Consultative Group of donors and UN agencies.

Quite a few proposals focused on the strengthening of the UNEP, which inter alia suggested:

- that UNEP be strengthened in its own right as the Central agency in the UN system on matters of environment and development. Its operations should be strengthened and enhanced by provision of additional funds, recruitment of experts and improvement of its infrastructural arrangements;
- that an interagency linkage be strengthened through the creation of coordinational offices at the UNEP Headquarters for all UN agencies;
- that the membership of the Governing Council be increased to make it more representative at the decision-making level in accordance with UNEP's new status;
- that UNEP's role be strengthened in coordinating regional environmental centres to enable them respond to issues of development both in the developed and developing countries;
- that a mechanism for the prevention and peaceful settlement of ecological disputes be established under UNEP and be located at its headquarters.

Deliberation on the subject continues. All the proposals mentioned above however need to be carefully examined.

III. PREPARATION FOR THE AALCC's COMMON STAND

1. *Dimensions and Emphasis of the Issue*

As stipulated by the Statute of the AALCC, one of the main purposes of the Committee is to exchange views and information on matters of common concerns having legal implications and to make recommendations thereto if deemed necessary. The Committee may, therefore, wish to consider this subject item of institutions related to UNCED, which is on the agenda for Working Group III of the Prepcom, and to make efforts to form a common stand thereon. This would render valuable assistance to its member governments in preparing for the UNCED at its final stage.

It is the suggestion of the Secretariat that general dimensions and the emphasis in the Committee's consideration of this item would be placed on the following substantive aspects which seem to be the key elements for the complex institutional issues:

(a) Basic principles and guidelines to be applied to deal with the institutional mechanisms arising from the need to integrate environment and development;
(b) Framework of intergovernmental mechanism for political deliberation and policy guidance in the field of environment and development;
(c) Framework of interagency coordinating mechanisms within the United Nations System; and
(d) Other major institutional arrangements such as strengthening of UNEP and settlement of ecological disputes.

2. *Basic Principles and Guidelines on Institutions*

It should be recalled that the General Assembly, at its resumed 45th Session, adopted Resolution 45/264 on the subject of restructuring and revitalization of the United Nations in the economiic, social and related fields. The Resolution contains 7 basic principles and guidelines for action. They are:

(a) restructuring is primarily the responsibility of member states;
(b) political will is an essential prerequisite for reform;
(c) the exercise should aim at achieving greater complementarity between the bodies and organs of the United Nations with the General Assembly;
(d) the preservation of the "democratic principles" in the decision-making process of the United Nations;
(e) the need to preserve and strengthen transparency and openness;
(f) the most efficient and effective use of the financial and human resources of the United Nations system in the economic, social and related fields; and
(g) importance of the ongoing revitalization of ECOSOC.

We are convinced that the above principles and guidelines are of direct relevance to UNCED. They could be applied not only to the restructuring and revitalization of ECOSOC but also equally to the institutional arrangements of UNCED. AALCC may thus wish to request the Prepcom to comply with these principles and guidelines in considering the institutional issues related to the UNCED.

In the context of the Sixth principle on efficient use of financial and human resources as mentioned above, we further suggest that the Prepcom should ensure that no proliferation of new institutions will take place. First of all it should concentrate on the improvement and strengthening of existing institutional mechanisms in the United Nations system, and on enhancing their better cooperation and coordination. We therefore stand firmly by the idea that no new intergovernmental bodies should be set up, except by combining or transferring resources from existing bodies. It would be the most logical and efficient way to meet the need for the institutions by making full use of the existing financial and human resources.

Based on the above-mentioned guidelines, the AALCC may wish to call attention to ECOSOC and UNEP.

At a high level, without prejudice to the jurisdiction of the General Assembly, the focus could be on the restructuring and revitalization of ECOSOC so that it may be enabled to serve as an intergovernmental forum in the field of environment and development, and under the authority of the General Assembly, to play a central role in policy-deliberation. It is true that most if not all of the functions so far envisaged for the proposed new intergovernmental mechanisms referred to above are within the scope of ECOSOC, and could be undertaken by it if the necessary restructuring would be completed. So the importance of ECOSOC in the context of the UNCED should be underscored.

With regard to UNEP, as pointed out in para 7, pc/809 it is widely recognized that an important result of UNCED is expected to be substantial strengthening of the mandate and capacity of the UNEP, which is mandated to be the coordinator of the environmental activities of the United Nations system. The Secretariat of the AALCC is of the view that the building of a better coordinating mechanism in the field of environment and development should take the UNEP as its core, and such mechanism should be designed on the basis of strengthening UNEP. In principle, UNEP should play a central role in overseeing the implementation of Agenda 21 and in coordinating the various activities of UN system as a whole in the field of environment and development.

3. *The Framework of Intergovernmental Mechanism*

The framework of intergovernmental political deliberative mechanism could be constituted in a two-fold process.

At the primary level, the General Assembly, which has the broadest membership of States and to which ECOSOC, UNEP, UNDP and other parts of the United Nations system report, should remain in charge of overviewing global action in the dimension of sustainable development as suggested in Resolution XX/228's description of the General Assembly as the appropriate political forum for discussion of international environmental policy. It is also the appropriate body where new global initiatives can be taken. For this purpose the principal function of the General Assembly in the political deliberation and policy guidance related to environment and development should be further enhanced and reinforced. In this context we suggest that a main Committee of the General Assembly be designated to be responsible.

Various ideas have been raised with regard to a further strengthening of intergovernmental cooperation at the highest level. It has been suggested that a regular high-level meeting, preferably at the Ministerial level, be instituted, which would give general policy guidance to the implementation of the objectives and action proposals of the UNCED and which would consider possible gaps. In our opinion, it is not necessary to create such a regular meeting at Ministerial level. It is better to leave the matter of a ministerial meeting to the discretion of the General Assembly in light of the importance of the issues to be dealt with and the feasibility of convening such a meeting.

Under the General Assembly, a forum for more focussed deliberation may also be needed. That is to be the second level process. ECOSOC which is able to devote in depth discussion to the thematic issues, and in which most of the time environment and development aspects play a dominant role could be considered in this context. One idea that has been suggested is that a number of existing Committees of ECOSOC dealing closely with related matters could be combined into a more comprehensive Committee to deal with environment and development. Reference could be made in this regard to the Committee on New and Renewable Sources of Energy, the Committee on National Resources and the Committee on Science and Technology

for Development. The task of monitoring and reviewing the implementation of UNCED's results, including Agenda 21, could be entrusted to this Committee. We consider the idea a positive one. We also underscore the importance of wider involvement and participation of the developing countries, and the democratic principle of decision-making in the proposed Committee. The proposed combined Committee could have the title of "The Commission/Board on Sustainable Development".

Furthermore, to facilitate the deliberation of the more technical aspects of environment and development, a special advisory group could be established under the direction and supervision of the proposed "Commission on Sustainable Development". The advisory group would be composed of a number of individual experts, mainly drawn from the human resources of UNEP and UNDP, the main tasks of which would be to consider, from the technical perspective, the questions referred to it by ECOSOC and its responsible Committee, and make recommendations thereto, as appropriate.

In short, the basic framework of the intergovernmental mechanism would be formed with a two fold structure. At the first level, the General Assembly itself and one of its main Committees as well as a possible irregular higher-level meeting at the ministerial level are envisaged. At the second level, ECOSOC in general, the "Commission on Sustainable Development" a new more comprehensive intergovernmental Committee which would be a restructured combination of several existing Committees of ECOSOC, in particular, and a subordinate advisory experts group would serve as the Centre for the regular intergovernmental policy deliberation in the field of environment and development, and for overseeing the implementation of Agenda 21.

4. *The Framework of the Interagency Coordinating Mechanism*

To establish a more effective and efficient interagency coordinating mechanism in the field of environment and development is undoubtedly crucial in the implementation of Agenda 21 and other outcomes of UNCED.

In keeping with the guidelines mentioned earlier, the Secretariat of the AALCC should like to make the following proposals:

(a) The coordinating mechanism should cover not only UNEP and UNDP but also other relevant agencies or programmes involved in the environment and development; namely, all the related activities within the United Nations system.
(b) The coordinating mechanism should be formed with the UNEP as its core making full use of its facilities and expertise.
(c) A steering interagency Coordinating Committee might be created under the chairmanship of the UNEP's Executive Director, who should have the rank of Under Secretary General of the United Nations, or under the co-chairmanship of the Chiefs of UNEP and UNDP, or other appropriate joint management arrangement. The Committee would be composed of the responsible high ranking officers from UNEP, UNDP, the Secretariat of UN, the World Bank and other UN bodies involved in the area of environment and development.
(d) The Coordinating Committee would be most appropriately located in the headquarters of UNEP so that UNEP's facilities and expertise would be fully used. Thus UNEP itself would play a real central role in effectively coordinating the various activities related to environment and development within the United Nations system.
(e) The Coordinating Committee would have close ties with the Administrative Committee on Coordination (ACC) of the UN Secretariat, which is chaired by the Secretary General and is currently responsible for coordination of environmental and developmental activities in the UN system. Thus a better cooperation and coordination could be created and maintained between the Secretariat and its agencies concerned in the field of environment and development.

(f) With regard to the relationship of the Coordinating Committee and the "Commission/Board on Sustainable Development", the former should function under the supervision of the latter, through which it would report on its work.

5. *Other Major Institutional Mechanisms*

In addition to the intergovernmental political deliberative mechanism and the interagency coordinating mechanism, certain institutional arrangements may be necessary to substantially strengthen UNEP in the field of peaceful settlement of international ecological disputes.

That UNEP should be further strengthened as the central catalyzing, coordinating and stimulating body in the field of environment within the United Nations system has been widely recognized. Now the question is how to achieve the goal. A number of ideas and proposals have been suggested. It is the view of the AALCC Secretariat that in this regard, the following key elements should be primarily addressed.

(a) The mandate of UNEP, as contained in Resolution 2997, should be reaffirmed in the context of UNCED and the need to integrate environment and development. The strengthening of UNEP first refers to strengthening its mandate, purposes and functions. In this respect, we suggest that the mandate of UNEP in the areas of further development of international environmental law, coordinating activities related to environment and development within the UN system and the settlement of international ecological disputes and overseeing the implementation of Agenda 21. These and other responsibilities emanating from UNCED might be strengthened or added.

(b) The leadership of UNEP. To ensure a wider participation of the developing countries, which is crucial to the performance of UNEP's mandate as enhanced in a satisfactory way, the Governing Council of UNEP should be enlarged and its memberships increased so as to make it more representational at the decision-making level. The new memberships should be allocated on the geographical basis, taking into account the special needs of the developing countries. We also think that rank of the Executive Director of UNEP should be at the status of the Under Secretary General of the United Nations.

(c) The Financial Basis. To enable UNEP to carry out its expanding mandate and responsibilities, it is requisite to call for the strengthening of its financial basis. This goal could be attained by enlarging its budget and opening up other additional financial resources besides voluntary contributions.

(d) The Coordinating Mechanism. To ensure that UNEP is capable of taking the responsibility for coordinating environmental activities within the United Nations system, a more effective and efficient coordinating mechanism should be established, the framework of which has been outlined above.

(e) The capacity of UNEP. Besides above elements, the improvement of UNEP's infrastructure and enhancement of its expertise should be addressed. We agree with the suggestion that UNEP needs greater expertise with respect to the developmental side of environmental questions, so that right from the outset environmental and developmental aspects of an issue could be fully considered.

We do believe that the strengthening of both the human and material resources of UNEP would make it better able to assume the responsibilities UNCED might entrust to it.

With regard to peaceful settlement of international environmental disputes, while we consider a more and effective use of the International Court of Justice, the Permanent Court of Arbitration and other international arbitrational institutions very important, it is also worthy envisaging a possible special environmental tribunal within the mandate of UNEP or the Commission on Sustainable Development."

53. Document No. AALCC/XXXI/ISLAMABAD/92/2 deals with the Intergovernmental Negotiating Committee (INC) established by General Assembly resolution 43/53 of 6 December 1988 and entrusted with the task of preparing an effective 'Framework Convention on Climate Change' and any other related agreements as might be agreed upon. The document recalls the guidelines for negotiations, and the mandates of Working Group I (commitments on limiting and reducing net emissions of greenhouse gases, and related matters) and Working Group II (Legal and institutional mechanisms) as reflected in the Report of the INC's first session (A/AC.237/6), and outlines the progress of the work up to and including the negotiations which took place at the INC's Third Session, held at Nairobi 9–20 September 1991.

54. Comments by the Secretariat on the negotiations thus far, include the following:

'. . .

7. It may be recalled that during the INC Second Session in Geneva, the Bureau of the Conference prepared a document which set out a compilation of 110 Principles compiled on the basis of informal and non-papers and the views expressed by various delegations during the Geneva Session. The Bureau was further requested to prepare a consolidated compilation of Principles. Accordingly, the Bureau submitted two documents namely, A/Ac.237/Misc 6 and A/Ac.237/Misc 9. The document A/Ac.237/Misc 6 containing compilation of texts related to principles arranged under five main headings and a number of subgroups. A/Ac.237/Misc 9 contained a more condensed set of Principles.

8. Working Group I took both these documents as the basis for discussion. During the discussion, there were divergent views on the purpose of inclusion of the Principles in the text of the Framework Convention. It was argued that many of these Principles could be accommodated in the Preamble and in the Section on commitments. On the other hand, while emphasising the need to include a set of Principles, it was felt that a section dealing with basic Principles would strengthen the commitments and lay the guidelines to implement those commitments.

9. Although there are divergent views in regard to the utility of inclusion of Principles in the text of the Framework Convention, it appears that ultimately an agreement might be reached to that end, and a section containing a short list of basic principles will find a place in the Convention. It should be pointed out that there are precedents where similar Conventions have incorporated a section on Principles. Besides, the Earth Charter under consideration in the UNCED and the draft text of the Framework Convention on Bio-diversity also contemplate inclusion of a section on Principles. Such a section in our view should be in the body of the Convention rather than in the preamble.

10. The Revised Conference Room Paper (A/Ac.237/WG1/Rev.1), prepared by the co-chairs of Working Group I in the light of the two rounds of discussions held during the Nairobi Session of the INC, contains a long list of Principles. Endeavour should be made to identify the principles which command wide support keeping in view their legal nature. Since "environment" in general and the climate change in particular, are evolving concepts embracing many scientific and technical matters, care ought to be taken when identifying such principles to ensured fairness and their linkage to climate related issues.

11. A tentative list might include such principles as common concern of mankind, sovereignty, equity, common but differentiated responsibility, right to development, sustainable development, Precautionary Principles, Polluter pays Principle, Non-conditionality, special circumstances, comprehensiveness, liability and flexibility. There is a possibility that the inclusion of some of these principles might be the bone of contention or an agreement might be reached to elevate some as commitments and general principles. That would help shorten the list. While streamlining the texts of the agreed principles, it would be desirable to use precise legal language. The Declaration of the Second World Climate Conference may provide useful guidance in that context.

12. Section on "Commitments" will form the fundamental Part of the Framework Convention. Indeed, the success or failure of the negotiations on the Framework Convention will largely depend upon how the issues related to commitments will be tackled during the forthcoming INC Session in Geneva and the subsequent one in New York. In spite of extensive and intensive discussions during the last two INC Sessions divergent views could not be narrowed down.

13. It is generally agreed that the Framework Convention should stipulate two types of commitments, namely (i) general commitments and (ii) specific commitments. The general commitments should be undertaken by all the Parties to the Convention whether they are developed or the developing states. The specific commitments could oblige a group of countries, particularly the industrialised countries.

14. It is evident from the trend of the discussions in Geneva and Nairobi Sessions that it would be difficult to draw a line between the two types of commitments. There may be areas where the obligations evisaged within the general commitments would spill over to specific commitments. There is likelihood that if the specific commitments are framed in a diluted form, they could take the shape of general commitments. In the course of the discussions, interesting concepts such as "common but differentiated responsibility" and a third category of commitments termed "unilateral commitments" have been introduced. These concepts need to be examined in detail. They appear to be simple but translating them into specific legal language and the subsequent implementation of the obligations envisaged in that context, would have implications which may go well beyond the imagination at this juncture of negotiations.

15. The text on commitments submitted by the Bureau of Working Group I prior to the conclusion of the Nairobi Session is very elaborate. Section II contains a set of eighteen paragraphs with several alternative formulations for most of the paragraphs. Among other things, these commitments envisage immediate and significant emission reductions, energy conservation, rational use of energy and development, promotion of co-operation by means of systematic observations, research and information exchange. Section III dealing with differentiation of commitments draws a distinction between the developed and developing countries mainly on the basis of economic criteria. Section IV is concerned with specific commitments in respect of all sources and sinks, including preparation of national strategies and programmes.

16. During the discussion, while there were different views on many of these commitments, it was generally recognised that all such commitments should be realistic and strike a balance between environment and economic development. The target and time-table for emission reduction should be flexible. With regard to sinks, it was stressed that while dealing with the question of forests, the relevant measures should take into account the ongoing deliberations in the UNCED. It was also pointed out that since oceans play an important role in the Earth Climate System, their significance as sinks needs to be examined. It was recognised that as the indirect consequences of the measures would vary, there was the need to consider "special situations" and the

degree of vulnerability. The examples of the countries whose economy depended upon the production and exportation of fossil fuels and those countries which were not in a position to find substitutes for fossil fuels were particularly relevant. On the question of the preparation of national strategies and programmes concern was expressed particularly by the developing countries. On the other hand it was emphasised by the developed countries that the availability of the financial and technological resources was closely linked to the commitments to be undertaken by the developing States.

17. The commitments on technology co-operation and transfer are crucial elements of the Convention. The General Assembly resolution 44/228 laid the guidelines for establishing an effective technology transfer mechanism. Further, INC decision 1/1 provided that such mechanism should be an integral part of the framework convention. During the last two INC Sessions, Working Group I held discussions on the commitment relating to transfer of technology and its mechanism as discussed in Working Group II. Divergent views on both the issues among the developed and the developing countries appear to be a great stumbling block. It has been suggested that the issues relating to technology transfer should be viewed in a broader perspective and should include technical co-operation as well. Such a notion would promote a "shared partnership" between the developed and developing countries. No doubt, this is an ideal suggestion. However, the "ifs" and "buts" associated with this ideal cannot be overlooked. The developing countries need support to develop their technological base and the "best available" "state of-art technology" which should be cost effective and environmentally safe and sound. Their primary need is "soft technology" to build up their own capabilities for climate monitoring and assessment. The framework convention must ensure expeditious transfer of the relevant technology on a fair and most favourable conditions. How far such terms will be "non-commercial" would depend on the source. Also, consideration might be given to the issues related to Intellectual Property Rights. The UNCED and the INC on Biodiversity are also engaged in similar discussion. It would be desirable to bring the INC discussion on the framework convention on climate change on similar lines.

18. A proposal has been made for the formation of a study group on technology transfer. It would be desirable to constitute such a group during the forthcoming INC Session in Geneva. The Study Group could identify the basic issues and suggest modalities for suitable mechanism on this matter.

19. Issues concerning commitments and Institutional Mechanisms for the provision of adequate and additional financial resources to enable developing countries to meet incremental costs required to fulfil the commitments evisaged in the Convention are of crucial importance. During the INC Second and Third Sessions, discussions on these matters have shown a great divergence of views. Some of the developed countries have expressed general support. However there is no explicit commitment in this regard.

20. The first and the foremost consideration therefore would be to identify ways and means to provide new and additional financial resources as it has been realised that the existing financial resources available from the United Nations Systems and other regional and bilateral arrangements would not be adequate. Suggestions have been made for the establishment of a funding mechanism for the purposes of providing financial and technical co-operation, including the transfer of technologies to the developing countries parties. Such a mechanism would include a multilateral fund composed of adequate additional and timely financial resources apart from other means or arrangements of multilateral, regional and bilateral co-operation.

21. Another proposal provides for the establishment of a Climate Fund which would operate under the authority and guidance of the Parties to the Convention. It envisages establishment of an Executive Committee consisting of members selected on the basis of an equitable representation of the developed and developing countries parties to the Convention. Further, the Climate Fund would be financed by contributions from developed countries parties on a grant basis, and according to criteria to be agreed upon by the Parties. Its function should be to meet the costs for developing countries parties to adapt and mitigate the adverse effects of climate change and the development and transfer of technology and knowledge relevant to scientific and technical research. Finally the fund would also meet the expenses concerning the Secretarial services and related support costs of the Climate Fund.

22. Another interesting proposal provides for the establishment of a clearing house system based on a bilateral agreement between countries and regional agreement between several countries. Accordingly, a clearing house would appraise and select projects for reducing emissions, according to their cost-effectiveness and co-ordinate the funding of these projects. The net reduction in emissions resulting from any specific project would be created to the country that contributes to the funding of the project and deducted from its national commitments. Thus, the transfer of financial resources between countries would be integrated in the system and would also facilitate co-ordination with other financial mechanisms. Another suggestion is that the recent initiative jointly undertaken by the World Bank, UNEP and the UNDP in establishing the Global Environment Facility (GEF) provides an innovative financing mechanism to help developing countries to meet their financing requirements to an extent.

23. During the discussions at the Nairobi Session, broadly two sets of views emerged and they represented the different viewpoints of the developing and the developed states on the financial mechanism to be incorporated in the framework convention on climate change. The developing countries insisted on the establishment of an independent fund democratically operated under the guidance and supervision of the Conference of the parties. As for the sources constituting the fund, it was stressed that adequate new and additional financial resources should be provided to the developing countries to meet their obligations as envisaged in the Convention.

The developed countries, on the other hand considered that the GEF operated by the World Bank, UNDP and UNEP would provide the suitable mechanism. The GEF was a three year pilot programme which could be improved both in terms of augmenting its resources and governance structure by enhancing the role of developing countries in its decision making. There was agreement to commit adequate and additional financial resources to enable developing countries to meet incremental cost required to fulfil their commitment. However, views differed on whether it should be "full" or "agreed" incremental cost. It was stressed that the concept needs to be defined in a clear and comprehensive manner.

24. Suggestions were made to examine the concept of an insurance scheme and "Polluter Pays Principle" taking into account relevant precedents and the development of international law in these areas.

25. Working Group II has been discussing issues related to legal and institutional mechanism, including, inter alia, entry into force, withdrawal, compliance and assessment and review. With regard to scientific assessment and exchange of information there are fairly convergent views. A suggestion was made for the establishment of a Scientific Committee. In that connection, it may be pointed out that the basic foundation of the framework Convention is the scientific assessment of the factors related to climate change. The Intergovernmental Panel on Climate Change

(IPCC) which was established in 1988 jointly by the WMO and the UNEP has provided valuable guidance and support to the work of the INC. This fact was also recognised by the General Assembly when it constituted the Intergovernmental negotiating Committee for the Framework Convention on Climate Change. It is not yet clear what role the IPCC would play after the completion of the work of the Framework Convention. It is however generally felt that till the Framework Convention comes into force, there will be need for assistance from the IPCC. Irrespective of such transitional arrangements, the need for a Permanent Scientific organ cannot be over-emphasised.

26. Consideration should also be given for the establishment of a specialised body like GESAMP, which is an advisory body consisting of specialized experts nominated by the sponsoring agencies (IMO, FAO, UNESCO, WMO, WHOM, IAEA, UN, UNEP) which provides authentic scientific advice on marine pollution problems. Perhaps IPCC could be made more broad based and could be thought of assuming such a task. In both cases, the structure, role and function of the two bodies would have to be considered in detail.

27. Preliminary discussions on verification and compliance indicate the sensitive nature of the issues involved. While there is a clear understanding that the thread of common but differentiated responsibility should run through various commitments envisaged in the Framework Convention on Climate Change, there are divergent views with regard to the achievement of this objective. The over-emphasis on compliance mechanisms may delay and perhaps defeat the very purpose for which such a mechanism is being advocated. The commitment to establish a national reporting system, submission of periodic national reports, subsequent review by a supranational authority and sanctions for any infringement of the commitments, all viewed together pose problems of many and different kinds. The lack of infra-structure to prepare the national inventory and collation of relevant information would deter the developing countries to undertake the commitment to make a report at regular intervals. What would be the worth of the national report, if there is no substantive information to present? Would it not be a cause for complaint? This may sound negative but certainly not illogical.

29. Views have been expressed outlining the compliance procedure and ways to deal with the complaints. Suggestions have been made that recourse should be considered to refer the disputes to the International Court of Justice or to an Arbitration Tribunal. Non-resolution of a complaint would not necessarily give birth to a dispute for which recourse ought to be made compulsorily to the highest judicial organ. Any compulsive dispute settlement procedure has remained an idealistic goal for long. The Framework Convention on Climate Change is not the kind of international instrument where such an idea could be translated into action. There is some gap in establishing the scientific credibility of the climate change convention. It would be far from reality to think of filling that gap with legal firmness. The 1985 Vienna Convention on the Protection of the Ozone Layer follows a practical step by step approach in regard to the matters concerning dispute settlement. Consideration may be given to incorporating a similar provision in the text of the Framework Convention on Climate Change. It would save time and close the discussion on a crucial issue.

30. The question of submission of national reports and their review would also need to be considered in a more flexible way, particularly in the context of the developing countries. The cart cannot be put before the horse. It is encouraging to note that there is great enthusiasm to support the developing countries in the preparation of country-studies and the creation of necessary national infrastructure which would

enable them to undertake any commitment to this effect. A suggestion has been made that as an alternative to "Pledge and Review" unilateral commitment could be undertaken by the parties to the Convention. The intention to chase out the twin ghosts which haunted the Nairobi meeting from its very first day is laudable. However, one cannot rule out the possibility that the ghosts might enter Geneva in a different shape.

31. It has been suggested that apart from the general and specific commitments or obligations, the Convention could envisage a legal framework for States to assume unilateral obligations. Such unilateral obligations would be "additional" and could be related to the availability of financial and technical assistance particularly for those developing countries which are not in a position to fully implement unilateral commitments without such assistance. Although it has not been stated categorically, it is amply clear that such financial and technical assistance could be given preferably to those countries which are prepared to undertake "unilateral" commitments to prepare and submit national reports which will be subject to review by an international review body.

32. It may be a little premature to make any specific comments on the concept of unilateral commitments at this juncture. However, at least two general observations may not be out of place. First, it has been noticed that during the discussions on the commitment with regard to the financial and technical resources, developed countries have zealously conveyed their hesitancy in making any specific commitments. It would be interesting to note if they will be prepared to make any express unilateral commitments in that respect. Secondly, the developing countries, indeed the Group of 77 as a whole, have made it very clear, leaving no ambiguity, that their national strategy could not be the subject of review by an international body. The fear of the twin ghosts entering the Conference room in Geneva from the backdoor is not imaginary but real. Maybe, on the eve of Christmas, an Angel enters from the front door and saves the Geneva Session from the impending deadlock on this issue.[18]'

55. Document No. AALCC/XXXI/ISLAMABAD/92/3 deals with the Intergovernmental Negotiating Committee (INC) for a Convention on Biological Diversity constituted by decision 16/42 of the Governing Council of UNEP in continuation of work on negotiation of an international legal instrument on the subject, previously undertaken by a succession of expert groups. The document recalls the mandates of Working Group I (fundamental principles, general obligations, implementation measures) and Working Group II (issues relating to international co-operation, technology and science, financial needs and mechanisms, and genetic material), and outlines the progress of work up to and including the negotiations which took place at the INC's Fourth Negotiating Session, held at Nairobi from 23 September to 2 October 1991.

56. The Secretariat provides 'An overview of the draft Convention' in part III of the document,[19] as follows:

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18. AALCC/XXXI/ISLAMABAD/92/2 pp. 15-25.
19. AALCC/XXXI/ISLAMABAD/92/3 pp. 11-21.

. . .

III. *AN OVERVIEW OF THE DRAFT CONVENTION*

21. The conservation of biological diversity and the problems relating to climate change are among the most important environmental issues facing the world at the present juncture. The destruction of habitats is causing thousands of species to become extinct every year and the consequent loss of biological diversity is a main factor in what might become an irreversible climate change. Biological diversity, therefore, needs to be conserved so that mankind could derive maximum sustainable benefit from world genetic resources.

22. The international community has already enacted instruments to protect biological diversity but they have proved to be inadequate. It is, therefore, essential to supplement such action by a global Convention which would enable the present generation to discharge its responsibility to future ones through preserving their heritage.

23. The Draft Convention on Biological Diversity presently under negotiation under the UNEP's auspices is intended to evolve a broad legal framework pulling together a wide range of actions at national and international levels for conservation and sound use of biological diversity that has hitherto been taken on a piecemeal basis. The Draft Convention originally consisted of 41 articles, but during the course of the ongoing intergovernmental negotiations six additional articles have been incorporated in the text, namely, Article 5 *Bis*, Article 7 *Bis*, Article 14 *Bis*, Article 15 *Bis*, 17 *Bis*, and 23 *Bis*.

24. Article 1 is addressed to setting forth the objectives of the proposed Convention. Although it has been considerably shortened, it stays within brackets in Article 2 on Use of Terms and is intended to be elaborated at a later stage. Article 3 is purported to enshrine the basic principles that would underpin this legal instrument. The basic principles recognized are that obligations should include *in-situ* and *ex-situ* conservation, intergenerational equity and responsibility, arrangements for the transfer of technologies, including biotechnology, and the establishment of financial mechanisms.

25. Article 4 is intended to frame the general obligations of the Contracting Parties at national and international levels. Article 5 obligates the Contracting Parties to develop their national strategies, plans and programmes for conservation and sustainable use of their biological diversity. Article 5 *Bis*. on Identification and Monitoring was introduced at the recently concluded fourth session of the INC and it requires the Contracting Parties to identify components of biodiversity important for conservation. Article 6 obligates the Contracting Parties to conserve their biological resources through *in situ* conservation. Article 7 requires Contracting Parties to adopt individually or jointly policies and programmes for conservation of species *ex-situ*, particularly those which are endangered or of established medical, agricultural or other economic value, relatives of domesticated species and other important sources of genetic material.

26. Article 7 *Bis* was introduced at the recently concluded fourth session of the INC and it makes compliance by developing Contracting Parties with the obligations contained in Articles 5, 6 and 7 conditional upon the provision of technical and financial assistance. Article 8 requires the Contracting Parties to integrate conservation of their biological resources into their domestic decision-making, both governmental and private. Article 9 enjoins the Contracting Parties to establish research and training programmes for the identification, conservation, management and sustainable use and development of biodiversity and its components.

27. Article 10 requires the Contracting Parties to promote general awareness about the importance of biodiversity and its sustainable use. Article 11 obligates the Contracting Parties to monitor environment impact assessment of their proposed projects or programmes within or beyond the limits of their national jurisdiction. Article 12 requires the Contracting Parties to maintain inventories of biodiversity within their jurisdiction and to establish data banks of such inventories in cooperation with other Contracting Parties and international organisations. Article 13 enjoins the Conference of Parties, the apex body to administer the Convention, to publish a global list of biogeographic areas of particular importance for biodiversity conservation and a global list of species threatened with extinction on a global level.

28. Articles 14 to 19 constitute the backbone of this Convention. Article 14 on *Access to (Biological Diversity) (Genetic Material)* provides two alternatives. The first one requires each Contracting Party to provide on mutually agreed terms and subject to the provisions of this article, access to *in-situ* and *ex-situ* genetic material within its national jurisdiction for purposes of research and development for the collective benefit of mankind. The second alternative makes such access available only in accordance with the Protocols that may be adopted by the Conference of the Parties or bilateral or multilateral agreements in cooperation with relevant research institutions.

29. Article 14 *Bis* was proposed at the recently concluded INC Meeting in Nairobi and is aimed at protecting the traditional, indigenous and local knowledge that contributes to conservation and sustainable use of biodiversity.

30. Article 15 on *Access to Technology* requires the Contracting Parties to provide on mutually agreed terms access to relevant technologies inclusive of biotechnology and to eliminate or refrain from imposing restrictions (such as patents or other intellectual property rights) that run counter to the principles enshrined in the Convention. It also obligates the Contracting Parties to encourage the private sector within their jurisdiction to facilitate such access and joint development of technologies by both governmental institutions and the private sector in developing countries. However, paragraph 4 of this article has two alternatives, one overriding the intellectual property rights and the other maintaining the *status quo* in regard to the existing intellectual property regimes. Article 15 *Bis*, which is closely connected with both Articles 15 and 16, enjoins the Contracting Parties to ensure continuing exchange of information and specialized knowledge and to establish the necessary modalities therefor.

31. Article 16 on *Transfer of Technology* is more or less along the same lines as Article 15 except for substituting references to access to technology by references to transfer of technology. It obligated the Contracting Parties, in particular the developed ones, to transfer technologies to developing Contracting Parties on a [fair, equitable and (most) favourable] [preferential and non-commercial] basis. Further, in the case of those developing countries that provide the genetic material or are countries of origin of the genetic material, it requires the developed Contracting Parties to transfer biotechnology to them on mutually agreed terms. Furthermore, the developed Contracting Parties are enjoined to (encourage) (ensure) the private sector to transfer technologies to developing Contracting Parties on a [fair, equitable and (most) favourable] [preferential and non-commercial] basis. Two options exist for such transfers — one without any regard to patent regimes and the other having due regard for such regimes.

32. Article 17 on *Technical and Scientific Cooperation* obligates the Contracting Parties to promote such cooperation in the context of conservation of biodiversity. In particular, it enjoins the developed Contracting Parties to promote such cooperation with the developing Contracting Parties and to provide financial resources for this purpose.

33. Article 17 *Bis* on *Handling of Biotechnology and Distribution of Its Benefits* requires the Contracting Parties to exempt the developing Contracting Parties which are countries of origin of genetic material or providers of genetic material for research, from royalties on patents relating to the products of such research. The developed Contracting Parties are also required to establish mechanisms to invite the participation of developing Contracting Parties in biotechnological research, particularly in relation to the products obtained from species in areas within the jurisdiction of the latter.

34. Articles 18 and 19 are key provisions on funds and funding mechanisms. Article 18 requires the Contracting Parties to provide financial support for conservation of biodiversity which would have to be made available according to the criteria to be decided upon by the Contracting Parties (*inter alia* on the basis of country studies). It makes amply clear that compliance by the developing Contracting Parties with the obligations stipulated by the Convention would depend on the provision of adequate, new and additional financial resources and technology transfer by the developed Contracting Parties. Article 19 contemplates the establishment of financial mechanisms to extend financial support to the developing Contracting Parties to enable them to comply with the obligations established by the Convention. These include (i) the establishment of a multilateral trust fund and (ii) cooperative arrangements with existing bilateral and multilateral sources of funding. The establishment of these financial facilities is to be decided by the Conference of the Parties at their first meeting or by means of a special protocol to this Convention.

35. Article 20 on *International Cooperation* requires the Contracting Parties to cooperate with each other and with or through competent international organisations for coordination of their activities and assisting each other in fulfilling their obligations under the Convention. This provision in all probability would be included in Article 4 on General Obligations.

36. Article 21 deals with the relationship of this Convention with other International Conventions relating to conservation of biodiversity. Article 22 enjoins the Contracting Parties, *inter alia*, to designate national bodies to implement the provisions of the Convention and to coordinate national activities related to conservation measures.

37. Articles 23 to 33 deal with the institutional measures for the Convention itself. They contemplate the establishment of a Conference of the Parties as the apex body to administer the Convention with the help of a Scientific Committee and a Secretariat. Articles 34 to 41 are in the nature of Final Provisions dealing with signature, ratification, acceptance or approval; accession; entry into force; reservations; withdrawals; depositary; and authentic texts.

38. Out of the 47 draft articles (41 plus additional six articles), the four rounds of intergovernmental negotiations have so far been able to give a first reading to Articles 1, 3, 4 and 15 *Bis* and a second reading to Articles 5, 6, 15, 16 and 17. Articles 3 and 4 were expected to be taken up for a second reading at the fourth session of the INC, but their consideration has been deferred until after the Working Group II has completed its deliberations on the articles assigned to it as several of the basic principles and general obligations contained in Articles 3 and 4 are closely connected with negotiations in that Group. Moreover, even in the draft articles given a second reading, there are still options and square brackets to be resolved. Consequently considerable part of the Draft Convention remains to be tackled by the negotiators. These are Articles 2, 5 *Bis*, 7 to 13 and 18 to 41. They cover definitions of terms used in the Convention; identification and monitoring, *ex-situ* conservation; research and training; education and public awareness; environmental impact assessment; surveys and inventories;

establishing a global list of biogeographic areas of particular importance for the conservation of biological diversity and a global list of species threatened with extinction on a global level; relationship with other international conventions; institutional measures on a national level; institutional arrangements for the convention itself; settlement of disputes; annexes and protocols and other procedural clauses. Since only three more meetings of the INC are scheduled to take place before the run-up to UNCED in June 1992, one wonders if it would be possible for the INC to clear the backlog by that time.

39. Something seems amiss with the negotiating strategy adopted to tackle the issues arising from the Draft Convention. Parts of the Draft Convention have been assigned to two Working Groups, Working Group I and Working Group II, for negotiations. While Working Group I has been assigned almost two-thirds of the Draft Convention Working Group II has been allotted Articles 14 to 19 which constitute the heart of the Convention. The successful elaboration of the Convention depends upon consensus being reached on the issues addressed in them. These provisions deal with access to genetic resources, access to and transfer of technology and funds and funding mechanisms. The impact of these provisions permeates the entire Convention.

40. Since progress in Working Group II is obviously slow on account of the contentious issues before it, the progress of work in Working Group I is also being adversely affected. Moreover, the Draft Convention itself suffers from being structurally haphazard in that while some of its provisions are duplicative and overlapping, others happen to be misplaced. This has quite often resulted in shunting of provisions from one Group to another entailing waste of precious time. Another factor that has contributed to unnecessary discussions is the lack of definitions of terms used in the Draft Convention which would be included in Article 2. The following terms and expressions should have specific connotations to facilitate the negotiations: conservation; species; endangered species; threatened species; species threatened with extinction; indigenous population; customary/traditional use; components of biological diversity; genetic material; genetic resources; country of origin or country providing genetic material and/or genetic resources. Furthermore, simultaneous negotiations proceeding in the two Working Groups has posed a problem especially for developing countries with a limited number of expert personnel which could mean not being able to be involved in the negotiations.

41. Fortunately, the UNEP has appreciated this difficulty and is providing financial assistance for their participation, even though limited to one or two persons from each least developed country. However, a more basic problem common to most of the governments is that since the issues of biodiversity are trans-sectoral, delegates, in general, do not understand the real issues at stake because of their orientation being basically sectoral. What is required is cross-sectoral terms negotiating for each country, but this is something which the developing countries cannot afford. For them the difficulties are further compounded because of the two negotiating forums. It is, therefore, felt that the stage has now been reached when negotiations should proceed in a single forum so that the required momentum could be generated to finalize the Draft Convention before the June 1992 deadline. A single forum would quicken the pace of negotiations since negotiators would have an integrated look at the overall Draft Convention and a better perspective of the outstanding problems so as to be able to find the corrective solutions.

42. The crucial points in the ongoing negotiations appear to be access to genetic resources (Article 14), transfer of technology (Articles 15 and 16) and funds and funding mechanisms (Articles 18 and 19). There is an intrinsic interlinkage between

access to genetic resources and transfer of technology since the value of genetic resources depends on the technology to use them. For the most part, genetic resources are concentrated in developing countries and access to them has hitherto relatively been unrestricted whilst the technologies needed to exploit them are mainly with the industrialized countries which are protected by intellectual property rights. In view of the obstacles posed by the intellectual property systems to the diffusion of technology, the main fear of developing countries has been that industrialized countries want them to conserve their genetic resources in order to continue to exploit them. The developing countries have, however, become aware of the enormous value of their genetic resources and would like to have a trade-off with the industrialized countries so that in return for providing access to this resource they are able to secure relevant technologies so as to be able to build their own capability to maintain *ex-situ* collections including the use of technologies such as cryogenics (freezing techniques) and biotechnology. Biotechnology has tremendous potential for contributing to improved health care, food production, environmental problems and industry in developing countries. But it has potential environmental risks as well and it is not fully regulated in all countries. Concurrently, UNCED is developing international guidelines for assessment of risks of biotechnology. Therefore, before they acquire this sophisticated technology, developing countries would do well to install the requisite infrastructural facilities as well as to develop skills so as to be able to absorb it. The Convention needs to strike a right balance between national sovereignty over genetic resources and collective responsibility for conservation and rational use of biodiversity.

43. Another issue of vital importance relates to the provision of funds and establishment of funding facilities for the application of the Convention nationally and internationally. Article 18 of the Draft Convention requires the Contracting Parties to provide financial support for conservation of biodiversity according to the criteria to be decided upon by the Contracting Parties. One such criterion could possibly be the assessment of all States based on their GNP and transfer to biodiverse States on the basis of need.

44. Article 19 contemplates the establishment of a multilateral trust fund and cooperative arrangements with existing bilateral and multilateral sources of funding. Consequently, what is being envisaged is the setting up of a multilateral trust fund with an initial base of US $500 million and an international corporation with initial funding of US $200 million. An important requisite in this context is the reaching of an agreement on an order of magnitude for the finances needed during the first few years of operation of the Convention. At the third meeting of the INC in Madrid, an option considered was the UNEP-UNDP-World Bank's Global Environment Facility (GEF). The GEF which provides grants or highly concessional resources to developing countries to meet the cost of well-appraised conservation projects is being suggested by some countries as the main funding mechanism for the Convention.

45. Developing countries have, however, expressed apprehension about the operations of the GEF. The negative features pointed out about the GEF operations are that the UNEP has refused to put projects to GEF because it does not have clear environment assessment criteria; that a panel of experts to help with environment assessment has just been put in place, but developing countries do not have confidence in the panel of experts; they are good scientists but have little knowledge of development; and that the World Bank seems to consider grants of less than US $5 million not to be worth while, whereas a lot could be done with smaller amounts of money. The positive feature about the GEF is that at least a mechanism has been set up and countries are contributing money. If GEF is envisaged as the funding mechanism for the implementation of the Convention, it would be crucial to detach it from suspicion.'

57. Discussion of the item took place at a special meeting from 26 to 27 January 1992, during the Committee's Thirty-First session. The *Secretary-General* introducing the item recalled that the Committee, at its Twenty-Ninth session in Beijing in 1990, while endorsing the future work programme in the field of the environment, had recommended that it participate actively in the preparatory phase of the United Nations Conference on Environment and Development scheduled to be held in Brazil in June 1992. Since then the AALCC Secretariat had drawn up an extensive programme to assist Member Governments in their preparations for UNCED which covered: (i) promotion of ratification of the 1982 UN Convention on the Law of the Sea and its subsequent implementation; (ii) transboundary movement of hazardous wastes and their disposal; (iii) consideration of issues before the Prepcom of UNCED, particularly Working Group III dealing with legal and institutional matters; (iv) assistance in the preparation of the Framework Conventions on climate change and on biodiversity; and (v) development of legal principles on environmentally sound and sustainable development. The Secretariat had monitored developments on these subjects in various forums and its findings were reported in the documents now before the Committee. In his view, because of the long-term nature of environmental protection, the Committee's concern and involvement should continue even after the conclusion of the Rio Conference, so as to include such activities as general assessment of the outcome of the Rio Conference; monitoring future stages of UNCED and follow-up of its new programmes with legal implications; preparation of analysis and comment on the Framework Conventions on climate change and biodiversity if adopted, monitoring developments after the signing of the Convention, and making recommendations thereon to Member States of the Committee in respect of ratification; studies on the further development of international environmental law; rendering assistance to Member States upon request in the field of national legislation concerning protection of the environment; and strengthening co-operation between AALCC and UNEP.

(a) *Notes on major agenda items of Prepcom Working Group III, dealing with* progress in drafting *the 'Earth Charter/Rio Declaration' and with the* survey *of existing agreements and* institutional issues (Doc. No. AALCC/XXXI/ ISLAMABAD/92/1) *(summary of the discussions as reflected in Report, pp. 219–258)*

58. There was general support for the Secretary-General's proposals concerning AALCC's role with regard to preparations for UNCED, participation at the Conference, and monitoring, study and assessment of subsequent developments.

59. The 'Earth Charter/Rio Declaration' should deal with the most urgent issues of environment and development, in particular those of importance to the developing countries including those relating to the right to a safe and clean environment, sustainable development, transfer of technology and funding. Among the central legal issues involved were those relating to (a)

the concept 'common concern' or 'common heritage' of mankind, (b) State responsibility, (c) liability, (d) settlement of disputes and (e) the nature and status of the proposed charter/declaration. The text should be action-oriented and readily translatable into national legislation. The Prepcom should streamline its procedures and make every effort to reach consensus on the issues before it.

60. The developed countries during their period of industrialization, had caused the present degradation of the environment, and were also mainly responsible for its continued deterioration through their excessive exploitation and consumption of natural resources, and massive emission of pollutants. In most developing countries, poverty was the cause of environmental degradation, and protection of the environment in those countries could only be achieved through the eradication of poverty. Accordingly, for them, issues of economic development and environmental protection were inextricably linked.

61. For the developing countries, rapid economic development was the first priority. Accordingly, when asked to share the burdens of protecting and preserving the environment, and to allocate a portion of their scarce resources for such purposes, they could only do so to the extent that the diversion did not adversely affect their economic development programmes. For them, environmental protection would become feasible if they were to receive (a) new and additional financial resources, and (b) transfer of environmentally sound technologies on concessional or preferential terms.

62. While protection and preservation of the environment might be regarded as a common concern of all countries, the derived responsibilities should be differentiated. Thus, the application of environmental standards by developing countries should be in accordance with their respective capabilities. While the developing countries might undertake to incorporate environmental safeguards into their development plans, the developed countries should undertake to promote the economic development of through, for example, reduction of the external debt burden of the developing countries, or increasing financial flows to them.

63. It was important, moreover, that financial assistance not be subjected to unacceptable conditionalities; and equally, that environmental regulations not be used as tools in establishing non-tariff barriers in global trade. It was proposed that the Secretariat study and report on (i) tariff or non-tariff measures for the purpose of environmental conservation provided for both in national legislation, and in bilateral or regional agreements; and (ii) possible trade distortions through intellectual property rights in environmental technology.

64. The survey of existing international agreements and instruments concerning the environment should cover reasons for the reluctance of the developing countries to adhere to them, which would include the difficulty of implementing many of the commitments provided for thereunder. Thus, any action to promote ratification of treaties should be selective, and take into account the capabilities of States to implement the undertakings in

those treaties. Proliferation of international agreements imposing a multiplicity of conditions relating to environmental protection represented an undue burden on the developing countries and should be avoided.

65. Similarly, proliferation of institutions dealing with environmental issues added to the difficulties of the developing countries and could be an obstacle to their effective participation in the global effort to resolve those issues. It was proposed that an international supervisory authority be appointed, charged with co-ordinating activities and programmes aimed at the prevention of further degradation of the environment.

(b) *Draft Framework Convention on Climate Change* (Doc. No. AALCC/XXXI/ISLAMABAD/92/2) *(summary of the discussions as reflected in Report, pp. 219–258)*

66. The countries which had, during their period of industrialization, brought about widespread degradation of the environment, were also mainly responsible for the climatic changes which gave rise to the need for a convention. Accordingly, such a convention should include their commitment to providing the developing countries, for which rapid economic development was the highest priority, with financial assistance and environmentally sound technologies to enable them to participate effectively in international co-operation aimed at dealing with climate change, in accordance with their capabilities and without impairing their development efforts.

67. As to funding, the World Bank's Global Environment Facility (GEF) might be a step in the right direction, but was not enough. It should be supplemented, *inter alia*, by additional funds generated on the basis of the 'polluter pays' principle. In regard to transfer of technology, a re-definition of intellectual property rights was needed that would balance such rights with the developing countries' need for environmentally sound technologies. The development of human resources in those countries, including education and training, were also of importance in that connection.

68. In order that realistic and practicable strategies should be adopted by the developing countries within their capabilities and means, they should have access to the best scientific knowledge available. The Convention could establish an organizational mechanism which would serve such a purpose.

69. Consideration should be given to the particular situation of developing countries whose economies were heavily dependent on the export of fossil fuels. In that connection, the Convention should require the industrialized countries, which were the largest consumers of such fuels and currently responsible for the largest emissions of greenhouse gases, to reduce such emissions.

(c) *Draft Convention on Biological Diversity* (Doc. No. AALCC/XXXI/ ISLAMABAD/92/3) *(summary of the discussions as reflected in Report, pp. 219–258)*

70. The decline of biological diversity due to human activity was proceeding at a rate that had given rise to concern, and could be irremediable. The developing countries were concerned that, while they were the main repositories of biological resources and had permitted relatively free access to them, the industrialized countries possessed the technology to exploit those resources, technology which was protected by intellectual property rights. Since the value of biological resources depended on the availability of technology to exploit them, the issue of access to the resources on the one hand, and issues relating to transfer of technology, funding and a funding mechanism for application of the Convention on the other, were among the most important awaiting negotiation at UNCED. The proposed Convention on Biological Diversity should strike the right balance between national sovereignty over biological resources and collective responsibility for conservation and rational use of biodiversity.

71. The Convention should, *inter alia*, make provision for the following: (i) an appropriate definition of the concept 'biological diversity' that would cover not only those species that are consumed by human beings and are considered to have economic value, but all species forming part of the web of life and are of importance for the support of life on the planet; (ii) recognition of national sovereignty of each State over its biological resources; (iii) direct linkage between conservation of biodiversity in developing countries and access to their biomaterials; (iv) protection and rewarding of local farmers, and of traditional, indigenous and informal innovations by local nationals; (v) access of developing countries to end products made from biomaterials from those countries, and to the relevant technologies; (vi) equitable sharing of research in biotechnology; (vii) equitable sharing of benefits and profits from the use of biomaterial, with the consent of the State of origin; (viii) transfer of technology to the developing countries on a preferential and non-commercial basis; (ix) new, additional and adequate funding for application of the Convention; and (x) equal emphasis on the rights and obligations of States.

(d) *Report of the AALCC Working Group on UNCED*

72. The open-ended Working Group established by the Committee (*Rapporteurs*: JAMSHED HAMID (Pakistan), AMRIT ROHAN PERERA (Sri Lanka); *core membership*: delegates of Arab Republic of Egypt, China, Ghana, India, Japan, Kenya, Libya, Pakistan, Sri Lanka) submitted a Report, to which was appended a *Statement of General Principles of International Environmental Law*. Based on a draft prepared by the Secretariat, the *Statement* attempted to reflect the views of as many delegations as possible. The Working Group agreed to place certain terms and expressions in brackets to accommodate the concerns of some delegations. The text of the *Statement*, which was later

adopted unanimously at a plenary meeting of the Committee (*Report*, p. 213),[20] reads as follows:

'. . .

STATEMENT OF GENERAL PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

The Asian-African Legal Consultative Committee after an exchange of views on legal aspects of environment and development affirms:

(i) that the environment is the common concern of mankind and that the environment and development are intrinsically and inextricably linked;
(ii) that the principle of sustainable development shall be given due effect and development shall not be pursued in a manner as would endanger the environment;
(iii) that all members of the international community shall ensure that no appreciable or significant harm is caused to the environment and that the environment does not suffer severe and irreversible degradation;
(iv) that the responsibility of member States of the international community shall be [common but differentiated] [differentiated] and the application and enforcement of environmental standards by the developing countries shall be in accordance with their respective capabilities and responsibilities;
(v) the need to protect inter-generation equities within the context of the progressive development and codification of international environmental law;
(vi) that the developed countrie in the interest of the common future of mankind and the protection and preservation of the environment, seriously consider making available to the developing countries [new] [adequate] and environmentally sound technologies on a [preferential and non-commercial] [fair and most favourable] basis;
(vii) that the developed countries, international and regional organizations and financial institutions consider, explore and, where necessary, make provision for [new] additional and adequate financial resources to the developing countries to meet the objectives of sustainable development and the protection and preservation of the environment;
(viii) that the UNCED should accord priority to the improvement and strengthening of the existing institutional mechanisms relating to environment and development in the United Nations system and to enhancing their cooperation and coordination; and
(ix) that any instrument to be adopted by UNCED should include appropriate provision for the peaceful settlement of disputes.'

Decision 7 of the Committee

73. The decision of the Committee on this item (*Report*, p. 114) relates to its work programme on the environment after the conclusion of UNCED, and reads, in part, as follows:

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[The Committee's] suggested measures and actions to be taken in this regard may include:

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20. Later reproduced in UNdoc./A/CONF.151/PC/WG.III/5.

1. Preparation of a general assessment of the outcome of the Rio Conference concentrating particularly on the issues with legal implications;
2. Continue to monitor the ongoing process of UNCED at its next stage and follow up aspects of its new programmes with legal implications;
3. Preparation of detailed analysis and comments on the two Framework Conventions on Climate Change and Biodiversity if adopted, and monitor the developments after the signature of the Conventions, and make recommendations to the Member States of the Committee in respect of ratification of the Conventions respectively as deemed appropriate;
4. Make studies on the further development of international environmental law. An item, "Legal Aspects of the Protection of the Environment of Areas Not Subject to a National Jurisdiction (Global Commons)", might be taken up by the Committee. The topic will hopefully be included in the future work programme of the International Law Commission.
5. Render assistance to the member States at their request in the field of national legislation concerning the protection of environment; and
6. Strengthen the co-operation between the AALCC and the UNEP. In this regard the conclusion of a co-operation agreement between AALCC and UNEP should be considered.

. . .'

4.2 United Nations Decade of International Law[21]

74. The Committee had before it a Note by its Secretary-General on the United Nations Decade of International Law (Doc. No. AALCC/XXXI/92/6) which presented an overview of the Committee's activities during the past year, and contemplated preparation of another set of notes and comments for transmission to the Office of Legal Counsel of the United Nations.

Decision 8 of the Committee

75. The Committee's decision on the item (*Report*, p. 115), *inter alia*

'. . .

Reaffirms the importance of strict adherence to the principles of International Law as in the Charter of the United Nations;

Affirms that many of the political, economic and social problems between Member States can be settled on the basis of the law;

Decides that the item be given serious attention and steps be taken to place the same on the agenda of the meeting of the Legal Advisers of Member States of the Committee to be convened at the UN Office in New York during the Forty-seventh Session of the General Assembly;

Welcomes the various initiatives taken by Member States of the Committee in the implementation and observance of the Decade;

Requests the Secretary-General to apprise the Secretary-General of the United Nations of the initiatives taken by the Committee in this regard;

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21. See 1 AsYIL (1991) 222.

Requests Member States to continue to give serious attention to the observance and implementation of the Decade;

Directs the Secretariat to continue its efforts towards the success of the U.N. Decade of International Law;

. . .'

4.3 Trade Law: Work of the Sub-Committee on International Trade Law Matters[22]

76. The Committee took up for consideration four items dealt with by the Sub-Committee on International Trade Law Matters: (a) Legislative activities of United Nations and other international organizations concerned with international trade law; (b) Legal aspects of privatization; (c) Debt burden of the developing countries; (d) Proposal for the establishment of a Data Collection Unit.

(a) *Legislative Activities of the United Nations and Other International Organizations*

77. The Committee had before it a document prepared by the Secretariat, entitled 'Legislative activities of United Nations and other international organizations concerned with international trade law' (Doc. No. AALCC/XXXI/ISLAMABAD/92/13) outlining work carried out on topics before the *United Nations Commission on International Trade Law* (legal guide for drawing up international countertrade contracts, model law on international credit transfers, model law on procurement, uniform law on standby letters of credit and guarantees, legal problems of electronic data interchange); the *United Nations Conference on Trade and Development* (international commodity agreements negotiated or renegotiated under UNCTAD auspices, international code of conduct on transfer of technology, multilaterally agreed equitable principles and rules for the control of restrictive business practices, model law or laws for the control of restrictive business practices and handbook on restrictive business practices legislation, and matters concerning maritime and multimodal transport, viz. charter parties, Review Conference on the UN Convention on a Code of Conduct for Liner Conferences, 1974 (1988, Resumed Session 1991), general average, UNCTAD/ICC rules on multimodal transport documents, multimodal transport and containerization, Draft Convention on Maritime Liens and Mortgages, and progress in ratification of the 1980 UN Convention on International Multimodal Transport of Goods, and the 1986 UN Convention on Conditions for Registration of Ships); the *United Nations Industrial Development Organization* (topics covered by the UNIDO 'System of Consultations', promoting contacts between industrialized and developing countries directed towards industrialization of the latter); the *International Institute for the Unification of Private Law* (UNIDROIT) (principles for international commercial contracts, the Hotelkeeper's Contract, international protection of cultural property, the

22. Cf. 1 AsYIL (1991) 224, 225, 227. See below, paras. 88–89.

Franchising Contract, relations between principals and agents in international sales of goods, security interests in mobile equipment, civil liability connected with the carrying out of dangerous activities, and uniform rules on forwarding agency); and the *Hague Conference on Private International Law* (preparation of a convention on the law applicable to negotiable instruments, work on the law applicable to automatic data processing, contractual obligations in general, agreements on licensing of technology and transfer of know-how, and unfair competition, as well as revision of the 1965 Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, and the 1970 Convention on the Taking of Evidence in Civil and Commercial Matters).

(b) *Legal Aspects of Privatization*

78. The Committee had before it a document prepared by the Secretariat at the request of the Sub-Committee entitled 'Legal aspects of privatization' (AALCC/XXXI/ISLAMABAD/92/14) intended, *inter alia*, to assist Member Governments to carry out the privatization programmes recently recommended by multilateral financial and monetary institutions in a manner not detrimental to national economic interests.

The document explains that most countries emerging from colonial rule and in search of a development model that would revitalize their economies, chose a 'mixed economy' in which primacy was given to the public sector, and the private sector was intended to play a complementary role. The rationale for this choice was that the State should ultimately determine economic policy, and that the welfare of the masses could be achieved only through socialism.

79. Although countries applying such development model achieved a degree of industrialization and self-reliance, overall performance by public sector enterprises (PSEs) was less than satisfactory, and has led to their becoming a severe financial burden to the State. Among the reasons for failure of PSEs are:

'(i) Some of the PSEs have virtually become social welfare organizations with no accent on efficiency and productivity. They have become breeding grounds for corruption, patronage, inefficiency and bureaucracy, guzzling huge resources from the larger economy.

(ii) The PSEs are incurring continuous and staggering losses on account of their producing goods and services at high cost and of indifferent quality.

(iii) Their freedom of operation is severely curtailed due to excessive interference by Governments, formally or informally.

(iv) They have bred a culture of no work.'

Accordingly, multilateral financial agencies have recently urged (1) closure of chronically sick PSEs, and (2) re-organization or privatization of the remainder, and have made financial assistance available to meet the cost of retrenchment and monetary benefits for workers, with a view avoiding industrial unrest that might accompany closure of PSEs.

80. Privatization and deregulation of the national economy has now become government policy in some 50 countries, including India, Pakistan, Sri Lanka, China and other countries of Southeast Asia, Angola, Algeria, Ethiopia, Kenya, Mexico, Chile and western and eastern Europe. Factors that led to this trend include (i) the success of privatization in the United Kingdom under Prime Minister Thatcher, (ii) the crumbling of economies that had relied on the public sector, such as those of eastern Europe, and their movement in the direction of privatization, (iii) movement away from the 'managing agency system' fostered under colonial rule, and the emergence of professional managers and a new entrepreneurial class, (iv) establishment of a substantial industrial and technological base and infrastructure, (v) growth of a capital market, and (vi) recognition that new industries like those concerned with micro-electronics, computers, and information technology may not necessarily benefit from State interference, and that withdrawal of the State from the economic process may be one of the keys to development. However, the manner and pace of privatization are important if adverse political consequences are to be avoided.

81. 'Privatization in essence means competition', and for the success of a programme of privatization there would have to be a restructuring of the economy and a fundamental change in the overall historical perspective. Four preconditions must be satisfied: (i) the economy must be globalized, and infra-national and international competition fully encouraged, (ii) subsidies must be abolished, (iii) price controls must be abolished, and (iv) internal and external protection through non-tariff measures must be abolished. However, poverty alleviation, equitable distribution of goods and services and maintenance of regional balances continue to be the major demands on governments, which have recourse to subsidies through the mechanism of administered and retention prices.

82. Accordingly, privatization is a long-term objective toward which governments should proceed in stages: (I) 'partial privatization' commencing with initial disinvestment of up to 20–25%; (II) proceeding, in the case of selected viable PSEs up to 49% without waiting for major re-structuring of the economy, with the objectives of (a) improving efficiency, (b) making available funds for modernization, expansion and growth, (c) giving PSEs independence and making them accountable for performance, and (d) distancing the government from the day-to-day functioning of PSEs; (III) 'effective privatization' involved giving away control over the PSE, provided equity is distributed among a large number of shareholders, including the workers of the enterprise; (IV) 'total privatization' implying total withdrawal of the State from the enterprise. As to chronically sick PSEs, workers should be given the opportunity to run them, and, if this fails, they should be closed, appropriate measures being taken for rehabilitation and relocation of workers. Capital raised through disinvestment should be placed in a separate fund and utilized for (a) re-investment in the public sector for modernization, expansion and corporate growth, (b) assisting ailing PSEs and turning them around, (c) establishing a social security scheme to safeguard the rights of workers, and (d) intervention in the market to sustain public confidence in this equity.

83. The legal aspects of privatization are addressed in the document,[23] as follows:

. . .

14. For implementing stages I and II of privatization, which can be characterized as partial privatization, there is already in place in most of the countries of the region the requisite legal framework, although a few changes will be required in certain legislation and a few items of fresh legislation may have to be enacted to create the new autonomous bodies to be entrusted with the task of facilitating and overseeing the process of partial privatization. At present, the equity of PSEs is not quoted at stock exchanges and therefore arrangements will have to be made to determine the sale and purchase price of their shares. For this appropriate changes and devices will have to be worked out in the Companies and Securities laws. Moreover, while embarking on a programme of progressive privatization, industrially sick units will have to be closed down which will result in massive retrenchment and unemployment of workers. Suitable amendments will have to be affected in the relevant industrial/labour laws to ease the cost of human adjustment.

15. For implementing stages III and IV of privatization, since the character of the PSE undergoes a transformation, considerable restructuring will be involved. Such restructuring will need a suitable legal framework. This legal framework generally includes constitutional guarantees and/or a law creating and respecting property rights, in which the term "property" is given the widest connotation; a law setting forth provisions for the transfer of property; a law regulating industrial development; a law relating to pollution prevention and environmental protection; a companies law; a contract law; an insolvency law; a securities law; a law of taxation on corporate incomes and dividends; an excise law (*ad valorum* and a value-added taxes); a competition law; and a set of industrial/labour laws regulating, *inter alia*, the treatment of employees in privatized enterprises.

16. Constitutional guarantees and/or a law creating and respecting property rights is a prerequisite because clearly defined property rights are an essential precondition of privatization. The law regulating transfer of ownership of land and businesses is required because almost all businesses to be privatized will involve the transfer of, or the right of use of, land from the State to the enterprises concerned. Such a law will provide whether companies with a certain percentage of foreign ownership can hold real property, and if so, under what conditions. The law relating to industrial development will specify the sectors which are reserved to the public sector and those which are open to the private enterprise. The prevention of pollution law, apart from checking pollution, will fix the liabilities for pollution damage caused by industrial accidents. The company law will specify the forms of business organisations (joint stock companies, both public and private, partnerships etc), confer separate legal personality on the business organizations and provide the extent of protection to investors from liabilities incurred by the business organisations in which they invest. The contract law is a *sine qua non* for commercial exchanges as it makes the contractual obligations binding on the parties to a contract. The insolvency law is necessary to deal with those businesses which fail to make a profit or are unable to continue to pay to their creditors. This will apply to private individuals as well as to businesses and will deal with the way in which outstanding creditors are paid for the pool of

23. AALCC/XXXI/ISLAMABAD/92/14 pp. 9 *et seq.*

remaining assets. The securities law is required to create the necessary legal and regulatory framework within which the market for trading securities is established and made functional and to protect the interests of investors. Such a law will also lay down rules governing the operation of a stock-exchange and the information that must be disclosed by companies to obtain a listing on the exchange. The tax law, apart from taxing corporate incomes and dividends, will provide fiscal incentives for the establishment of new industrial enterprises. The competition law, an essential precondition for privatization, is intended to promote a healthy competitive environment and to ensure that PSEs, once privatised, do not maintain their monopolistic position. Side by side with the competition law, an independent *quasi* judicial body (such as the Monopolies and Restricted Trade Practices Commission in India) will have to be created to investigate and to implement the said legislation.

17. This body of laws may have to be complemented by a transformation law and a privatization law. The transformation law will be needed to facilitate the transfer of title to businesses from the State to the private sector. Such a law will provide that a PSE may be transformed either by the Government itself or by the management and/or workers with the permission of the Government. It might adopt either of the following two approaches: (i) the PSE may be transformed into a company, and once this has taken place the State will be the sole shareholder of the company and the shares may then be sold in the privatization process; and (ii) a new company will be formed and the government will contribute various assets together with the business as a going concern as its contribution to the capital. The remaining shares in the new enterprises may then be sold to raise finance for the running of the business.

18. A specific law on privatization will be necessary to empower the government to carry out the privatization programme. This is because under the Constitutions of many a State, a trade or industry can be nationalised by legislation and that too for a public purpose. From that it necessarily follows that a trade or industry can be privatised only by a specific enactment for that purpose and that such legislation must disclose the grounds on which public or community interest is better served by privatization. Moreover, in the case of those countries whose Constitutions ordain the State to function as a welfare State and vest the ownership of all means of production and natural resources in the State, a constitutional amendment may be necessary specifically providing that privatization is justified in public interest only when it leads to greater productivity, efficiency and development.'

. . .

84. Recognizing that social and economic conditions and existing legal parameters would vary among Member States of AALCC, and that the collection of relevant information from those States would be necessary in order to identify the policy and legal issues that could arise in connection with privatization, the Secretary-General with his letter dated 30 July 1991 circulated a questionnaire to Member States, inviting a response as soon as possible. By the opening of the Committee's Thirty-First session, only two States had responded. The Secretariat's questionnaire is reproduced below, together with the response of Singapore, chosen by way of example, for its completeness.

. . .

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE QUESTIONNAIRE

1. What have been the social, economic and political factors which have led your Government to go in for privatisation?

2. How is the term "privatisation" defined in your country?
3. What aims has your country set for privatisation?
4. What is the precise sphere of privatisation (sectors and industries)?
5. What are the economic, financial, fiscal and legal preconditions for privatisation in your country?
6. The basic methods and procedures for privatisation appear to be as follows:

(i) *Private sale of shares* — In this, the State sells all or part of its shareholding in a wholly- or partly-owned State enterprise to a pre-identified single purchaser or group of purchasers.
(ii) *Public offering of shares* — In this the State sells to the general public or to a limited class of purchasers all or large blocks of stocks it holds in a wholly or partly owned State enterprise.
(iii) *Managment/Employees Buy-out* — This refers to the acquisition of controlling shareholding in a company by a small group of management and/or employees.
(iv) *Sale of assets* — This involves sale of particular assets (trademarks, plants, etc.) rather than shares in a going concern.
(v) *Restructuring* — This involves the breaking-up of a State-owned enterprise into several subsidiaries.
(vi) *New private investments* — In this modality, the State does not dispose of its existing equity in a public undertaking, but increases overall equity and causes a dilution of the Government equity.
(vii) *Leases and Management Contracts* — These are arrangements whereby private sector management, technology and/or skills are provided under contract to a State-owned undertaking or in respect of State-owned assets for an agreed period and compensation.

Which of these modalities are adopted in your country for privatisation and what have been the legal problems encountered in that regard?

7. Has your Government set up a statutory body to supervise privatization process? If so, what is its role, rights and obligations?

RESPONSE OF SINGAPORE

Answer to Question 1

The rationale for our privatisation programme is as follow:

(a) To withdraw from commercial activities which no longer need to be undertaken by the public sector;
(b) to add breadth and depth to the Singapore stock market by the floatation of government linked companies and statutory boards and through secondary distribution of government-owned shares; and
(c) to avoid or reduce competition with the private sector.

Answer to Question 2

The initial sale of shares of a subsidiary that has hitherto been wholly-owned by the Government is "partial privatisation". The sale of shares of a partially privatised company is "further privatisation", sale to the extent of giving away control of a company is "effective privatistion" and complete withdrawal from a company is "total privatisation".

Answer to Question 3

Please see answer to Question 1.

Answer to Question 4

The Government has shareholdings in a very diversified group of companies. Our policy is to privatise as many companies as possible.

Answer to Question 5

Companies which are privatised through public floatation must satisfy the listing requirements laid down by the Stock Exchange of Singapore. Please see attachment.

Answer to Question 6

We do not restrict ourselves to any one particular method, as we have to look at the situation and circumstances of each case of privatisation. We have not encountered any major legal problems so far.

Answer to Question 7

No.

[Attachment to response of Singapore]
ORIGINAL LISTING REQUIREMENTS

A. *Criteria for Original Listing*

101 *General*

The approval of an application for the listing of securities on the Stock Exchange of Singapore Limited is a matter solely within the discretion of the Exchange.

The Exchange has established certain numerical standards, set out below, which will be considered in evaluating potential listing applicants. Aside from the numerical standards set out below, there are, of course, other factors which must necessarily be taken into consideration in determining whether a Company qualifies for listing. A Company must be a going concern or be the successor of a going concern. While the amount of assets and earnings and the aggregate market value are considerations, greater emphasis is placed on such questions as the degree of national interest in the Company, the character of the market for its products, its relative stability and position in its industry, and whether or not it is engaged in an expanding industry with prospects of and/or maintaining its position.

102 *Ordinary Shares*

Companies applying for quotation of ordinary shares are, as a general rule, expected to meet the following criteria:

(1) It has a paid-up capital of at least $4,000,000.

(2) At least $1,500,000 or 25 per cent of the issued and paid-up capital (whichever is the greater) is in the hands of not less than 500 shareholders.

(3) A minimum percentage of the issued and paid-up capital is in the hands of shareholders each holding not less than 500 shares and not more than 10,000 shares:

Nominal value of issued and paid-up capital	*Minimum percentage*
less than $50 million	20%
$50 million and above and less than $100 million	15% or $10 million whichever is the greater
$100 million and above	10% or $15 million whichever is the greater

In complying with this distribution, the following are to be excluded:

(a) Holdings by parent, or companies deemed to be related by virtue of Section 6 of the Companies Act.
(b) Holdings by directors (including those of persons designated directors under the Companies Act).

(4) Except in very exceptional circumstances, the Exchange will refuse a quotation to partly paid shares, and even, should such a quotation be granted to such partly paid shares, the Exchange may impose such restrictions on the dealings in such shares.

103 *Bonds, Debentures and Loan Stock*

A Limited Liability Company seeking official quotation of Loan Securities may be considered for admission to the Official List if:

(1) It has at least $750,000 of issued loan securities of the class to be quoted;
(2) There are at least 100 holders of such securities;
(3) The securities are created and issued pursuant to a Trust Deed, which must comply with the Trust Deed requirements of the Exchange as set out in Part X, the trustee of which is:

(a) A company authorised by the law of Singapore to take in its own name and grant of Probate or Letters of Administration of the estate of a deceased person;
(b) A company registered under any law of Singapore relating to Life Insurance;
(c) A banking company;
(d) A company of which the whole of the issued shares are beneficially owned by one or more companies referred to in (a), (b) and (c) above;
(e) A company approved for this purpose by the Government of Singapore as trustee for the holders of such securities.

104 *Securities of Foreign Companies*

The requirements for admission to the Official List of foreign companies shall be prescribed by the Exchange from time to time and such requirements shall be published as "Guidelines for the listing of foreign companies".

105 *Exploration and Development Companies*

An application for listing from a Company whose current activities consist solely of exploration will not normally be considered, unless the Company is liable to establish:

(1) The existence of adequate reserves of natural resources which must be substantiated by the opinion of an expert in a defined area over which the Company has exploration and exploitation rights, and
(2) An estimate of the capital cost of bringing the Company into a productive position, and
(3) An estimate of the time and working capital required to bring the Company into a position to earn revenue.

106 *Property Investment/Property Development Companies*

The Exchange generally will not list a property Company unless a valuation of the freehold and leasehold property of the Company or the Group (such as the case may be) has been conducted by an independent professional valuer on a date which should be not more than six months from the date of the Company's application to the Exchange for quotation.

107 *Special types of Companies*

(1) Companies with good prospects for growth and are in need of raising capital may be considered for listing notwithstanding that they have yet to establish any track record or otherwise unable to comply with any of the listing requirements of the Exchange. The Exchange will take into consideration all pertinent factors, particularly with regard to the quality and expertise of the management and/or board of directors of the companies.

(2) If, in the opinion of the Exchange, a Company, seeking admission to the Official List is engaged in a business or activity which is peculiar to a particular trade and for which the requirements of the Exchange may not be totally applicable, the Continuing Listing Requirements of the Exchange in general and the Directorate Requirements in particular, may be amended to bring the requirements more in line with the nature or activity of the company.

B. *Policies*

111 *Conflicts of Interest*

The existence of material conflicts of interest between Companies and their officers, directors or substantial shareholders (or members of their families or concerns controlled by them) will be reviewed by the Exchange on an individual basis in considering the eligibility of Companies for original listing. In many cases, Companies may be able to eliminate conflicts situation prior to listing within a reasonable period after the listing and may be asked to do so. Where a conflict cannot be resolved promptly for some business reasons, the Exchange will consider all pertinent factors.

The most common types of conflict situation to which this policy applies include personal interests of officers, directors or principal shareholders in any business arrangements involving the Company, such as the leasing of property to or from the Company, interests in subsidiaries, interests in business that are competitors, suppliers or customers of the Company, loans to or from the Company, etc.

In considering the eligibility of Companies applying for original listing under its conflicts of interest policy, the Exchange considers, among other factors:

(1) persons involved in conflict and relationship to the Company;
(2) significance of conflict in relationship to the size and operations of the Company;
(3) any special advantage for management involved in the conflict;
(4) whether the conflict can be terminated, and if so, how soon and on what basis, and, if the conflict cannot be promptly terminated, whether:

(a) the arrangement is necessary or beneficial to the operations of the Company;
(b) the terms of the arrangement are the same or better than those that can be obtained from unaffiliated concerns;
(c) the arrangement has been approved by independent directors or shareholders;
(d) the arrangement has been adequately disclosed to shareholders through prospectus, proxy statements or any reports.

In some cases, the Exchange will require a Company to enter into a special arrangement with the Exchange, designed to reduce the possibility of a conflict situation that could not be terminated immediately.

112 *Memorandum and Articles of Association*

Companies seeking admission to the Official List of the Exchange are required to incorporate into their Memorandum and Articles of Association various provisions which are set out in Part IX of this Manual.

C. *Additional Requirements*

121 *Original Listing Application*

Companies seeking admission to the Official List must submit an application for original listing in accordance with Part II of this Manual. Application for original listing is designed to serve the purpose of placing before the Exchange the information essential to its determination as to the suitability of the securities for public trading on the Exchange.

122 *Prospectus*

All Companies seeking admission to the Official List of the Exchange, whether through a

public issue, Offer for Sale or an Introduction, must issue a prospectus which must, in addition to complying with the prospectus requirements of the Companies Act, comply with the prospectus requirements of the Exchange as set out in Part VII.

123 *Additional Listings*

Following listing, Companies and their registrars are not permitted to issue any securities in excess of those authorised for listing until the Exchange has approved an additional listing application covering the additional securities as described in Part IV.

124 *Listing Undertaking*

Companies applying for listing on the Exchange are required to enter into an Undertaking with the Exchange to comply with all the listing requirements and policies of the Exchange (See Appendix I).

125 *Allotment of shares reserved for employees etc.*

Companies seeking admission to the Official List may be permitted by the Exchange to reserve up to 10% of the offered shares for allotment to their employees, executive directors, customers, suppliers, etc. provided that the companies lodge with the Exchange a statement giving number of shares to be allotted to the following categories of persons and the basis of allotment:

(a) employees;
(b) executive directors;
(c) customers;
(d) suppliers; and
(e) others (state relationship with issuer).'

(c) *Debt Burden of the Developing Countries*

85. The Secretariat's document on the debt burden of developing countries (Doc. No. AALCC/XXXI/ISLAMABAD/92/16, the latest in a series of its studies of the subject, outlines the origins of the debt crisis facing the developing countries, and discusses various solutions proposed before the United Nations, GATT, UNIDO, UNCTAD, and the EC, proceeding thereafter to examine the legal aspects of 're-scheduling' and to suggest guidelines for developing countries engaging in the process as well as related renegotiation of loan agreements.

(d) *Research and Development of Legal Regimes Applicable to Economic Activities in Developing Countries*

86. Document AALCC/XXXI/ISLAMABAD/92/17 contained a proposal by the Secretary-General for the establishment of a Data Collection Unit as an integral part of the AALCC Secretariat, in implementation of a proposal made by the Republic of Korea at the Committee's Nairobi session (1989).[24]

Having recalled the proposal of the Republic of Korea for the establishment under the auspices of AALCC, of a 'Centre for Research and Development

24. Cf. 1 AsYIL (1991) 225.

of Legal Regimes applicable to Economic Activities and Changing Situation of the Afro-Asian countries', and that Government's willingness to contribute financially to the project, the Secretary-General suggests that establishment of such a Centre as an autonomous institution would require considerable financial outlays, preparatory work and acquisition of expertise. Thus, while establishment of an autonomous Centre should remain the long-term objective, a first practical step would be to set up a Data Collection Unit as an integral part of the Secretariat. The Secretary-General's proposals regarding staff and equipment for the Unit, as well as for financing its operation during 1992 and 1993 from the remainder of a grant made by Korea, are set out in the document.

87. The documents referred to in paragraphs 77–86 above were considered by the *Sub-Committee on International Trade Law Matters*, which also had before it a letter from the Secretary of UNCITRAL concerning a Congress on Uniform Law in the Twenty-First Century, to convene in New York from 18 to 22 May 1992, and inviting AALCC to make a contribution on the topic 'Value of universal unification for regional integration and development'.

88. After discussion of the documents before it, the Sub-Committee submitted a Report recording its decision to recommend to the plenary, *inter alia*, (i) that it request the Secretary-General to prepare a practice-oriented paper on the topic 'Value of universal unification for regional integration and development' as a contribution to the Congress referred to; (ii) that, as the topic 'Privatization' had acquired immense importance for the developing countries, it should urge Member Governments which had not responded to the Secretary-General's questionnaire on the topic to do so as early as possible and/or to furnish any relevant documentation to the Secretariat; and (iii) that, as a Data Collection Unit was likely to be set up soon as in the AALCC Secretariat, it should request the Secretary-General to take the necessary steps to conclude co-operation agreements between AALCC and other international and regional organizations active in the areas of international trade law and economic relations so as to stimulate the flow of information to the Data Collection Unit (*Report*, pp. 98–101).

89. The Report of the Sub-Committee was adopted unanimously at the Committee's Plenary session (*Report*, p. 213).

UNITED NATIONS ACTIVITIES WITH SPECIAL RELEVANCE TO ASIA 1991-1992

LEE SHIH-GUANG

1. ADMISSION OF NEW MEMBERS TO THE UNITED NATIONS

On 17 September 1991, the Democratic People's Republic of Korea and the Republic of Korea were admitted to the United Nations upon the recommendation of the Security Council, bringing total membership in the United Nations to 166.

2. AFGHANISTAN

The General Assembly, *inter alia*, called upon all parties concerned to work urgently for the achievement of a comprehensive political solution, the cessation of hostilities and the creation of the necessary conditions for peace and normalcy that would enable the Afghan refugees to return voluntarily to their homeland in safety and honour; emphasized the need for an early start of the intra-Afghan dialogue for the establishment, through democratic procedures acceptable to the Afghan people, including free and fair elections, of a broad-based ground to ensure the broadest support and immediate participation of all segments of the Afghan people; requested the Secretary-General and his Personal Representative to continue to encourage and facilitate the early realization of a comprehensive political settlement in Afghanistan in accordance with the provisions of the Geneva Agreements and of General Assembly resolution 46/23 (Report of the Secretary-General on the status of the process of political settlement, A/46/577 — S/23146.)

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, Volume 2, 255-277

3. CAMBODIA

3.1. The Agreements on a Comprehensive Political Settlement of the Cambodia Conflict was signed on 23 October 1991, in Paris (S/23177), which was welcomed and supported by both the Security Council and the General Assembly. The Agreements provided, *inter alia*, for the designation of a Special Representative of the Secretary-General and the establishment of a United Nations Transitional Authority in Cambodia (UNTAC).

3.2. The Security Council called upon all Cambodian parties to comply fully with the ceasefire that entered into force upon signature of the Agreements, and the Supreme National Council of Cambodia, and all Cambodians for their part, to co-operate fully with the United Nations in the implementation of the Agreements as a comprehensive political settlement of the Cambodia conflict (SC resolution 718).

3.3. The General Assembly, *inter alia*, expressed support of the efforts of the Secretary-General to set up an effective UNTAC in Cambodia, with the aim of restoring peace and stability in Cambodia and to implement the Paris Agreements; called upon all parties concerned to ensure respect for and full observance of the human rights and fundamental freedoms of the Cambodian people to assist them to examine their right to self-determination in free and fair elections, as provided for in the Paris Agreements (resolution 46/18).

4. INDIAN OCEAN AS A ZONE OF PEACE

The General Assembly reiterated its decision to convene the first stage of a United Nations Conference at Colombo in 1993 as a necessary step for the implementation of the 1991 Declaration of the Indian Ocean as a Zone of Peace, which was adopted by a large majority but called for the full and effective participation in the Conference of the permanent members of the Security Council and the major maritime users of the Indian Ocean (resolution 46/49, adopted by a large majority, but France, Japan, United Kingdom and USA voted against the resolution).

5. HUMAN RIGHTS

5.1. Afghanistan

The General Assembly urged all parties concerned to increase the efforts in order to achieve a comprehensive political solution based on the five points of the Secretary-General's plan of 21 May 1991 on the free exercise of the right to self-determination by the people of Afghanistan through democratic procedures acceptable to the Afghan people, including free and fair

elections, the cessation of hostilities and the creation of conditions that would permit the free return of refugees to their homeland in safety and honour, whenever they wish, and the full enjoyment of human rights and fundamental rights and freedoms by all Afghans; urged all parties to the conflict: (a) to respect accepted humanitarian rules as set out in the Geneva Conventions of 12 August 1949 and the additional protocols thereto of 1977; (b) to halt the use of weapons against the civilian population; (c) to protect all prisoners from acts of reprisals and violence, including cruel treatment, torture, and summary executions; (d) to transmit to the International Committee of the Red Cross the names of all prisoners; (e) to expedite the exchange of prisoners wherever they may be held; and (f) to grant to the ICRC unrestricted access to all parts of the country and the right to visit all prisoners in accordance with its established criteria; called upon all States and parties concerned to render all possible assistance in order to resolve the issue of all prisoners of war as a result of the conflict; requested the Afghan authorities to take the proper steps in order to permit activity by the political opponents; appealed to all conflicting parties to act likewise; urgently appealed to all member States, humanitarian organizations, and all parties concerned to co-operate fully, especially on the matter of mine detection and clearance in order to facilitate the return of refugees and displaced persons to their homes in safety and dignity; urged all parties concerned to undertake all necessary measures to insure the safety of personnel of humanitarian organizations involved in the implementation of United Nations humanitarian and economic assistance programs to Afghanistan (resolution 46/136).

5.2 Iraq

5.2.1. The General Assembly expressed its concern about the numerous allegations of grave human rights' violations by the Government of Iraq including arbitrary detention, extrajudicial killings, hostage-taking and the use of persons as 'human shields'; called upon the Government of Iraq to release all persons arrested and detained without ever being informed of charges against them, and without access to legal counsel or due process of law; called upon Iraq as a State Party to the International Covenant of Civil and Political Rights to abide by its obligations to that Covenant and the other international instruments of human rights, and particularly, to respect and ensure these rights to all individuals irrespective of their origin within its territory and subject to its jurisdiction, including Kurds and Shiites; called upon Iraq to reply quickly in a comprehensive and detailed manner to the allegations mentioned above (resolution 46/134).

5.2.2. The General Assembly requested Iraq to provide information on all Kuwaiti persons and third country nationals deported from Kuwait between 2 August 1990 and 26 February 1991 who may still be detained, and to release, in accordance with Iraq's obligations under Article 118 of the Geneva Convention relative to Prisoners of War and Article 134 of the Geneva Convention relative to the Protection of Civilian Persons in Times of War, these

persons without delay; requested Iraq to provide, in accordance with its obligations under Articles 120 and 127 of the Geneva Convention relative to Prisoners of War and Articles 129 and 130 of the Geneva Convention relative to the Protection of Civilian Persons in Times of War, detailed information on persons arrested in Kuwait between 2 August 1990 and 26 February 1991 who may have died during or after that period while in detention as well as on the site of their graves; further requested Iraq to search for the persons still missing and to co-operate with the international humanitarian organizations such as the International Committee of the Red Cross in this regard (resolution 46/135).

5.3. Myanmar

The General Assembly reaffirmed that all Member States have an obligation to promote and protect fundamental freedoms stated in the Charter of the United Nations and elaborated in the Universal Declaration of Human Rights and the International Covenants on Human Rights and other applicable human rights' instruments; noted with concern the grave human rights situation in Myanmar; took note that the Government of Myanmar had assured the Assembly and the other United Nations bodies of its intention to take all necessary steps toward democracy in the light of elections held in 1990; looked forward to the early implementation of this commitment; urged the Government of Myanmar to allow all citizens to participate freely in the political process in accordance with the principles of the Universal Declaration of Human Rights (resolution 46/132).

5.4 Covenants on Human Rights

5.4.1. The Second Optional Protocol (abolition of the death penalty) to the International Covenant on Civil and Political Rights entered into force on 11 July 1991.[1]

5.4.2. The General Assembly urged States Parties to the Covenants to fulfil their reporting obligations under the International Covenants on Human Rights; emphasized the importance of the strictest compliance by States Parties with their obligations under the Covenants and, where applicable, the Optional Protocols to the International Covenant on Civil and Political Rights; stressed the importance of avoiding the erosion of human rights by derogation from the instruments; and the necessity of strict observance of the agreed conditions and procedures for derogation under Article IV of the International Covenant of Civil and Political Rights, bearing in mind the need for States Parties to provide the fullest possible information during

1. Report of the Secretary-General A/46/393 which contained information on the status of the Covenants.

states of emergency so that the justification for and appropriateness of measures taken in these circumstances could be assessed; appealed to States Parties of the Covenants that have exercised their sovereign rights to make reservations in accordance with relevant rules of international law to consider whether such reservations should be reviewed (resolution 46/113).

5.5. Human Rights of Indigenous People

The General Assembly adopted a program of activities to be taken at the national and international level, following the Assembly's decision to proclaim 1993 as the International Year for the World's Indigenous People (resolution 46/128).

6. IRAQ INVASION OF KUWAIT: SUBSEQUENT DEVELOPMENT

6.1. By its resolution 678 (1990) adopted on 29 November 1990, the Security Council authorized Member States co-operating with Kuwait's legitimate Government to use 'all necessary means' to compel Iraq to comply with all its relevant resolutions and to restore international peace and security in the area, if Iraq had not fully implemented such resolutions by 15 January 1991. Despite the diplomatic initiatives of a number of Member States and efforts by the Secretary-General (including his meeting with Iraqi President SADDAM HUSSEIN in Baghdad on 12 and 13 January 1991), Iraq continued its occupation of Kuwait. On 15 January 1991, the Secretary-General issued an appeal in which he urged Iraq to comply with the relevant Security Council resolutions beginning with resolution 660 (1990) and thus to 'turn the course of events away from catastrophe'. On 16 January 1991, one day after the deadline, the States co-operating with the Government of Kuwait, acting in accordance with the Council's authorization, but not under the control of or direction by the United Nations, began offensive military operations. On 27 February, after six weeks of intensive air and ground action, Kuwait City was liberated. The same day, Iraq reported that all of its armed forces had withdrawn from Kuwait. Within hours it also informed the Security Council that it had decided to comply with Security Council resolution 660 (1990) and all other Security Council resolutions. Offensive operations were suspended as of midnight on 28 February 1991. From 2 March 1991 to 11 October 1991, the Security Council adopted 11 resolutions on the situation between Iraq and Kuwait.

6.2. By its resolution 686 of 2 March 1991,[2] the Security Council, acting under Chapter VII of the Charter, demanded that Iraq implement its acceptance of all 12 resolutions adopted in 1990 and further demanded that Iraq:

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2. Adopted by a vote of 11 in favour, 1 against (Cuba), and 3 abstentions (China, India and Yemen).

(a) cease hostile or provocative actions by its forces against all Member States including missile attacks and flights of combat aircraft;
(b) designate military commanders to meet with counterparts from the forces of Kuwait and the Member States co-operating with Kuwait pursuant to resolution 678 to arrange for cessation of hostilities at the earliest possible time;
(c) arrange for immediate access to and release of all prisoners of war under the auspices of the International Committee of the Red Cross and return the remains of any deceased personnel of the forces of Kuwait and the Member States co-operating with Kuwait; and
(d) provide all information and assistance in identifying Iraqi mines, booby traps and other explosives as well as any chemical and biological weapons and material in Kuwait, in areas of Iraq where forces of Member States co-operating with Kuwait are present temporarily and in the adjacent waters.

6.3. Iraq informed the Secretary-General and the President of the Security Council on 3 March 1991, that it had agreed to fulfil its obligations under resolution 686. On 3 April, after more than one month of extensive consultations, the Security Council adopted resolution 687 (1991) setting specific terms for a formal ceasefire to end the conflict.[3] Resolution 687 of 3 April 1991 reads as follows (in part):

The Security Council,
Recalling its resolutions 660 (1990) of 2 August 1990, 661 (1990) of 6 August 1990, 662 (1990) of 9 August 1990, 664 (1990) of 18 August 1990, 665 (1990) of 25 August 1990, 666 (1990) of 13 September 1990, 667 (1990) of 16 September 1990, 669 (1990) of 24 September 1990, 670 (1990) of 25 September 1990, 674 (1990) of 29 October 1990, 677 (1990) of 28 November 1990, 678 (1990) of 29 November 1990 and 686 (1991) of 2 March 1991.

. . .

Affirming the commitment of all Member States to the sovereignty, territorial integrity and political independence of Kuwait and Iraq, and noting the intention expressed by the Member States cooperating with Kuwait under paragraph 2 of resolution 678 (1990) to bring their military presence in Iraq to an end as soon as possible consistent with paragraph 8 of resolution 686 (1991).

Reaffirming the need to be assured of Iraq's peaceful intentions in the light of its unlawful invasion and occupation of Kuwait.

. . .

Bearing in mind its objective of restoring international peace and security in the area as set out in recent resolutions of the Security Council.

Conscious of the need to take the following measures acting under Chapter VII of the Charter.

1. *Affirms* all thirteen resolutions noted above, except as expressly changed below to achieve the goals of this resolution, including a formal cease-fire;

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3. Adopted by a vote of 12 in favour, 1 against (Cuba) and 2 abstentions (Ecuador and Yemen).

(*A*)

2. *Demands* that Iraq and Kuwait respect the inviolability of the international boundary and the allocation of islands set out in the "Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters", signed by them in the exercise of their sovereignty of Baghdad on 4 October 1963 and registered with the United Nations and published by the United Nations in document 7063, United Nations, *Treaty Series*, 1964;

3. *Calls upon* the Secretary-General to lend his assistance to make arrangements with Iraq and Kuwait to demarcate the boundary between Iraq and Kuwait, drawing on appropriate material, including the map transmitted by Security Council document S/22412 and to report back to the Security Council within one month;

4. *Decides* to guarantee the inviolability of the above-mentioned international boundary and to take as appropriate all necessary measures to that end in accordance with the Charter of the United Nations;

(*B*)

5. *Requests* the Secretary-General, after consulting with Iraq and Kuwait, to submit within three days to the Security Council for its approval a plan for the immediate deployment of a United Nations observer unit to monitor the Khor Abdullah and a demilitarized zone, which is hereby established, extending ten kilometres into Iraq and five kilometres into Kuwait from the boundary referred to in the "Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters" of 4 October 1963;

. . .

(*C*)

7. *Invites* Iraq to reaffirm unconditionally its obligations under the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and to ratify the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, of 10 April 1972;

8. *Decides* that Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of:

(a) All chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities;
(b) All ballistic missiles with a range greater than 150 kilometres and related major parts, and repair and production facilities;

9. *Decides*, for the implementation of paragraph 8 above, the following:

(a) Iraq shall submit to the Secretary-General, within fifteen days of the adoption of the present resolution, a declaration of the locations, amounts and types of all items specified in paragraph 8 and agree to urgent, on-site inspection as specified below;

(b) The Secretary-General, in consultation with the appropriate Governments and, where appropriate, with the Director-General of the World Health Organization, within forty-five days of the passage of the present resolution, shall develop, and submit to the Council for approval, a plan calling for the completion of the following acts within forty-five days of such approval:
  (i) The forming of a Special Commission, which shall carry out immediate on-site inspection of Iraq's biological, chemical and missile capabilities, based on Iraq's declarations and the designation of any additional locations by the Special Commission itself;
  (ii) The yielding by Iraq of possession to the Special Commission for destruction, removal or rendering harmless, taking into account the requirements of public safety, of all items specified under paragraph 8 (a) above, including items at the additional locations designated by the Special Commission under paragraph 9 (b) (i) above and the destruction by Iraq, under the supervision of the Special Commission, of all its missile capabilities, including launchers, as specified under paragraph 8 (b) above;
  (iii) The provision by the Special Commission of the assistance and cooperation to the Director-General of the International Atomic Energy Agency required in paragraphs 12 and 13 below;

10. *Decides* that Iraq shall unconditionally undertake not to use, develop, construct or acquire any of the items specified in paragraphs 8 and 9 above and requests the Secretary-General, in consultation with the Special Commission, to develop a plan for the future ongoing monitoring and verification of Iraq's compliance with this paragraph, to be submitted to the Security Council for approval within one hundred and twenty days of the passage of this resolution;

11. *Invites* Iraq to reaffirm unconditionally its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968;

12. *Decides* that Iraq shall unconditionally agree not to acquire or develop nuclear weapons or nuclear-weapons-usable material or any subsystems or components or any research, development, support or manufacturing facilities related to the above; to submit to the Secretary-General and the Director-General of the International Atomic Energy Agency within fifteen days of the adoption of the present resolution a declaration of the locations, amounts, and types of all items specified above; to place all of its nuclear-weapons-usable materials under the exclusive control, for custody and removal, of the International Atomic Energy Agency, with the assistance and cooperation of the Special Commission as provided for in the plan of the Secretary-General discussed in paragraph 9 (b) above; to accept, in accordance with the arrangements provided for in paragraph 13 below, urgent on-site inspection and the destruction, removal or rendering harmless as appropriate of all items specified above; and to accept the plan discussed in paragraph 13 below for the future ongoing monitoring and verification of its compliance with these undertakings;

13. *Requests* the Director-General of the International Atomic Energy Agency, through the Secretary-General, with the assistance and cooperation of the Special Commission as provided for in the plan of the Secretary-General in paragraph 9 (b) above, to carry out immediate on-site inspection of Iraq's nuclear capabilities based on Iraq's declarations and the designation of any additional locations by the Special

Commission; to develop a plan for submission to the Security Council within forty-five days calling for the destruction, removal, or rendering harmless as appropriate of all items listed in paragraph 12 above; to carry out the plan within forty-five days following approval by the Security Council; and to develop a plan, taking into account the rights and obligations of Iraq under the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968, for the future ongoing monitoring and verification of Iraq's compliance with paragraph 12 above, including an inventory of all nuclear material in Iraq subject to the Agency's verification and inspections to confirm that Agency safeguards cover all relevant nuclear activities in Iraq, to be submitted to the Security Council for approval within one hundred and twenty days of the passage of the present resolution;

14. *Takes note* that the actions to be taken by Iraq in paragraphs 8, 9, 10, 11, 12 and 13 of the present resolution represent steps towards the goal of establishing in the Middle East a zone free from weapons of mass destruction and all missiles for their delivery and the objective of a global ban on chemical weapons;

(*D*)

15. *Requests* the Secretary-General to report to the Security Council on the steps taken to facilitate the return of all Kuwaiti property seized by Iraq, including a list of any property that Kuwait claims has not been returned or which has not been returned intact;

(*E*)

16. *Reaffirms* that Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait;

17. *Decides* that all Iraqi statements made since 2 August 1990 repudiating its foreign debt are null and void, and demands that Iraq adhere scrupulously to all of its obligations concerning servicing and repayment of its foreign debt;

18. *Decides also* to create a fund to pay compensation for claims that fall within paragraph 16 above and to establish a Commission that will administer the fund;

19. *Directs* the Secretary-General to develop and present to the Security Council for decision, no later than thirty days following the adoption of the present resolution, recommendations for the fund to meet the requirement for the payment of claims established in accordance with paragraph 18 above and for a programme to implement the decisions in paragraphs 16, 17 and 18 above, including: administration of the fund; mechanisms for determining the appropriate level of Iraq's contribution to the fund based on a percentage of the value of the exports of petroleum and petroleum products from Iraq not to exceed a figure to be suggested to the Council by the Secretary-General, taking into account the requirements of the people of Iraq, Iraq's payment capacity as assessed in conjunction with the international financial institutions taking into consideration external debt service, and the needs of the Iraqi economy; arrangements for ensuring that payments are made to the fund; the process by which funds will be allocated and claims paid; appropriate procedures

for evaluating losses, listing claims and verifying their validity and resolving disputed claims in respect of Iraq's liability as specified in paragraph 16 above; and the composition of the Commission designated above:

(F)

20. *Decides*, effective immediately, that the prohibitions against the sale or supply to Iraq of commodities or products, other than medicine and health supplies, and prohibitions against financial transactions related thereto contained in resolution 661 (1990) shall not apply to foodstuffs notified to the Security Council Committee established by resolution 661 (1990) concerning the situation between Iraq and Kuwait or, with the approval of that Committee, under the simplified and accelerated "no-objection" procedure, to materials and supplies for essential civilian needs as identified in the report of the Secretary-General dated 20 March 1991 [S/22366] and in any further findings of humanitarian need by the Committee:

21. *Decides* that the Security Council shall review the provisions of paragraph 20 above every sixty days in the light of the policies and practices of the Government of Iraq, including the implementation of all relevant resolutions of the Security Council, for the purpose of determining whether to reduce or lift the prohibitions referred to therein;

22. *Decides* that upon the approval by the Security Council of the programme called for in paragraph 19 above and upon Council agreement that Iraq has completed all actions contemplated in paragraphs 8, 9, 10, 11, 12 and 13 above, the prohibitions against the import of commodities and products originating in Iraq and the prohibitions against financial transactions related thereto contained in resolution 661 (1990) shall have no further force or effect;

23. *Decides* that, pending action by the Security Council under paragraph 22 above, the Security Council Committee established by resolution 661 (1990) shall be empowered to approve, when required to assure adequate financial resources on the part of Iraq to carry out the activities under paragraph 20 above, exceptions to the prohibition against the import of commodities and products originating in Iraq;

24. *Decides* that, in accordance with resolution 661 (1990) and subsequent related resolutions and until a further decision is taken by the Security Council, all States shall continue to prevent the sale or supply, or the promotion or facilitation of such sale or supply, to Iraq by their nationals, or from their territories or using their flag vessels or aircraft, of:

(a) Arms and related *matériel* of all types, specifically including the sale or transfer through other means of all forms of conventional military equipment, including for paramilitary forces, and spare parts and components and their means of production, for such equipment;
(b) Items specified and defined in paragraphs 8 and 12 above not otherwise covered above;
(c) Technology under licensing or other transfer arrangements used in the production, utilization or stockpiling of items specified in subparagraphs (a) and (b) above;
(d) Personnel or materials for training or technical support services relating to the design, development, manufacture, use, maintenance or support of items specified in subparagraphs (a) and (b) above;

25. *Calls upon* all States and international organizations to act strictly in accordance with paragraph 24 above, notwithstanding the existence of any contracts, agreements, licences or any other arrangements;

26. *Requests* the Secretary-General, in consultation with appropriate Governments, to develop within sixty days, for the approval of the Security Council, guidelines to facilitate full international implementation of paragraphs 24 and 25 above and paragraph 27 below, and to make them available to all States and to establish a procedure for updating these guidelines periodically;

27. *Calls upon* all States to maintain such national controls and procedures and to take such other actions consistent with the guidelines to be established by the Security Council under paragraph 26 above as may be necessary to ensure compliance with the terms of paragraph 24 above, and calls upon international organizations to take all appropriate steps to assist in ensuring such full compliance;

28. *Agrees* to review its decisions in paragraphs 22, 23, 24 and 25 above, except for the items specified and defined in paragraphs 8 and 12 above, on a regular basis and in any case one hundred and twenty days following passage of the present resolution, taking into account Iraq's compliance with the resolution and general progress towards the control of armaments in the region;

29. *Decides* that all States, including Iraq, shall take the necessary measures to ensure that no claim shall lie at the instance of the Government of Iraq, or of any person or body in Iraq, or of any person claiming through or for the benefit of any such person or body, in connection with any contract or other transaction where its performance was affected by reason of the measures taken by the Security Council in resolution 661 (1990) and related resolutions;

(*G*)

30. *Decides* that, in furtherance of its commitment to facilitate the repatriation of all Kuwaiti and third country nationals, Iraq shall extend all necessary cooperation to the International Committee of the Red Cross, providing lists of such persons, facilitating the access of the International Committee of the Red Cross to all such persons wherever located or detained and facilitating the search by the International Committee of the Red Cross for those Kuwaiti and third country nationals still unaccounted for;

31. *Invites* the International Committee of the Red Cross to keep the Secretary-General appraised as appropriate of all activities undertaken in connection with facilitating the repatriation or return of all Kuwaiti and third country nationals or their remains present in Iraq on or after 2 August 1990;

(H)

32. *Requires* Iraq to inform the Security Council that it will not commit or support any act of international terrorism or allow any organization directed towards commission of such acts to operate within its territory and to condemn unequivocally and renounce all acts, methods and practices of terrorism;

(I)

33. *Declares* that, upon official notification by Iraq to the Secretary-General and to

the Security Council of its acceptance of the provisions above, a formal cease-fire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678 (1990);

34. *Decides* to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area.

6.4. The Security Council, *inter alia*, declared that a formal ceasefire between Iraq, Kuwait and the countries co-operating with Kuwait would come into effect after official notification by Iraq of its acceptance of the conditions of resolution 687. On 6 April, Iraq officially notified the Secretary-General and the President of the Security Council that it had no choice but to accept the provisions of resolution 687. On 11 April, the President of the Security Council, on behalf of its members, formally accepted Iraq's notification. He noted that the conditions established in the resolution had been met and that the formal ceasefire was in effect.

6.5. Pursuant to resolution 687, the following bodies were to be established:

(a) The United Nations Iraq–Kuwait Observation Mission (UNIKOM): to monitor the Khawr Abd Allah Waterway between Iraq and Kuwait and the demilitarized zone extending 10 kilometres into Iraq and five kilometres into Kuwait, to deter violations of boundary through its presence in and surveillance of the demilitarized zone (DMZ), and to observe any hostile or potentially hostile action mounted from the territory of one State to the other;
(b) the United Nations Special Commission to oversee the destruction, removal or rendering harmless of all Iraq's chemical and biological weapons and related capabilities and facilities, and its ballistic missiles with a range greater than 150 kilometres. The Commission is also to assist the International Atomic Energy Agency in the destruction, removal or rendering harmless as appropriate of Iraq's nuclear capabilities;
(c) the Iraq–Kuwait Boundary Demarcation Commission: to demarcate the international boundary set out in the 'agreed minutes between the State of Kuwait and the Republic of Iraq regarding the restoration of friendly relations, recognition and related matters', signed by them on 4 October 1963 and registered with the United Nations;
(d) the United Nations Compensation Commission: to administer the Compensation Fund, to pay compensation for 'any direct loss, damage, including environmental damage, and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait'.

6.6 Pursuant to Security Council resolution 686 (1991), the Secretary-General appointed a senior United Nations official to co-ordinate the return of property from Iraq to Kuwait.

6.7. In addition, the Security Council's Sanctions Committee established by resolution 661 is to monitor the prohibitions against the sale or supply of

arms to Iraq and the related sanctions set out in resolution 687 in accordance with the approved guidelines. Furthermore, in pursuance of resolutions 706 and 712, the Sanctions Committee is responsible for monitoring the export by Iraq of petroleum and petroleum products during a period of six months beginning on 19 September 1991 to produce a sum not to exceed $1.6 billion for the purchase of items of a humanitarian character. The Committee is also responsible for monitoring the purchase of those items by Iraq and their distribution inside the country.

6.8. By its resolution 689,[4] the Security Council, acting under Chapter VII of the Charter, approved the Report of the Secretary-General on the implementation of paragraph 5 of Security Council resolution 687 (S/22454 and Addenda 1, 2, 3) and established UNIKOM; noted that the decision to set up UNIKOM was taken in accordance with paragraph 5 of resolution 687 and can only be terminated by a decision of the Council. The Council decided to review the situation every six months.

6.9. By its resolution 692,[5] the Security Council decided to establish the Compensation Fund and a Commission to administer the Fund (S/22559) under a Governing Council to be located in Geneva. The Security Council requested the Governing Council to report as soon as possible on the actions it had taken with regard to the mechanisms for determining the appropriate level of Iraq's contribution to the Fund and the arrangements for ensuring that payments are made to the Fund.

6.10. By its resolution 699,[6] the Security Council, acting again under Chapter VII of the Charter, approved the plan contained in the Report of the Secretary-General (S/22614) regarding the disposal of weapons, facilities and all other items specified in Section C of resolution 687, and confirmed that the Special Commission and IAEA have the authority to conduct activities under Section C of resolution 687 for the purpose of the destruction, removal or rendering harmless of the items specified in paragraphs 8 and 12 of that resolution, after the 45-day period following the approval of this plan until such activities have been completed. It also decided that the Government of Iraq shall be liable for the full costs of carrying out the tasks authorized by Section C of resolution 687.

6.11. By its resolution 700,[7] the Security Council approved the Guidelines to facilitate full international implementation of the arms embargo against Iraq required under its resolution 687 (S/22660). The Sanctions Committee established under resolution 661 was entrusted with the responsibility for the implementation of the Guidelines.

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4. Adopted on 9 April 1991 by unanimous vote.
5. Adopted on 20 May 1991 by a vote of 14 in favour, none against, 1 abstention (Cuba).
6. Adopted on 17 June 1991 by unanimous vote.
7. Adopted on 17 June 1991 by unanimous vote.

6.12. By its resolution 705,[8] the Security Council decided that compensation to be paid by Iraq (as arising from Section E of resolution 687) shall not exceed 30 per cent of the annual value of its exports of petroleum and petroleum products (S/22661).

6.13. By its resolution 706,[9] the Security Council decided, under Chapter VII of the UN Charter, the terms for the limited sale of Iraqi oil and oil products, for the purpose, *inter alia*, of meeting essential civilian needs under strict and close UN monitoring, and for the establishment by the United Nations of an escrow account to be administered by the Secretary-General.

6.14. By its resolution 707,[10] the Security Council condemned Iraq's 'serious violation' of a number of its obligations under Section C of resolution 687 (i.e. destruction of weapons) and of its undertakings to co-operate with the Special Commission and IAEA. The Council adopted a list of nine demands to Iraq.

6.15. By its resolution 712,[11] the Security Council confirmed the ceiling of $1.6 billion in limited Iraqi oil sale established by the Council in resolution 706, and invited its Sanctions Committee to authorize the Secretary-General to release immediate one-third of that asset from an escrow amount established by the United Nations to meet Iraq's essential civilian needs.

6.16. By its resolution 715,[12] the Security Council demanded that Iraq meet unconditionally all its obligations under two plans approved by the Council for the future monitoring and the verification of Iraq's compliance with resolution 687 and 707.

7. LAW OF THE SEA

7.1 As of 12 December 1991, fifty-one States had ratified the 1982 UN Convention on the Law of the Sea, sixty ratifications are required to bring the Convention into force.

7.2. In 1991, the Preparatory Commission of the International Sea-bed Authority and the International Tribunal for the Law of the Sea approved two applications for registration as pioneer investors, i.e. China Ocean Mineral Resources Research and Development Association (COMRA) and the Interoceanmetal Joint Organization (IOM) submitted by Bulgaria, Cuba, the Czech and Slovak Federal Republic, Poland and the USSR. In 1987, the Preparatory Commission had already registered as pioneer investors: the

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8. Adopted on 15 August 1991 by unanimous vote.
9. Adopted on 15 August 1991 by a vote of 13 in favour, 1 against (Cuba), and 1 abstention (Yemen).
10. Adopted on 15 August 1991 by unanimous vote.
11. Adopted on 19 September 1991 by a vote of 13 in favour, 1 against (Cuba), and 1 abstention (Yemen).
12. Adopted on 11 October 1991 by unanimous vote.

Institut français de recherche pour l'exploitation de la mer (IFREMER), the Government of India Deep Ocean Research Development Co. Ltd. (DORD) and Yuzhmorgeologiya, whose applications were submitted respectively by the Governments of France, India and the USSR, respectively. A total of six pioneer investors have then been registered (see A/46/724, paras. 146–151).

7.3. The Secretary-General's initiative to promote dialogue aimed at addressing issues of concern to some States in order to achieve universal participation in the Convention continued in 1991, and in its course the following issues relating to the regime for sea-bed mining, as contained in Part XI of the 1982 LOS Convention, were identified as problem areas for some States: costs to States parties, the Enterprise, transfer of technology, production limitations, compensation fund, financial terms for contracts, decision-making, environmental considerations, and the Review Conference (Report of the Secretary-General, A/46/724, paragraphs 15–20).

7.4. The 1989 Treaty on the Zone of Co-operation in an Area between the Indonesian province of East Timor and Northern Australia ("Timor-Gap Treaty") entered into force on 11 February 1991 (A/45/721, para. 26). On 22 February 1991, Portugal submitted an application to the International Court of Justice against Australia regarding certain actions undertaken by that country relating to East Timor concerning the so-called Timor-Gap. The Application focused mainly on the 'opposability to Australia of the right of the people of East Timor to self-determination and of Portugal's capacity as the administering power of that non-self-governing Territory'. Through that Application, Australia's international responsibility was claimed. Portugal specifically requested that Australia cease its efforts with Indonesia concerning delimitation and resource development, and generally refrain from exercising jurisdiction over the continental shelf in the area of the Timor-Gap.

8. FISHERIES

The General Assembly called upon all members of the international community to implement its resolutions 44/225 and 45/197 (see 1 ASYIL 249) by, *inter alia*, taking the following actions:

(a) beginning on 1 January 1992, reducing fishing effort in existing large-scale pelagic drift-net fishing by, *inter alia*, reducing the number of vessels involved, the lengths of the nets and the area of operation so as to achieve by 30 June 1992 a 50 per cent reduction in fishing effort;
(b) continuing to ensure that the areas of operation of large-scale pelagic high seas drift-net fishing were not expended and, beginning on 1 January 1992, were further reduced in accordance with the above paragraph;
(c) ensure that a global moratorium on all large-scale pelagic drift-net fishing is fully implemented on the high seas of the world's oceans and seas, including enclosed seas and semi-enclosed seas by 31 December 1992 (resolution 46/215 and Report of the Secretary-General, A/46/645/Add. 6 and A/46/344, Annex).

9. ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

The General Assembly affirmed that the fight against drug abuse and illicit trafficking should continue to be based on strict respect for the principles enshrined in the Charter of the United Nations and international law, particularly respect for the sovereignty and the territorial integrity of States, non-interference in the internal affairs of States, and non-use of force or the threat of force in international relations; called upon all States to intensify their actions to promote effective co-operation in the effort to combat drug abuse and illicit trafficking so as to contribute to a climate conducive to achieving this end, and to refrain from using the issue for political purposes; further affirmed that the international fight against drug trafficking should not in any way justify violation of the principles enshrined in the Charter and international law, particularly the right of all peoples freely to determine without external interference their political status and to pursue their economic, social and cultural development, and that every state has the duty to respect this right in accordance with the provisions of the Charter (resolution 46/101).

10. INTERNATIONAL TERRORISM

10.1. The General Assembly urged all States to fulfil their obligations under international law and take effective and resolute measures for the speedy and the final elimination of international terrorism, and to that end, in particular:

(a) to prevent the preparation and organization in their respective territories, for commission within or outside their territories, of terrorists and subversive acts directed against other States and their citizens;
(b) to ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts;
(c) to endeavour to conclude special agreements to that effect on a bilateral, regional and multilateral basis;
(d) to co-operate with one another in exchanging relevant information concerning the prevention and combating of terrorism;
(e) to take promptly all steps necessary to implement the existing international conventions on the subject to which they are parties, including the harmonization of their domestic legislation with those conventions.

10.2. All States as well as the relevant UN organs were urged by the General Assembly to contribute to the progressive elimination of the causes underlying international terrorism and to pay special attention to all situations including colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedom that may give rise to international terrorism and may endanger international peace and security; at the same time, the General Assembly also expressed concern at the growing and dangerous links between terrorist groups, drug traffickers and their

para-military gangs which have resulted to all types of violence thus endangering the constitutional order of States and violating basic human rights (resolution 46/51).

11. ANTARCTICA

11.1. At its 11th Antarctic Treaty Special Consultative Meeting, a Protocol on Environmental Protection to the Antarctic Treaty (including four annexes) was adopted on 4 October 1991. The Protocol designates Antarctica as a 'natural reserve, devoted to peace and science' and sets forth the general principles applicable to any human activity in Antarctica. All mineral-resource activities, except scientific activities, are prohibited under the Protocol.

11.2. The General Assembly once again expressed its regret that, despite the numerous resolutions adopted by it, the Secretary-General had not been invited to the meetings of the Antarctic Treaty Consultative Parties, and urged once again that the Secretary-General be invited to their future meetings; reiterated its call upon the Antarctic Treaty Consultative Parties to deposit information and documents covering all aspects of Antarctica with the Secretary-General of the United Nations; disappointed that, while welcoming the signing of the Madrid Protocol on Environmental Protection by the Antarctic Treaty Parties, the Protocol was not negotiated with the full participation of the international community, and the protocol lacked the monitoring and implementation mechanisms for compliance and had not taken into consideration the call of the international community to ban permanently prospecting and mining in Antarctica (resolution 46/41A[13]).

11. NON-SELF GOVERNING TERRITORIES

(a) American Samoa

The General Assembly welcomed the measures taken by the territorial government in 1990 to implement the American Samoa Environmental Act by protecting and conserving marine resources and by preventing the pollution of its territorial waters; called upon the United States in co-operation with the territorial government to promote the economic and social development in the territory (resolution 46/68B).

(b) Guam

The General Assembly called upon the Administering Power to ensure that the presence of military bases and installations in the territory should

13. Adopted by a roll-call vote of 101-0-7 with 53 States not participating in the vote.

not constitute an obstacle to the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples nor hinder the population of the territory from exercising its right to self-determination and independence in conformity with the purposes and principles of the Charter of the United Nations; urged the United States to support measures by the territorial government aimed at promoting growth in commercial fishing and agriculture (resolution 46/68B VI).

(c) Tokelau

The General Assembly encouraged the Government of New Zealand to continue to respect fully the wishes of the people of Tokelau in carrying out the territory's political and economic development in order to preserve their social, cultural and the traditional heritage (resolution 46/68B VIII).

12. UNITED NATIONS DECADE OF INTERNATIONAL LAW

The Sixth Committee reconvened the Working Group at the Forty-Sixth session to continue its work in accordance with resolution 47/40 on this subject. The General Assembly, *inter alia*, invited all States and international organizations and institutions referred to in the programme to provide, update or supplement information on activities they had undertaken in the implementation of the programme to the Secretary-General, as well as to submit their views on possible activities for the next term of the Decade; requested the Secretary-General to submit on the basis of such information a report to the General Assembly at its Forty-Seventh session; encouraged States to disseminate information contained in the Report of the Secretary-General (A/46/372) at the national level (resolution 46/53).

13. THE INTERNATIONAL LAW COMMISSION

13.1. The International Law Commission held its Forty-Third session at the UN Office at Geneva from 29 April to 19 July 1991.

13.2. It completed the final draft articles on jurisdictional immunities of States and their property and the provisional draft articles on the Law of the Non-Navigational Uses of International Watercourses and on the Draft Code of Crimes against the Peace and Security of Mankind (Report of the International Law Commission on the Work of its Forty-Third session, *Official Records* of the General Assembly, Forty-Sixth session, Supplement no. 10 (A/46/10).

13.3 The General Assembly suggested a number of measures to improve the Commission's procedures and methods of work (resolution 46/54).

13.4. The General Assembly drew the attention of Governments to the

importance, for the International Law Commission, to have their views on the subject-matters mentioned in paragraph 13.2 above and urged Governments to present in writing their comments and observations to the Commission (resolution 46/54).

14. INTERNATIONAL CRIMINAL JURISDICTION

The General Assembly invited the International Law Commission within the framework of the Draft Code of Crimes against the Peace and Security of Mankind to consider further and analyze issues raised in its 1990 Report (A/46/10, Ch. II, Sec C) concerning the question of international criminal jurisdiction including proposals for the establishment of an international criminal court or other international criminal trial mechanism in order to enable the General Assembly to provide guidance on the matter (see resolution 46/54).

15. JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

15.1. The International Law Commission decided at its Forty-Third session to recommend that the General Assembly should convene an international conference of plenipotentiaries to examine the draft articles on jurisdictional immunities of States and their properties prepared by it and to conclude a convention on the subject (paragraph 25, Report of the International Law Commission, A/46/10).

15.2. Divergent views were expressed on the draft articles at the Sixth Committee. The General Assembly decided to invite States to submit their written comments and observations on the Draft Articles and to establish at its Forty-Seventh session an open-ended working group of the Sixth Committee to examine, in the light of the written comments of Governments as well as views expressed in debates at the Forty-Sixth session of the Assembly:

(a) issues of substance arising out of the Draft Articles in order to facilitate a successful conclusion of a convention through the promotion of a general agreement;
(b) the question of convening an international conference to be held in 1994, or subsequently, to conclude a convention on jurisdictional immunities of States and their property (resolution 46/55, paragraph 4).

16. SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION (THE CHARTER COMMITTEE)

16.1. The Charter Committee held its 1991 session from 4 to 22 February

1991 in New York (*Official Records of the General Assembly*, Forty-Sixth session, Supplement No. 33 and Corr. (A/46/33 and Corr.1) and completed its work on the draft Declaration on Fact-Finding by the United Nations in the field of Maintenance of International Peace and Security.

16.2. The USSR submitted a working paper entitled 'New Issues for consideration in the Special Committee' (A/AC.182/L.65), which included the question of co-operation between the United Nations and Regional Organizations.

16.3. The General Assembly requested the Charter Committee at its 1992 session to consider the following:

(a) to accord priority to the question of the maintenance of international peace and security in all its aspects and to consider the proposal on the enhancement of co-operation between the UN and the regional organizations as well as other specific proposals in this regard that may be submitted;
(b) to continue its work on the question of the peaceful settlement of disputes between States and, in this context, to consider the proposal on UN Rules for the Conciliation of Disputes between States and to consider other specific proposals relating to this question that may be submitted to the Committee at its 1992 session;
(c) to consider various proposals with the aim of strengthening the role of the Organization and enhancing its effectiveness.

16.4. The General Assembly decided that the Charter Committee accept the participation of observers of Member States in its meetings, including those of its Working Group (resolution 46/58).

17. HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES

In response to a request of the General Assembly, the Secretary-General completed in 1991 the preparation of the Handbook on the Peaceful Settlement of Disputes between States (UN Pub. Sales No. E. 92). The publication contains four chapters with an introduction and three annexes plus bibliography and index: Chapter I, *Principles of the Peaceful Settlement of Disputes between States*; Chapter II, *Means of Settlement*, which includes negotiations, consultations, inquiry, good offices, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements and other peaceful means; Chapter III, *Procedures Envisaged in the Charter of the United Nations*; Chapter IV *Procedures Envisaged in Other International Instruments.*

18. DECLARATION ON FACT-FINDING

18.1. The General Assembly at its Forty-Sixth session adopted the Declaration on Fact-Finding by the United Nations in the Field of Maintenance

of International Peace and Security, which was prepared by the Charter Committee; was convinced that the adoption of the Declaration would contribute to strengthening the role of the United Nations and enhancing its effectiveness in maintaining international peace and security; urged that all efforts be made so that the Declaration becomes generally known and fully implemented. The text of the Declaration is annexed to General Assembly resolution 46/59.

18.2. Main points of the Declaration are summarized as follows: fact-finding means any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent UN organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security. Fact-finding should be comprehensive, objective, impartial and timely. The sending of a fact-finding mission can signal the concerns of the organization and should therefore contribute to building confidence and diffusing the dispute or situation while avoiding any aggravation of it. The sending of a UN fact-finding mission to the territory of any State requires the prior consent of the State, subject to the relevant provisions of the Charter of the United Nations. Fact-finding missions may be undertaken by the Security Council, the General Assembly and the Secretary-General in the context of their respective responsibilities in maintaining international peace and security in accordance with the Charter. The Secretary-General, on his own initiative or at the request of the States concerned, should consider undertaking a fact-finding mission when a dispute or situation exists. The Secretary-General should monitor the state of international peace and security regularly and systematically in order to provide early warning of disputes or situations which might threaten international peace and security. The Secretary-General may bring relevant information to the attention of the Security Council and, where appropriate, of the General Assembly. To this end, the Secretary-General should make full use of the information-gathering capabilities of the Secretariat and keep under review the improvement of these capabilities.

19. INTERNATIONAL TRADE LAW

19.1. The United Nations Commission on International Trade Law (UNCITRAL) held its Twenty-Fourth session in 1991.[14] The General Assembly called upon UNCITRAL to continue to take into account, as appropriate, the relevant provisions of the resolutions concerning the international economic order; affirmed the importance, in particular, for developing countries, of the work of UNCITRAL concerned with training and assistance in the field of international trade law and the desirability for it to sponsor seminars and symposia to provide such training and assistance (resolution 46/56).

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14. Report of the Commission, A/46/17 and Corr. 1.

19.2. The United Nations Conference on the Liability of Operators of Transport Terminals in International Trade was held at Vienna in April 1991 and resulted in the adoption of the UN Convention on the Liability of Operators of Transport Terminals in International Trade.[15] The Convention was based on work prepared by UNCITRAL.

19.3. At its Twenty-Fourth session, UNCITRAL decided to organize, as a first step in the preparation of its programme of activities for the United Nations Decade of International Law, a Congress on International Trade Law during the last week of its Twenty-Fifth session to be held in New York from 4 to 22 May 1992.[16]

19.4. The General Assembly expressed the hope that all States and interested international organizations would take the opportunity to send appropriate delegates to the Congress to consider the accomplishments achieved in the progressive unification and harmonization of international trade law during the past 25 years and the practical needs that can be foreseen in the future (resolution 46/56).

20. MEASURES TO AMEND THE NUCLEAR WEAPON TESTS BAN TREATY IN THE ATMOSPHERE, IN OUTER SPACE AND UNDER WATER

A substantive session of the Amendment Conference of the States Parties to the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water was held in New York in January 1991.[17] This Conference was held at the request of more than one-third of the parties to the Treaty; they had requested the Depositary Governments to convene a conference to consider an amendment that would convert the Treaty into a comprehensive test-ban treaty. Pursuant to a decision of the Amendment Conference, the President was to conduct consultations with a view to achieving progress on such issues as verification of compliance and possible sanctions against non-compliance. The General Assembly of the United Nations reiterated its conviction that, pending the conclusion of a comprehensive nuclear-test-ban treaty, the nuclear-weapon States should suspend all nuclear-test explosives through an agreed moratorium or unilateral moratoria (resolution 46/28, US and UK voted against the resolution).

15. A/CONF.152/13.
16. Report of the International Trade Law Commission A/46/17 and Corr. 1.
17. Report of the Conference, PTBT/CONF/131 Rev. 1.

21. TRANSPARENCY IN ARMAMENTS

By its Resolution 46/36L, the General Assembly requested the Secretary-General to establish and maintain at the UN headquarters in New York a universal and non-discriminatory Register of Conventional Arms to include data on international arms transfers as well as information provided by Member States on military holdings, procurement through national production and relevant policies. The procedures and input requirements were set out in an Annex to the resolution. The Register came into effect on 1 January 1992. The Secretary-General was also requested to provide annually a consolidated report to the General Assembly of the data registered together with an index of the other inter-related information.

CHRONICLE

CHRONICLE OF EVENTS AND INCIDENTS RELATING TO ASIA WITH RELEVANCE TO INTERNATIONAL LAW
September 1991 - July 1992

Ko Swan Sik
with contributions from KOTERA AKIRA (Tokyo)

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AFGHANISTAN

Agreement on cessation of arms deliveries

The U.S.and the Soviet Union as the two Guarantors of the Geneva Agreements [on the Settlement of the Situation Relating to Afghanistan of 14 April 1988, UNdoc.S/19835 annex I] on 13 September 1991 concluded an agreement to "discontinue weapons deliveries to all Afghan sides" as of 1 January 1992. The agreement was negotiated for more than two years, and would to a large extent disengage the two states from the Afghan conflict. In connection with the conclusion of the agreement the U.N.Secretary General tried to persuade the Saudi and Pakistani sides and the Afghan guerilla chiefs to implement the U.N.five-point peace plan.(IHT 14/15-09-91)

On 25 January 1992 Pakistan decided to abandon its two-track policy of military backing of the rebels and simultaneous support for peace negotiations. Instead it said it would fully support the UN talks and committed itself to a cutoff of arms.(IHT 17-02-92)

New UN peace plan

In an effort to speed up the peace process the UN secretary general announced a new peace plan on 10 April 1992.(For the May 1991 peace formula, *see* 1 AsYIL 266 and UNdoc.A/46/577-S/23146 annex) Under the plan a 15-member "pre-transition council" of neutral, respected Afghans would take power from president NAJIBULLAH to pave the way for an interim reconciliation government to be selected later by representatives of the various Afghan factions. This interim government would hold national elections. The pre-transition council would hold power for 45 days before yielding to the interim government.(IHT 11/12-04-92;FEER 23-04-92 p.12)

The fall of the NAJIBULLAH government

Before the UN plan could be implemented, president NAJIBULLAH resigned on 16 April 1992 and the government surrendered power to a coalition of 4 long-time career generals who had emerged from the civil war untainted, and a leading commander of the *Jamiat-e-Islami* guerrilla group. While most of the rebel groups were expected to support the coalition, the most radical resistance

faction, *Hezb-e-Islami*, vowed it would not do so.(IHT 17-04-92)

The former president sought refuge at the UN compound in Kabul. The special UN envoy was not able to negotiate his safe passage out of Afghanistan.(IHT 22-04-92; FEER 30-04-92 p.10)

On 24 April 1992 political leaders of most of the guerrilla groups agreed in Peshawar, Pakistan, on the composition of a 51-member interim council (*Jehadi* Council)that would take power in Kabul. The council would include 5 members from each of the 10 major guerrilla parties based in Pakistan and Iran. On 28 April 1992 the interim council was installed and the head of the council announced the creation of an Islamic State of Afghanistan. In accordance with the agreement the first President, SEBGHATULLAH MOJADDEDI, leader of the *Jabha-e-Najat-e-Melli Afghanistan* [Afghan National Liberation Front] served two months after which BURHANUDDIN RABBANI, a leader of the *Jami'at-e-Islami Afghanistan* [Islamic League of Afghanistan] became head of government on 28 June 1992 until a more permanent Islamic Council could be formed.(IHT 25/26-04-92,29-06-92, UNdoc.A/47/705-S/24831)

New civil strife

The new government was not recognized by the *Hezb-e-Islami* Party (led by GULBUDDIN HEKMATYAR). One of its demands was the withdrawal from the capital of the *Jauzjani* militia force, made up mainly of ethnic Uzbeks and commanded by general ABDUL RASHID DOSTAM. The latter had defected from the former government and had joined forces with the mujahidin leader AHMED SHAH MASOUD. The *Jauzjani* force was disliked by many Mujahidin rebels.(IHT 04-05-92)

On 25 May 1992 the two rival leaders AHMAD SHAH MASOUD and GULBUDDIN HEKMATYAR signed an agreement to end hostilities, pull out forces from Kabul and hold elections in six months.(IHT 26-05-92)

Release of Russian POW
(*see* 1 AsYIL 267)

The new Afghan government released a Russian prisoner of war on 19 May 1992 as a first step toward ending a decade of hostility. When the Soviet Union withdrew its troops from the country it left behind 300 soldiers listed as missing in action.(IHT 20-05-92)

ALIENS: ACTIVITIES

Expulsion of British journalist from China

A Beijing correspondent of the (British) The Independent newspaper was expelled from China on 15 September 1991 on grounds that he had obtained secret documents about arrests in Inner Mongolia. The Foreign Ministry said he had harmed China's interests and was conducting activities not in keeping with his status as a journalist.(IHT 17-09-91)

Expulsion of the International Committee of the Red Cross from Iran

Iran ordered the expulsion of all foreign Red Cross staff and froze the organization's operations in Iran, in March 1992. According to the official Iranian press agency the measure was taken because of "violations" that were "in contradiction with the normal expectations and the declared goals" of the Red Cross. (IHT 23-03-92) The Red Cross team was accused of "transgressing the limits of its competence as stated by the Geneva Conventions" and of violating the spirit of an agreement with Iran allowing it to operate in the country. In response the ICRC accused Iran on 27 March 1992 that the expulsion and the consequent cutting off access to thousands of Iraqi prisoners of war (from the Iran-Iraq war) was a violation of the Geneva Conventions.(IHT 28/29-03-92)

Political demonstrations by tourists

A four-member official Canadian parliamentary delegation investigating human rights conditions in China was expelled on 7 January 1992 for "engaging in activities incompatible with their status [as tourists]". The team had planned to go uninvited to the prison where dissidents were being held and to lay a wreath in Tiananmen Square in memory of those killed in June 1989.(FEER 16-01-92 p.14)

Seven European trade unionists were expelled from China on 1 May 1992 after the group staged a protest in Beijing. The Chinese foreign ministry said the persons, visiting China on tourist visas, violated laws by acts incompatible with their status. The group said they had for two years applied in vain for proper visas to visit Beijing to assess human and union rights, and denied that they had behaved provocatively when they shouted slogans, unfurled banners and handed out leaflets in Tiananmen Square, one of the politically most sensitive places in China since the incident of June 1989.(IHT 2/3-05-92)

Islamic radicals in Pakistan

Pakistan decided to deport thousands of Islamic fundamentalists from more than 30 countries, who had trained and fought along with the Afghan mujahideen and were settled in Pakistan, after international criticism that Pakistan was becoming an Islamic base for destabilizing other Muslim countries. According to some there were about 20,000 foreign radicals in Pakistan, most of them coming from Middle Eastern and North African countries, Indonesia, Malaysia, Myanmar and Bangladesh. Complaints seemed to have been lodged by, *inter alia*, Algeria and China. (FEER 02-04-92 p.18).

Insulting HO CHI MINH in Vietnam

Two Americans, one of whom was a Vietnamese-American, were expelled by Vietnam for allegedly insulting the memory of the late President Ho CHI MINH by taking pictures of one of them defiantly rairing a clenched fist in front of an image of Ho CHI MINH.(FEER 30-07-92 p.12)

ALIENS: TREATMENT

Illegal foreign workers in Malaysia

The Malaysian government planned to legitimize the status of tens of thousands of illegal aliens, most of them construction workers or maids, but wanted to send them home first, then issue work permits and levy charges ranging from about $130 to $870. The Home Ministry had given illegal workers, estimated at over 100,000 in West Malaysia alone, until 31 December 1991 to register.(IHT 9/10-11-91)

Abolition of fingerprinting by aliens
(*see* 1 AsYIL 269)

There were reports in January 1992 about disagreements in Japan between the Ministry of Justice and the National Police Agency about the government's policy of replacing the system of identification of foreigners by fingerprinting. The Justice Ministry said the new policy applied to all foreigners, while according to the police it should be applied to resident Koreans only. In view of the rising rate of crimes by foreigners the police argued that its work would become more difficult without records of fingerprinting.(FEER 09-01-92 p.7)

The Japanese Parliament approved legislation on 20 May 1992 ending mandatory fingerprinting of about 640,000 ethnic Koreans and Taiwanese who are permanent residents of Japan. Fingerprinting was to be replaced by a system of photographs, signatures and a family register.(IHT 18/19-04-92,21-05-92)

Foreign observers barred from attending court session

It was reported that despite calls from foreign countries for open proceedings, foreign observers would be barred from the trial of a prominent Chinese dissident in July 1992. A spokesman from the Chinese foreign ministry said that foreigners may only attend trials concerning foreign nationals, provided the court gives permission.(IHT 10-07-92)

ARMS SUPPLIES
See also:Cambodia, Divided States: China, Embargo, Financial claims, Missile technology, Space activities

Sale of French military equipment to Taiwan

On 27 September 1991 France confirmed the sale of 16 Lafayette class frigates to Taiwan despite objections from China. A French foreign ministry statement said that the frigate sale was "purely a commercial deal which imlies no official relationship with the authorities of Taiwan." (FEER 10-10-91 p.14, 19-03-92 p.12)

In connection with reports that Taiwan was seeking to buy Mirage fighters from France China had warned France that relations could be seriously harmed

if such sales would take place. It was said that the US wanted to preempt the sale of Mirages for fear it would fan a destabilizing arms race between Taiwan and the mainland. (IHT 24-03-92, 18-05-92)

South Africa-Thailand

In June 1991 a Thai military delegation visited South Africa with a view eventually to buying arms and to look at commando training. It was expected, however, that there would be no formal deal until the US and other Western countries would have lifted economic sanctions on South Africa.(FEER 29-08-91 p.20)

US-Pakistan

Under a US law "no military equipment or technology shall be sold or transferred to Pakistan" unless the president certifies to Congress that "Pakistan does not possess a nuclear explosive device." Although the US government was informed in a memo of 23 June 1983 about "unambiguous evidence that Pakistan is actively pursuing a nuclear weapons development program" its publicly stated policy was to provide increased military aid and to permit Pakistan to buy sufficient levels of conventional weapons to assure its security without resort to nuclear weapons. In addition Pakistan was used as a conduit for military assistance to anti-Communist rebels in Afghanistan.

In October 1990, however, the supply of US arms was officially cut off (see 1 AsYIL 271), although even after that the US kept quietly permitting the Pakistani armed forces to buy American-made arms from commercial companies. Meanwhile, Pakistan started to try finding new suppliers. It turned to China and the Middle East for new weapons systems and to secondary markets for spareparts to maintain its US-made jets, tanks and helicopters.(IHT 07/08 and 19-03-92)

CIS and Britain - Malaysia

In April 1992 Malaysia was reported to be considering the purchase of MiG-29 warplanes from the former Soviet Union, a move that US and European arms manufacturers feared could harm their sales prospects in developing countries. According to Malaysian military sources the CIS had offered to provide two squadrons of MiG-29s at a much cheaper fly-away price than comparable Western fighter-planes. The CIS would accept a substantial part of the payment in commodities rather than cash and undertook to start deliveries much earlier than competing Western industries. However, there remained doubts about the operating costs of the plane over its full life and about the length of its operating life.(IHT 18/19-04-92)

Malaysia decided to buy two frigates at a price of $550 million instead of two corvettes initially agreed upon under a memorandum of understanding with Britain. The purchase agreement was signed at Kuala Lumpur on 31 March 1992.(FEER 09-04-92 p.14)

Arms sales to the Third World

According to a report from the US Congressional Research Service arms sales to the Third World fell sharply in 1991, to $24.7 billion from $41.1 billion in 1990. The US accounted for 57 percent of all sales in 1991.(IHT 22-07-92)

Military defence spending

Asian states that release figures currently spend an average of 3.1% of GDP on arms, with an estimated increase of at least 4% a year. According to figures from the London-based International Institute for Strategic Studies North Korea, Pakistan, Myanmar, Sri Lanka, Taiwan and Singapore exceeded the IMF-guideline of 4.5% of GDP, and it was suspected that Brunei, Afghanistan, Cambodia, Laos, Mongolia and Vietnam also had gone over the 4.5%.(FEER 07-11-91 p.52)

Sale of captured US weapons

According to the Thai army commander-in-chief Vietnam had agreed to sell Thailand stocks of US weapons captured during the Vietnam War.(IHT 11/12-01-92)

China-Myanmar

Delivery by China of a substantial number of arms and equipment to Myanmar in 1990 and 1991 took place under a $1.4 billion arms supply agreement of October 1989.(FEER 30-01-92 p.6)

Chinese arms sales to the Middle East

During talks between the Israeli foreign minister and the Chinese prime minister on the occasion of the establishment of diplomatic relations between the two countries, China insisted that it should not have to halt arms sales to Arab states unless the US and other powers did so as well.(FEER 06-02-92 p.14)

ASIAN DEVELOPMENT BANK
See also: Sanctions

Iranian participation

Iran was reported to consider becoming a member of the ADB. According to an Iranian official Iran would neither loan nor borrow money at first upon joining, but would mainly use the bank's technical expertise and take advantage of the bank's ability to act as a catalyst to attract investment to the region. In the long run Iran would contribute funds to the Bank.(IHT 06-05-92)

Security problems in Manila

According to reports in early April 1992 there had been an incident not long before in which a senior US staff member of ADB was killed on the premises by a security guard, provoking a written protest to the Philippine government by the Bank president. According to the same reports the current Bank president was besieged in his hotel upon arrival in Manila to take up his tenure until his release was negotiated.(FEER 09-04-92 p.8)

ASSOCIATION OF SOUTH EAST ASIAN NATIONS (ASEAN)
See also:East Asian Economic Grouping/Caucus,Environmental protection, European Economic Community,Inter-state relations, International trade, Regional security

Asian representation in the UN-sponsored Cambodia peace plan

In a letter to the UN Secretary General ASEAN requested that the new UN special representative to Cambodia would have an Asian background or experience. It also wanted more than token representation in the UN Advance Mission in consideration of its active involvement in the search for a peaceful solution.(FEER 24-10-91 p.8)

ASEAN Free Trade Area (AFTA)
(*see* 1 AsYIL 273)

Economic ministers from the six ASEAN countries agreed on 8 October 1991 to work toward creating a free-trade area within 15 years beginning 1 January 1993. The proposed trade area would cover only manufactured products, not trade in services or agricultural items, while participating countries could choose to continue protecting vulnerable industries. In order to gain support from Indonesia and the Philippines it was agreed that tariff levels of up to 5 percent could remain on manufactured goods beyond the 15 year period. On the other hand, the agreement includes the possibility of accelerating the implementation of the free trade area under the common effective preferential tariff (CEPT) scheme which would eliminate tariffs not on an item-by-item basis, but by groupings or sectors.

A Philippine suggestion that the agreement be cast in a formal economic treaty was considered too legalistic. The accord was finally incorporated into a Framework Agreement on Enhancing Asean Economic Cooperation, which was approved by ASEAN heads of government at Singapore on 28 January 1992.(*see* Documents) (IHT 09-10-91,29-01-92;FEER 24-10-91 p.64,23-01-92 p.15,06-02-92 p.10)

Singapore Declaration of 1992

The Declaration was adopted by the Conference of Heads of Government on 28 January 1992.

On political and security cooperation it welcomed access by all countries in Southeast Asia, including the Indochinese states, to the Treaty of Amity and Cooperation of 1978 that has been the basis for ASEAN cooperation. It affirmed ASEAN commitment to the centrality of the UN role in the field of international peace and security as well as socio-economic development.

In the economic field the Conference endorsed the Framework Agreement on Enhancing ASEAN Economic Cooperation (*see* Documents) and affirmed the intention to establish the ASEAN Free Trade Area within 15 years beginning 1 January 1993. The Declaration states that "ASEAN attaches importance to APEC's fundamental objective of sustaining the growth and dynamism of the Asia-Pacific region" and with respect to the idea of an East Asia Economic Caucus "ASEAN recognises that consultations on issues of common concern among East Asian economies, as and when the need arises, could contribute to expanding cooperation among the region's economies, and the promotion of an open and free global trading system."

In the field of external relations the Declaration affirmed the desirability of intensifying "cooperative relationships" with the Dialogue Partners (which were expressly listed as: Australia, Canada, the European Community, Japan, the Republic of Korea, New Zealand and the U.S.) and of engaging in "consultative relationships" with "interested non-Dialogue countries and international organizations".

On the organizational plane the Declaration referred to agreement reached on having a formal summit meeting every three years and on the redesignation of the current "Secretary General of the ASEAN Secretariat" into "Secretary General of ASEAN" with an enlarged mandate to initiate, advise, coordinate and implement ASEAN activities. The Secretary General shall be appointed on merit and accorded ministerial status. (Summarized from original text, IHT 29-01-92, FEER 06-02-92 p.10).

New dialogue partners

In the context of the ASEAN system of having regular dialogues with specifically determined non-ASEAN states China and India were approved by the summit meeting of January 1992 as new dialogue partners.(FEER 06-02-92 p.11)

BORDER INCIDENTS

See also: Military cooperation (Indonesia-PNG)

Bangladesh-Myanmar

In the first incident between the two countries involving military personnel Myanmar border guards shot and killed a Bangladeshi soldier and wounded three others on 22 December 1991. The incident began on 21 December after Myanmar guards attacked men of the Bangladesh Rifles paramilitary border force at Rezupara in the Chittagong Hill Tracts. The two countries share 273 kilometers of land and river border. Early 1991 thousands of Myanmar

Moslems began fleeing into Bangladesh to escape the Myanmar army.(*see* Minorities)(IHT 23-12-91)

Myanmar-Thailand
(*see also*:Refugees)

In their campaign against Karen rebels Myanmar troops had been crossing into Thailand on several occasions to attack rebel bases from the rear. Such incidents were reported to have taken place in December 1991 and February 1992.(FEER 27-02-92 p.16)

Myanmar forces crossed into Thailand again on 15 March 1992 and warned Thai troops to retreat from the border or face air and artillery attacks on Kaw Moo Ra, the Karen base 6 km.from the Thai town of Mae Sot. According to Thai reports the Myanmar forces had established a mortar base 40 kilometers west of Mae Hong Son in order to attack Karen rebels from the rear. Myanmar accused Thailand of allowing the Karens to use Thai territory to fire into Myanmar. Thai military commanders on their side warned they would retaliate against any encroachment into Thai territory. Thai planes bombed Myanmar positions on the Thai side of the border and killed at least five Myanmar soldiers.(IHT 16,17 and 19-03-92)

BORDERS
See also: Hongkong

Sino-Vietnamese land border

There is no agreement about the exact location of the land border between the two countries.

According to the Chinese it should be 300m deeper into what was accepted as Vietnamese territory prior to the 1979 war.(FEER 16-04-92 p.14)

It was reported in July 1992 that according to the Vietnamese China was occupying 36 small areas totalling some 8,000ha along the border that Vietnam considered to be Vietnamese territory, and that near the Friendship Pass crossing point Chinese forces had moved a border marker 400 m into Vietnam.(FEER 16-07-92 p.21)

Malaysia-Singapore boundary in the Straits of Johor

A fourth meeting between the two countries on the demarcation of the boundary was held from 6 to 8 May 1992.(Singapore Government Press Release)

India-Bangladesh lease of territory

India transferred to Bangladesh a 1.5 hectare piece of land, the Tin Bigha corridor, in perpetual lease under an agreement signed in 1974. The narrow strip of land separated an enclave of Bangladeshi in the Ganges delta

(Dahagram and Angrapota) from the rest of their country. The transfer turned a pocket of Indian territory with about 50,000 mostly Hindu people into an enclave, though residents would have the right to cross Tin Bigha.(FEER 09-07-92 p.12,BLD 1992 No.11)

BROADCASTING

See also: Space activities

Satellite television

The Japanese Ministry of Post and Telecommunications raised objections against the start in November 1991 of the new world service television by the BBC, broadcast by Star Television which is operated by an affiliate of a Hong Kong conglomerate. The Hong Kong company buys programming from the BBC and inserts its own advertising before broadcasting from the Asiasat I satellite, the latter being owned by Hong Kong, British and Chinese interests. The Japanese ministry which is in charge of issuing television and radio broadcasting licenses held the position that "[i]f a country wants to broadcast directly to other nations, it should negotiate first." The Japanese noted that since Asiasat was registered by Britain as a communications satellite, it should not be used for general television broadcast. The British reply was that the situation was not unique and that there were cases in Europe of communications satellites used for broadcasting purposes as well as regular communications such as telephone calls. Besides, British officials were quoted as saying that the matter comes under the jurisdiction of Hong Kong.(IHT 6-12-91;FEER 28-11-91 p.32)

Global News Network

The semi-public Japanese Broadcasting Company Nihon Hoso Kyoku (NHK) abandoned as not economically feasible the idea of creating a worlwide news network that would have challenged the growing hegemony of Western broadcasters such as CNN and BBC. GNN was aimed at offering an Asian perspective on the news to balance the biased and increasingly dominant reporting of Western news organizations. The quest for a broader Japanese role in the global information order, however, met several obstacles, such as fears of a potential backlash in Asia itself because of lingering bitterness over Japanese wartime occupation. Finally NHK found itself unable to finance the annual costs estimated at more than 100 billion yen. Instead NHK decided to pursue a scaled-down version of GNN, a type of Asian newspool that would aim at improving the quality and exposure of Asian news broadcasts.(IHT 7/8-12-91;FEER 28-11-91 p.34)

US plans for broadcast to China

A presidential task force in the US proposed that a radio station modeled on Radio Free Europe and Radio Liberty be set up to broadcast to China and other

Communist countries in Asia. China warned on 19 December 1991 that the proposed broadcast to China would harm Chinese-US relations, and asked the US government to make a "wise decision".(IHT 20-12-91)

CAMBODIA

See also: Association of Southeast Asian Nations

Conclusion of peace accord

(*see also* 1 AsYIL 275)

The two sides in the conflict reached an accord on 20 September 1991 when the Phnom Penh government accepted a U.N.proposed compromise on political representation in a new Cambodia.(IHT 23-09-91)

The peace treaty was finally signed by the leaders of the Cambodian factions and the foreign ministers of 18 interested states on 23 October 1991 (1 AsYIL: Documents) at a session of the Paris Conference on Cambodia.(IHT 24-10-91)

UN peacekeeping force

The UN Security Council on 28 February 1992 authorized sending a 22,000-member force, the biggest in UN history, to oversee and implement the peace agreement of 23 October 1991. The proposed contingent would consist of 15,900 military personnel, 3,600 civilian police officers and 2,400 civilians who would virtually run the country.(IHT 29-02/01-03-92)

Disarmament and demobilization and Khmer Rouge reluctance

Soldiers of the Cambodian (Phnom Penh) army began handing over weaponry to the UN for the first time in early June 1992. (IHT 10-06-92) However, the Khmer Rouge guerrilla group refused to participate in this second phase of the peace process by announcing that it would neither allow UN authorities into areas it controlled nor send its forces into the cantonments to be disarmed. The Khmer Rouge leadership demanded that UN authorities first verified the complete withdrawal of all Vietnamese forces and insisted that the Supreme National Council be given governmental powers, in line with its role of embodying Cambodian national sovereignty, during the peace process.

Although UNTAC officials were reported to contend that the Khmer Rouge's primary motive for introducing new demands was to delay the peace plan, there were also reports of evidence that some Vietnamese special forces and military advisers were still based in Cambodia. The UN had established checkpoints along Cambodia's borders with Vietnam, Laos and Thailand to help verify that all foreign troops had withdrawn from the country and that no weapons were being funnelled to any of the factions.(*See*, as to the Vietnamese version of the facts, two notes dated 30 May 1992 from the Ministry of Foreign Affairs of Viet Nam addressed to UNTAC, UNdoc.S/24082)

The problems were heightened on 4 May when Khmer Rouge guerrillas mounted attacks against Phnom Penh army positions. Upon pressure by the

UN the Khmer Rouge finally pledged to uphold the cease-fire, grant UN troops freedom to go anywhere within their zones and mark their minefields prior to disarmament.

On 14 July 1992 the Khmer Rouge issued a statement promising to send all its guerrillas to barracks within a month if the Vietnamese-installed government was dissolved during that period. The government refused to be dissolved, and the peace agreement also said that it is to remain in place until elections in 1993.

The weakness of the UN peace plan is that it relies heavily on Khmer Rouge aquiescence to measures that would tend to marginalize the group.(IHT 13/14-06 and 09 and 15-07-92;FEER 23-04-92 p.13,11-06-92 p.24)

Tokyo Declarations on Cambodia

A Ministerial Conference on the Rehabilitation and Reconstruction of Cambodia (MCRRC) was held in Tokyo in June 1992, hosted by Japan and co-chaired by the host and the UNDP. The conference was attended by 33 states, the EC and various UN bodies. On 22 June 1992 it adopted the Tokyo Declaration on the Cambodia Peace Process, which in essence endorsed the implementation of the Paris Agreements on Cambodia, and the Tokyo Declaration on the Rehabilitation and Construction of Cambodia.

By the latter Declaration the Conference, *inter alia*, agreed to establish a consultative body to be called the "International Committee on the Reconstruction of Cambodia"(ICORC), which will be a international mechanism for coordinating, in consultation with the future Cambodian government, the assistance for the country. A "framework" of the Committee was appended to the Declaration.(UN doc.A/47/285)

Vietnamese presence in Cambodia

Newspaper reports speak of a growing presence of Vietnamese workers in Cambodia as a result of the economic boom touched off by the UN peace-keeping force. They were said to be flocking in from southern Vietnam where the urban unemployment rate should exceed 20 percent. The Phnom Penh government admitted to 90,000 Vietnamese civilians in the country, but other estimates seemed to put the number at a half-million.(IHT 23-06-92)

Khmer-Vietnamese animosity is rooted in centuries of memories of loss of land, political subjugation and cultural domination by the Vietnamese. The decline of the Angkor empire of Cambodia after the 14th century was accompanied by a steady loss of territory to Siam (Thailand) and Annam (Vietnam). French intervention in the 19th century helped Cambodia recover the western provinces from Thailand, but no territories were recovered from Vietnam. The Vam Co River basin (including what was later to become Saigon) and the Mekong delta remained in Vietnamese hands.

Even before the French came to Indochina, Vietnamese had begun moving into Cambodia in search for trade. Early this century the French began importing Vietnamese officials to run the administration as well as indentured labour to work on the rubber plantations. At the time of the 1970 coup d'état against Prince SIHANOUK, the number of Vietnamese had soared to about

500,000. Following the coup there was an anti-Vietnamese progrom in April 1970 resulting in the killing of thousands of Vietnamese and an exodus of a large number of them. When the Khmer Rouge came to power in 1975 the majority of the remaining Vietnamese fled to Vietnam. Khmer speaking and other Vietnamese filtered back following the Vietnamese intervention.

There was concern that by claiming to be born in Cambodia - the main criterion of voter eligibility under the peace agreement - the Vienamese would obtain voting rights. This would be facilitated by the fact that many of the Vietnamese speak Khmer.(FEER 30-07-92 p.14)

Japanese contribution

The head of UNTAC told Japanese leaders in March 1992 that Japan was expected to pay for at least a third of the cost of stationing troops in Cambodia, and to contribute civilians even if it could not send soldiers.(IHT 12-03-92) In his response the Japanese foreign minister indicated on 12 March 1992 that Japan was ready to contribute more funds to the United Nations efforts in Cambodia. According to him it was not sufficient for Japan to pay only 12.5 percent of the cost, which under UN procedures was the Japanese share of the estimated $2.8 billion mission (compared to 30 percent for the US).(IHT 13-03-92)

Diplomatic relations

Japan's new ambassador to Cambodia arrived in Phnom Penh on 10 November 1991 as the first of a series of envoys from several states returning to their post. The US envoy would reopen the US embassy on 11 November.(IHT 11-11-91)

Accord with Thailand on repatriation of refugees

Prince NORODOM SIHANOUK signed a memorandum of understanding with Thailand and the United Nations on 21 November 1991 on the repatriation of 350,000 refugees from camps on the Thai-Cambodian border. The accord included clauses to ensure that refugees are not coerced into returning to zones controlled by rival factions.(IHT 22-11-91)

UN protection sought for Cambodian leaders

It was reported that the Khmer Rouge had asked that UN peacekeeping forces protect its representatives in Phnom Penh. This request came after two Khmer Rouge leaders were attacked and beaten by an angry mob.(IHT 2-12-91)

CIVIL WAR
See: Cambodia

CULTURAL OBJECTS

Underwater treasures

A huge amount of pieces of Chinese porcelain was recovered in 1989 from a shipwreck in Vietnamese territorial waters off the port of Vung Tau. They would be auctioned on behalf of the Vietnamese ministry of transport in Amsterdam in April 1992. The most celebrated similar auction took place in 1986 of the so-called "Nanking cargo" of the wreck of an 18th century Dutch ship, the "Geldermalsen". The finders at that time insisted that the wreck was located in international waters.(FEER 26-03-92 p.48)

DEBTS

See also: Economic cooperation

The Philippines

The Philippine Congress on 12 December 1991 passed a budget for 1992 that would limit foreign debt payments to 10% of exports, in contrast of the current 30%, but the President later vetoed the decision. The President had previously also vetoed a provision in the 1991 budget limiting foreign debt payments to 20% of export income.(IHT 13-12-91,16-01-92))

On 20 February 1992 the Philippine government reached agreement with creditor banks on a $5 billion-debt rescheduling. It involved either the discounted sale of debt for cash or the conversion into 17-25 year bonds. The agreement was signed on 24 July 1992. The agreement included the conversion into bonds of allegedly fraudulent loans for the notorious so-called Bataan nuclear-power plant project that was suspended because of alleged technical flaws.(*see* 1 AsYIL 279)(FEER 05-03-92 p.64,IHT 25/26-07-92)

Bangladesh

Bangladesh and the US signed a debt-relief agreement in Dhaka on 21 September 1991 which canceled repayments due from Dhaka up to July 1991 on all outstanding official development aid. Bangladesh was the first Asian country to receive such debt relief from the US.(FEER 03-10-91 p.59)

DEVELOPMENT AID

See: Economic cooperation

DIPLOMATIC INVIOLABILITY

See also: Asian Development Bank

Abduction of diplomat in India

The Romanian Chargé d'affaires in New Delhi was kidnapped by a Sikh guerilla group on 9 October 1991. According to the police the kidnapping was apparently in retaliation for the killing of a Sikh extremist and the arrest of two others who shot and wounded the Indian ambassador to Romania in Bucharest on 20 August 1991.(IHT 11-10-1991)

Bakhtiar case

Swiss police arrested a member of the Iranian embassy staff in Bern, Mr ZEYAL SARHADI, in connection with the assassination in Paris in August 1991 of SHAHPUR BHAKTIAR, a former Iranian prime minister. The Iranian government, which had repeatedly denied that it was involved, demanded the man's release and warned the Swiss government not to hand him over to France.(IHT 26-12-91) The Swiss denied that the man was ever registered as a diplomat. On 29 December 1991 Switzerland closed its embassy in Tehran - which also represents US interests - "untill further notice" to protest harassment of its diplomatic staff following the above arrest: the Iranian authorities briefly confiscated the passport of a Swiss diplomat at Tehran airport. The embassy reopened on 5 January.(IHT 30-12-91,06-01-92) On 24 February 1992 the Swiss authorities approved the extradition to France of Mr.SARHADI who was wanted in France on charges that he aided the assassins.(IHT 25-02-92) On 12 March 1992 the Tehran Times reported that Iran might retaliate against Swiss companies if Switzerland proceeded with the extradition (13-03-92) but nevertheless Mr. SARHADI was turned over to France on 26 May 1992. The Iranian foreign ministry summoned the French and Swiss ambassadors to protest, calling the extradition "unjust and illegal."(IHT 27-05-92)

Harassment of Indonesian diplomats in Canberra

Indonesian diplomats in Canberra were harassed and bricks were thrown at two embassy cars on 2 January 1992 when a crowd protested against killings in East Timor. According to the Indonesian foreign minister police failed to do more than shout at the mob to stop. Indonesia lodged a strong protest to Australia.(IHT 4/5-01-92;FEER 16-01-92 p.14)

Expulsion of Indian diplomat from Pakistan

Pakistan ordered a senior Indian diplomat to leave the country on 24 May 1992 after the diplomat accused Pakistani intelligence officials of abducting and torturing him. The Pakistani foreign ministry said that the diplomat had been caught receiving "highly classified documents" from a Pakistani contact.(IHT 25-05-92)

Anglo-Iranian expulsion of diplomats

Iran ordered a Third Secretary at the British Embassy to leave the country

within a month because of actions "violating diplomatic norms".(IHT 22-07-92) A couple of days later Britain ordered three Iranians to leave Britain "for reasons of national security". Two of the persons were Iranian embassy employees and the third was in Britain on a student visa. The Foreign Office said that one of the persons was expelled because of his involvement in "unacceptable intelligence activities" and the two others because of "their association with foreign intelligence service." Press reports said that the three men were suspected of being Iranian agents, sent to Britain to carry out the death sentence passed on the author SALMAN RUSHDIE by the late Iranian religious leader AYATOLLAH KHOMEINI.(IHT 25/26-07-92)

DIPLOMATIC PROTECTION

See also: International trade: American Honda Motor Co.

Korean victims of Los Angeles riots

A South Korean delegation went to the US to seek reparations for the Koreans who suffered damage in the Los Angeles riots in April 1992. The Korean-American community in the Los Angeles area, consisting of 300,000 to 400,000 persons, was the worst victim with an estimated 850 Korean-owned businesses that suffered damage or were destroyed. Tensions had been high between South Koreans and black American soldiers since a Korean grocer in Los Angeles shot and killed a black teenager last year for allegedly stealing a bottle of orange juice. The tension increased when the grocer was convicted of second-degree murder but did not receive a jail sentence.(IHT 05-05-92)

DIPLOMATIC AND CONSULAR RELATIONS

See also: Cambodia, Divided states:China, Inter-state relations (Thailand-Vietnam)

Belgium-Sri Lanka

It was reported that irked by the impounding of a Belgian ship by Sri Lankan authorities for carrying an arms shipment allegedly destined for the separatist Tamil Tigers, Belgium held up its agreement for the appointment of the new Sri Lankan ambassador to Belgium and the EC.(FEER 10-10-91 p.8)

Indonesia-Libya

Indonesia and Libya established diplomatic relations at the ambassadorial level on 17 October 1991. This marked a reconciliation between the two countries: Indonesia had for years suspected Libya of helping train [North Sumatran] Acehnese separatists. It was reported in July 1992 that Libya had opened its embassy in Jakarta.(FEER 31-10-91 p.14,23-07-92 p.12)

China and Israel

Although they had long had trade and other contacts, including arms sales, the two countries never had diplomatic relations. Israel was the first Middle East state to recognize the People's Republic government of China in 1949, but plans by the Israeli government to establish relations were sidetracked a year later by the outbreak of the Korean War. The two countries had official relations only in the scientific field, Israel being represented in Beijing by a liaison office of its Academy of Science. In June,1991 the two countries signed a bilateral agreement on scientific cooperation.

Israeli foreign ministry officials who had come to China as guests of the semi-official Israeli representative office in Beijing in early October 1991 had meetings with Chinese foreign ministry officials "on the Middle East question and on other international issues".(IHT 11-10-91) In November 1991 the Israeli defence minister carried out a secret official visit to China. and on 18 November 1991 a delegation of the Israeli Chamber of Commerce held the first official talks on establishing formal trade ties between the two countries. (IHT 21-11-91) In December 1991 the Chinese deputy foreign minister visited Israel and invited the Israeli foreign minister to visit China.(IHT 26-12-91) This visit took place in January 1992 and led to the establishment of official diplomatic relations on 24 January 1992.(IHT 11-10-91,21-11-91,23-01-92,25/26-01-92)

India and Israel

India announced on 29 January 1992 that it was establishing full diplomatic relations with Israel. India had recognized Israel in 1950 but had kept Israeli representation to a consulate-general in Bombay.(FEER 13-02-92 p.14)

Laos and U.S.

In a sign of improving relations between the two countries, the US decided to send an ambassador to Laos for the first time since a Communist government took power in 1975. According to the American President the decision was made because Laos had taken steps toward political and economic change, had aided US efforts to find US servicemen still missing from the Vietnam War and had worked with the US on narcotics control.(IHT 14-11-91)

South Korea and Vietnam

It was expected that diplomatic relations between the two countries, broken off in 1975 after the fall of South Vietnam, would be resumed by March 1992. Talks on normalization were held in Bangkok. The re-opening of ties was expected to lead to similar South Korean overtures to Laos and Cambodia. (FEER 06-02-92 p.8)

Opening of consulate without permission

It was reported that some time in June or July 1992 Iran opened a consulate

in the northern Afghan city of Mazar-i-Sharif without asking permission from the Afghan government. It was closed again upon demand of the Afghan government.(IHT 28-07-92)

South Korea and Albania

On 26 August 1991 South Korea and Albania established diplomatic relations. Albania was the last country in Eastern Europe that had still not recognized South Korea. The relations between Albania and North Korea would be continued.(FEER 05-09-91 p.14)

DISARMAMENT

UN Regional Centre for Peace and Disarmament in Asia and the Pacific

A regional meeting, the third in the series, entitled "Non-proliferation and other disarmament issues in the Asia-Pacific region: trends and challenges" was held at Kathmandu on 27-29 January 1992. It was organized by the Centre which was established in 1989 and which functions under the auspices of the Office for Disarmament Affairs of the UN.(UNdoc.A/47/359)

China's basic position on nuclear disarmament

In a working paper submitted by China to the UN Disarmament Commission it is said, *inter alia*,
" Pending the realization of complete prohibition and thorough destruction of nuclear weapons, as an effective measure for the prevention of nuclear war, all nuclear-weapon states should undertake the following commitments:
(a) Not to be the first to use nuclear weapons at any time and under any circumstances, and conclude an international agreement on not being the first to use nuclear weapons;
(b) Not to use or threaten to use nuclear weapons against non-nuclear-weapon states and nuclear-weapon-free zones, and conclude an international legal instrument in this regard;
(c) To support the proposals for the establishment of nuclear-weapon-free zones, respect their status and undertake the corresponding obligations." (UNdoc.A/CN.10/166 of 24 Apr.1992)

DISSIDENTS

See also:(Non-)Interference,Nationality

Nobel prize for AUNG SAN SUU KYI

AUNG SAN SUU KYI was awarded the Nobel Peace Prize. Students rallied in Yangon in her support on 10 December 1991, the day that she was to have collected the prize in Oslo, Norway.(IHT 11-12-91)

DIVIDED STATES: CHINA
See also: Arm supplies, Foreign property rights, GATT

Curbs on investments from Taiwan in mainland China

The government at Taiwan in 1991 withheld approval of a large rubber industry investment plan and did not rule out the possibility of imposing a ceiling on the value of future investment projects on the Chinese mainland. Government officials had repeatedly warned local enterprises of depending too heavily on the mainland.(IHT 13-09-91;14/15-09-91)

In February 1992 the Taiwanese authorities decided to ban investment in mainland China for 18 industries that the government considered vital for long-term economic development. So far Taiwanese companies had been allowed to manufacture nearly 3,700 products on the mainland. It was estimated that at least $3 billion of Taiwan investment had poured into the mainland since political tension between the governments began easing in the late 1980s.(IHT 28-02-92)

Sanfu Motors Industrial Co.of Taiwan was reported to plan to set up an automobile assembly plant in mainland China with the French car company Renault. It would avoid violating the Taiwanese ban on investments in certain strategic industries by making its investment in the name of the son of the Sanfu chairman, who is a Canadian citizen.(IHT 20-03-92)

Piracy in the Taiwan Strait

Taiwan's quasi-official Straits Exchange Foundation held a second round of talks in Beijing on 4 November 1991 on cooperation to prevent piracy and other criminal activities in the Taiwan Strait. It was expected that the Chinese government would set up a corresponding liaison agency in order to enable negotiations to be held.(FEER 14-11-91 p.14)

Means of mainland-Taiwan communication

In response to initiatives from Taipei, the Chinese government established a non-governmental Straits Relations Association to promote collaboration between the Chinese mainland and Taiwan and further reunification.(FEER 26-12-91 p.12)

Easing of restrictions on visits from the mainland

The cabinet-level Mainland Affairs Council at Taiwan eased restrictions on visits from the mainland by permitting brothers, sisters and parents-in-law to visit sick relatives and attend funerals in Taiwan. Previously, only spouses and parents were allowed.(FEER 05-12-91 p.14)

In January 1992 the requirement for mainland Chinese arriving in Taiwan to sign a statement renouncing their communist party membership was abolished. Following this decision a Taiwanese court in early April 1992 acquitted a Hongkong businessman from a charge of conspiration to commit sedition

purely on the basis of his membership in the Chinese Communist Party, because it determined he had committed no violent act and had no intention to commit sedition.

On 16 May 1992 the sedition law was revised whereby penalties for non-violent acts outlined in the anti-sedition provisions of Article 100 of the Criminal Code were removed. Under the revised definition sedition requires the intention "to overthrow the government by actual violence and coercive action." (FEER 23-04-92 p.32,30-07-92 p.12)

Taiwan lifted its ban on student exchanges with the mainland on 25 May 1992 by allowing Taiwanese students to stay a maximum of two months on the mainland. However, a ban on Taiwan students' enrollment in Chinese universities would remain in effect.(IHT 26-05-92)

The (Taiwanese) Straits Relations Act

The Taiwan legislature passed an omnibus bilateral-relations law, the Straits Relations Act, on 16 July 1992, giving the government blanket authority to allow almost anybody from the mainland to visit Taiwan and to take many more initiatives in promoting relations with the mainland, such as exchange representative offices.(FEER 30-07-92 p.12)

Chinese common market

The economics minister in Taiwan proposed linking Taiwan, mainland China and Hong Kong in a single economic bloc establishing a "Greater Chinese Common Market", but said that political tensions would prevent the goal being achieved in the short term. However, sharpening economic competition around the world made the proposal necessary, while democratic reforms in China were inevitable and would eventually reduce political tensions with Taiwan.(IHT 4-11-91)

It was reported in late December 1991 that officials and economists from mainland China and Taiwan started feasibility studies on establishing an economic zone or a common market including southestern China, Taiwan, Hongkong and Macao. Chinese officials later proposed expanding the zone to cover the area south of the Yangtze River and eventually to include even northwest China.(IHT 31-12-91/01-01-92)

Taiwanese ban on Chinese ships

The Mainland Affairs Council, a cabinet-level body at Taiwan that formulates policies towards mainland China ordered revised guidelines to be drawn up to avoid the creation of direct shipping links across the Taiwan Strait, which are banned by the Taipei government. While visits by China-registered vessels were already banned, the new regulations banned port calls for third-country-registered ships that are more than 40 percent-owned by Chinese companies or people. The ban also applies to vessels owned by companies that have Chinese nationals in senior positions. It was emphasized that direct shipping links would not be allowed until the second stage of the so-called

National Unification Guidelines. These guidelines were issued by the Taipei government in February 1991 to underline the stages of development of relations across the Taiwan Strait.(*see* 1AsYIL 284)(IHT 9/10-11-91)

External relations of the government in Taipei

By the end of 1990 the Taipei government maintained diplomatic relations with 29 states, among which the following seven granted recognition since the Tiananmen incident in Beijing: Belize, Grenada, Guinea-Bissau, Lesotho, Liberia, Nicaragua and the Central African Republic. On 19 June 1992 Niger re-established diplomatic relations after having switched recognition to the central government in Beijing in 1974, bringing the number of countries with envoys accredited to Taipei to 30.

"Substantive" or "functional" relations with Western Europe were upgraded. Early 1991 the French minister of industry was the first European cabinet-level official to visit Taipei in 25 years. Following the French lead, Italy, Ireland and Sweden subsequently sent ministerial-level officials, and in July 1991 Britain dispatched an under-secretary of the Department of Trade and Industry to conduct trade talks in Taipei. Except for the US which institutionalized its ties in the Taiwan Relations Act of 1979 no other country has a formal legal basis for conducting official business in the absence of formal relations.

In 1991 Taiwan signed air rights agreements with Canada, Austria, New Zealand, Australia and Vietnam, and fishing pacts with the Philippines and the Soviet Union. It is a member of the Asian Development Bank under the name Taipei-China, and was admitted as a member of the APEC forum under the name of "Chinese Taipei", under which it also participated in the Olympic Games. It applied for membership of GATT as "The Customs Territory of Taiwan, Penghu, Jinmen and Matsu". By November 1991 it was a member of 11 international organizations under its official name of "Republic of China".(FEER 14-11-91 p.31-33,02-07-92 p.12)

Despite the absence of diplomatic relations Latvia agreed to allow Taiwan to set up a consulate-level office under its official name of "Republic of China".(FEER 20-02-92 p.14)

For the first time in over four decades there were contacts between Taiwan and Russia when two senior Russian naval officers arrived in Taiwan on 22 June 1992.(IHT 23-06-92)

East European representative offices in Taiwan

Czechoslovakia, Poland and Hungary intended to open representative offices in Hong Kong and Taipei by the end of 1991, having cleared the matter with the Chinese government. All three countries would send trade representatives to Taipei in response to China's insistence that the offices remained unofficial.(FEER 05-09-91 p.9)

Franco-Taiwanese relations

It was reported in January 1992 that France had agreed to establish an air link and more formal trade ties with Taiwan. Trade cooperation councils would be established in each other's capitals.(IHT 25/26-01-92) On 24 March 1992 France and Taiwan agreed in principle to share technology and form joint ventures in strategic industries such as aerospace and telecommunications.(IHT 26-03-92)

Return of nationalized property

It was reported that the Chinese government would hand back a Shanghai knitting mill that was nationalized in 1949, to the original owners, now based in Taiwan. The case marks the first time a nationalized factory would be returned to owners living in Taiwan.(FEER 30-07-92 p.65)

DIVIDED STATES: KOREA
See also:Diplomatic and consular relations, Nuclear capability

Withdrawal of US troops

After having cut its troops from 43,000 in 1990 to 39,000 and planning to reduce them further to 36,000 in 1992, the US disclosed its plan to withdraw 6,000 more troops from South Korea by 1993, scaling down its military strength to 30,000. and bringing the number scheduled for withdrawal in the next four years to 13,000, in accordance with the 1990 Nunn-Warner Report of the Congress. At the annual US-Korean Security Consultative Meeting in November 1991, however, the US decided to halt the troop reductions "until the dangers and uncertainties of the North Korean nuclear program have been thoroughly addressed."(IHT 22-10-91,28-10-91,22-11-91;FEER 05-12-91 p.28) This position was maintained despite the reconciliation and non-aggression treaty concluded by North and South Korea in December 1991 (*see infra*)(IHT 16-12-91)

Rejection of peace guarantee plan

South Korean officials opposed suggestions of the US, the Soviet Union, Japan and China guaranteeing the outcome of an agreement between North and South Korea on peace and possibly reunification, saying that such a scheme would invite foreign intervention in what was essentially an inter-Korean issue.(FEER 21-11-91 p.14)

Treaty of Reconciliation and Non-aggression

At the fifth round of talks in Seoul between the prime ministers of North and South Korea the two countries concluded a Treaty of reconciliation and non-aggression on 13(14?) December 1991.(*see* Documents) The treaty prescribes

the re-establishment of a measure of regular communication between ordinary North and South Koreans, and replaces the armistice with a kind of "peace regime". It was expected that the provisions on economic exchanges between the two countries were the most likely to be carried out quickly, contrary to the exchanges of people, newspapers and information.

The treaty included a series of confidence-building measures. A joint military committee would be formed to discuss violations of the armistice agreement, and an emergency hotline would be opened for quick consultation in times of crisis. Direct trade and investment between North and South would be allowed, and the two countries would begin restoring rail and road connections destroyed during the war.

Until the conclusion of the treaty North Korea had always demanded to negotiate directly with the US, which was the signer of the 1953 armistice agreement.(IHT 13 and 14-12-91) The agreement was the first document to confirm the existence of the two Koreas and the first government-level agreement since the country's division in 1945.(IHT 18 and 19-02-92;FEER 26-12-91 p.8)

North-South economic relations

At the fourth meeting of the prime ministers in October 1991 South Korea offered to buy 44 kinds of agricultural products and raw materials from North Korea. On the other hand North Korea declared that it would not bar South Korea from taking part in the development of the Tumen river region into a special economic zone.(*see*:Joint development)(IHT 25-10-91)

It was reported early December 1991 that Samsung Co, South Korea's largest trading company, was negotiating the establishment of a liaison office in North Korea, and that they had signed a contract with a North Korean trading concern to export coal to the South. South Korean government officials confirmed that the Unification Ministry had approved the request to import the coal. Samsung was also negotiating terms for the export of South Korean textiles and other goods, and was seeking to take part in the above-mentioned planned special economic zone around the Tumen River.(IHT 7/8-12-91)

In January 1992it was reported that Lucky-Goldstar International Corp. was involved in a barter deal, importing coal against TV sets and polyester film and that the Daewoo Group had reached agreement with North Korea for the setting up of a number of light industries and of an international hotel in Pyongyang. The South Korean government gave its permission on 11 February 1992 but later banned North-South exchanges until North Korea would allow inspection of its nuclear facilities.(IHT 16-01-92,24-01-92,27-01-92,26-02-92) Indirect trade between the two Koreas totaled $190 million in 1991, up from $25 million in 1990.(IHT 24-01-92)

Reunification aims

The head of the North Korean mission to the European headquarters of the United Nations at Geneva said in a news conference, *inter alia*:"Since the North and the South have agreed to recognize and respect each other's systems, it is

quite natural to unify the country in the form of a confederation on the principle: one nation and one state, two systems and two governments....But in the end the people themselves will decide whether they all want to live under one system and what it will be....We do not want to say the future of the country will be socialist. But it must be united, neutral and non-aligned and living at peace with its neighbours."(IHT 16-01-92)

Armed incident

South Korean troops shot and killed three North Korean soldiers on 22 May 1992 in the southern side of the demilitarized zone when a North Korean patrol crossed the armistice line. While South Korea complained to North Korea about the incursion, the latter denied sending troops into the southern section of the zone and accused the South of manufacturing the incident.(IHT 23/24 and 26-05-92).

EAST ASIAN ECONOMIC GROUP(ING)/CAUCUS

Modification of the idea

The meeting of ASEAN economic ministers in October 1991 which agreed on an ASEAN free trade system in 15 years'time (*see* ASEAN) also decided to meet the objections raised by the US against a stronger proposal from Malaysia for an East Asian Economic Grouping which could encourage the growth of antagonistic trade blocs (*see* 1 AsYIL 289). The proposal was modified and as a result the grouping was to be called the East Asia Economic Caucus (*see* ASEAN). Japan, China, South Korea, Taiwan and Hong Kong were to be invited to join.

It was said in a joint statement of the ASEAN ministers and endorsed by the Heads of government that the Caucus would not be an institutionalized entity or a trading bloc and that it would only "meet as and when the need arises." (IHT 09-10-91;FEER 24-10-91 p.65;21-11-91 p.14) Nevertheless a joint session of ASEAN foreign and economic ministers in January 1992 decided not yet to proceed with its formal establishment, fearing "political implications" of angering the US. Indonesia wanted the caucus to exist within the larger APEC framework in order to make it easier to persuade Japan and South Korea to join while the US would find it hard to oppose. Malaysia rejected the APEC setting, arguing that East Asian countries should be able to set up their own grouping independently of the US.(IHT 25/26-01-92;FEER 06-02-92 p.11).

US efforts to oppose the proposal

It was reported that at a meeting during the Asia Pacific Economic Cooperation forum in Seoul in November 1991 the US Secretary of State, in his efforts to oppose the Malaysia-initiated plan, reminded his South Korean counterpart:"Malaysia didn't spill blood for this country, but we did", whereupon the Korean minister said that South Korea would accede to US

wishes and oppose the Malaysian plan. A few days before the US sent a memorandum to the Japanese foreign ministry asking that Japan oppose the plan. It was reported that the US had hinted that any Japanese move to join would affect US-Japanese economic relations. The Japanese foreign minister responded by saying it would be "not wise" to proceed with a trade grouping that did not include the US.(IHT 09-10-91,14-11-91;FEER 24-10-91 p.65,28-11-91 p.26)

ECONOMIC COOPERATION AND ASSISTANCE

See also: European Economic Community, Human rights

Japanese official development aid

(*see* 1 AsYIL 293)

Japan accepted a UN target that called for Japan ultimately to commit 0.7% of its GNP to official development aid (ODA), implying aid spending of around $20 billion a year. There were signs that Tokyo was having difficulty fulfilling its pledge to spend $50 billion in ODA between 1988 and 1992. During the three years to 1990, its ODA disbursements totalled $27.3 billion - only 54% of the five-year goal.(FEER 10-10-91 p.68)

Aid to the Soviet Union

Reversing a long-standing policy Japan decided to provide a package of up to $2.5 billion in economic aid, including $500 million for food and medical supplies, $200 million in export credits and $1.8 billion in trade insurance. Japan previously refused Soviet requests for aid, insisting that economic relations should depend on an improvement in political relations.(*see* 1 AsYIL 292) Japanese officials went to great lengths to insist that they were not attempting to buy back the Northern Territories captured by the Soviet Union in the closing days of World War II and claimed by Japan.(*see* Territorial claims)(IHT 09-10-91;FEER 17-10-91 p.16)

South Korea decided to suspend a $1.2 billion loan promised for 1992 because of the growing political and economic chaos as the Soviet Union disintegrated. The loan was part of the $3 billion package agreed in January 1991(*see*:1 AsYIL 290)(IHT 12-12-91)

Asia-Pacific Economic Cooperation forum

(*see* 1 AsYIL 289)

The third annual ministerial meeting of APEC took place at Seoul in November 1991. It concentrated on regional economic trends and issues and the future of the 15-nation group. China, Taiwan (to be called "Chinese Taipei") and Hong Kong participated as new members, and according to South Korean officials Mexico, Chile, Ecuador and the Soviet Union had applied for membership. Malaysia downgraded its representation to express its displeasure over reports of a US move to enlist Japan against a proposed East Asian

Economic Grouping.(*see supra*)

The APEC countries reached agreement on establishing a permanent secretariat to devise and coordinate cooperation programs.(IHT 11-11-91;FEER 14-11-91 p.27,28-11-91 p.27;BLD 1992 No.13)

Conditions attached to German development aid

The German minister for economic cooperation said on 10 October 1991 that in future his ministry would apply five criteria to recipient countries: respect for human rights, popular involvement in political decision processes, legal security, creation of a "market-friendly" economic system, and orientation of government policies towards development. Referring to the fifth criterion, the minister said development could not be achieved without reducing exaggerated military spending. In assessing military spending Germany would look at the percentage of GNP spent on defence, the ratio of military spending to other sectors of government spending, especially education and health, and the share of weapons in total imports.

Aid levels for 1992 under these criteria would lead to cutbacks in the case of four of the largest recipients: India, Indonesia, Pakistan, and Morocco. Accordingly the German government declared in November 1991 that development aid to India and Pakistan would be cut because of "excessive armament" of the two countries.(FEER 28-11-91 p.21)

Cuts in military spending as condition for developing aid

Following a ministerial meeting on 4 December 1991, Western donors in the OECD served notice on developing countries that future development aid would depend on these countries effecting cuts in military expenditure.(FEER 19-12-91 p.14)

Rejection of Dutch development aid by Indonesia

The Netherlands suspended new development aid projects on 21 November 1991 until the Indonesian investigation into the incidents in East Timor (see *infra*) would yield an acceptable result.(IHT 22-11-91)

On 25 March 1992 Indonesia decided to reject any development aid from the Netherlands and disbanded the 24-year old Inter-Governmental Group on Indonesia (IGGI), a 14-member aid consortium chaired by the Netherlands. The move was the expression of strong Indonesian objections against Dutch attempts to link human right concerns and other conditions to aid. Indonesia asked the World Bank to establish a new aid grouping for Indonesia which would have all the original members except the Netherlands. The new multilateral aid group is called Consultative Group on Indonesia and met for the first time in Paris on 16-17 July 1992. It was reported that Indonesia wished to add South Korea, Saudi Arabia, the Islamic Development Bank and the Nordic Investment Bank to the consortium. The Group finally comprised 18 countries and 13 multilateral agencies. The consortium pledged an amount in aid that was slightly more than the amount allocated by its predecessor. In 1991

the Dutch contribution to the IGGI-sponsored aid made up 1.9% of the total. Japan, the World Bank and the Asian Development Bank contributed more than 80% of total IGGI aid. (FEER 09-04-92 p.10, 11-06-92 p.57, 30-07-92 p.9)

Japanese financial aid for US superconducting supercollider project

The US sought a Japanese contribution of about $1.25 billion to a giant atom-smasher project that will cost $8.25 billion at current estimates and that is under construction in Texas. [The supercollider project began during the Reagan administration as a national project, and many of the major decisions, including the choice of its site, were made without any international participation. Subsequently the US government moved to "internationalize" the project when the price began to skyrocket. So far India was the only country to announce its support, pledging $50 million.] According to Japanese press reports the Japanese finance minister agreed that Japan should contribute more to basic scientific research but would do so by building research facilities within Japan.[One reason the Japanese have been hesitant about the supercollider was their unhappiness about US cooperation on joint research in space. The Japanese have contributed about $.2.5 billion to build part of the US space station Freedom, only to see the project repeatedly delayed by the US Congress. After waiting years for NASA to fulfill its promise to carry a Japanese astronaut into orbit, Japan finally got its first spaceman last year - by purchasing a seat for $12 million on a Soviet rocket.] The supercollider issue was a subject of discussion again during the visit of the US President to Japan in January 1992 but no agreement on Japanese funding was achieved.(IHT 05-12-91,09-01-92,11/12-01-92)

Aid to Vietnam

Japan prepared to end a 14-year suspension of development aid and to provide almost 4 billion yen in 1992-1993. The aid was suspended following the Vietnamese invasion of Cambodia in 1978, and would now be resumed after the conclusion of the Cambodian peace treaty in October 1991.

A Japanese delegation visited Vietnam in January 1992 to prepare the groundwork for the resumption of the assistance. It also began talks on the repayment of Vietnam's outstanding debt to Japan, estimated at 30 billion yen. Some of this debt included credit provided to the US-backed Saigon government, and another part came from credit extended to Vietnam before the invasion of Cambodia. Japan could either cancel the debt by awarding a debt-relief grant, or reschedule it. Vietnam had already expressed its willingness to pay off the debt in a 10-year period.(IHT 03-01-92;FEER 30-01-92 p.41)

In order to avoid another clash with the US which had yet to lift its economic sanctions against Vietnam, Japan had delayed resumption of large-scale development aid, and had dissuaded major corporations from making conspicuous investments.(IHT 28-04-92)

Australia, which suspended aid to Vietnam following the latter's intervention in Cambodia in 1978, said on 13 April 1992 that it would resume

assistance to Vietnam at a level of A$100 million in the next four years.(FEER 23-04-92 p.67)

Informal cooperation among the most developed countries in the Asia-Pacific region

On 4 May 1992 Australia, Hong Kong, Japan and Singapore agreed informally to meet on a regular basis but denied plans to create an alliance modeled after the Group of Seven industrialized countries. At their first meeting, held as a sideline to the ADB annual conference in Hong Kong they discussed cooperation in financial markets, specifically over equities and futures trading.(IHT 06-05-92)

Withholding of World Bank loan for the Pak Moon Dam project

The World Bank decided to delay granting a loan for a proposed hydropower scheme in Thailand. The scheme includes the construction of a dam at the mouth of the Moon River, about 5 km. before it flows into the Mekong. The decision was directly linked to a lobbying campaign initiated by environmental groups in Thailand and abroad. The issue laid bare the split between the developed and developing world, with opposition to the loan coming from the richer countries, including the US. The Thai finance minister bitterly attacked the World Bank decision and, in reference to western environmentalists, said that it set a dangerous precedent whereby "the tyranny of a few in other countries" prevails over the rights of borrowing member countries.(FEER 17-10-91 p.98;24-10-91 p.79)

ECONOMIC COOPERATION ORGANIZATION

Expansion of membership

The Economic Cooperation Organization, with Pakistan, Iran and Turkey as its members, emerged from the trilateral Regional Cooperation for Development in 1985, while the RCD was formed in 1977 under the Treaty of Izmir, itself the successor of the post-World War II anti-communist Bagdhad Pact. Following the revision of the Izmir Treaty in Islamabad in 1990 the ECO focused on intra-regional trade and domestic industrialization, with the ECO Council of Foreign Ministers as the highest policy-making body.

At a summit meeting at Tehran on 16 February 1992 the organization accepted Azerbaijan, Turkmenistan and Uzbekistan as new members, and left little doubt that Kazakhstan, Kyrgystan and Tajikistan would soon join. A political settlement in Afghanistan could lead to membership for that country, while Turkish officials said that Romania had also asked to join the organization, until now exclusively Islamic.(IHT 14-01-92,17-02-92, FEER 05-09-91 p.26)

EMBARGO
See also: Inter-state relations(Vietnam-US),Oil, Sanctions

Illegal arms export during Iran-Iraq War

The Japanese government banned Japan Aviation Electronics Industry (JAEI) from exporting for 18 months because it illegally supplied arms to Iran during the Iran-Iraq War. The company was said to have repaired and sold air-to-air missile parts to the US company Aero Systems, knowing that the parts were to be shipped to Iran via the US firm's Hongkong and Singapore subsidiaries.(FEER 07-11-91 p.67)

ENVIRONMENTAL PROTECTION
See also:Economic cooperation

Forest fires in Indonesia

Huge forest fires destroyed more than 100,000 hectares of rain forest in Indonesia in September and October 1991. The Indonesian foreign minister said that his government had asked Western nations for training and equipment to fight the fires but none had responded. He criticized them for "being very quick at campaigning against logging but doing nothing to offer assistance in fighting the forest fires". The criticism was shared by Malaysian officials. However, World Bank officials regretted that no requests for funds or technical help had been received while the Bank could have provided quick-disbursing emergency aid such as those provided by way of earthquake relief to the Philippines or as long-term relief for re-afforestation to China in 1989. Besides it seemed that the US, Canada, Britain, France and Australia also offered to provide Indonesia with, *inter alia*, portable fire-fighting equipment.(IHT 11-10-91;FEER 31-10-91 p.20)

ASEAN common policy

A common policy under the name of "Singapore Resolution on Environment and Development"(UNdoc.A/47/118 Appendix) was agreed by the fifth bi-annual ASEAN Ministerial Meeting on the Environment (AMME) on 18 February 1992. The policy included the principle that countries should honour the sovereign right of states to develop their natural resources and the rejection of any unilateral measures to ban the import of tropical timber. It also called for financial help to conserve the forests and agreed to a US proposal for a "US-Asian Environmental Partnership"(USAEP) that would help with the transfer of environmentally sound technologies to the region.(FEER 27-02-92 p.67,05-03-92 p.10)

Kuala Lumpur Declaration

The 30-point Declaration (UNdoc.A/47/203) was adopted by a conference

of 54 Third World states in April 1992, covened in order to achieve a common Third World stand at the UNCED in June 1992. Among other things the Declaration called for developed states to make assessed contributions toward a fund for environmental projects, in addition to and separate from their existing official development aid (ODA) targets. Developing countries could contribute to the fund on a voluntary basis.(IHT 29-04-92;FEER 14-05-92 p.22)

Hongkong practice

The Montreal Ozone Layer Protocol which was signed by Britain in 1987 committed signatories to halve CFC use by the year 2000, allowing developing countries an extra 10 years.

Hongkong enacted the Ozone Layer Protection Ordinance in 1989 in order to bring local usage of CFC into compliance with the Protocol. The law banned CFC production in the colony and also limited the import of the chemical to an amount equivalent to the 1986 level. Beginning 1995 imports would not be allowed to exceed half that amount. Meanwhile many of the manufacturers using CFC had been moving their activities across the border into southern China in the past couple of years while some of those remaining in Hongkong had switched to substitutes.(FEER 14-05-92 p.54)

EUROPEAN ECONOMIC COMMUNITY

Interpretation of the EEC-Japanese agreement on car imports

Japanese industrial circles repeatedly emphasized that the agreed import limitation (*see*:1 AsYIL 322) does not apply to cars produced in Europe, and that the assumed production of 1.2 million vehicles by the "transplant factories" by 1999 is merely a factual estimate. Details of the agreement seem never to have been made public, but both the Internal Market and the Competition Commissioners of the E.C. confirmed the above interpretation. The Competition Commissioner expressly affirmed that cars made in Europe by Japanese owned companies are in the same position as cars made in Europe by U.S.owned companies.
(IHT 12-09-91;13-09-91;19-09-91)

Improved Sino-EEC cooperation

Under a 1985 agreement an EC-China Joint Commission would meet annually to discuss their mutual relationship. The Commission met again in Beijing in October 1991 for the first time since the 1989 Tiananmen Square incident. There were disagreements about mutual trade deficits.(IHT 25-10-91)

Strained EC-Indonesian relations

Indonesia's relations with the EC became strained by the Community's lack of response to Indonesian efforts to ameliorate possible human rights abuses in

East Timor after the shooting incident in November 1991. This lack of appreciation contrasted starkly to the EC statement condemning the shooting which came within hours of the incident.

A Portuguese statement on 27 December 1991 called the report of the Indonesian investigation team "a clumsy and desparate attempt" to rebut criticism of the Indonesian East Timor policy and called for a separate international inquiry to be held. Portugal assumed the EC presidency on 1 January 1992 for six months.(FEER 30-01-92 p.11)

EC-ASEAN agreement on economic cooperation

EC insistence on a "human rights clause" (*see* 1AsYIL 295) and ASEAN rejection constituted a major obstacle in the plans to negotiate a new expanded agreement on EC-ASEAN economic cooperation. No progress was expected during the first half of 1992 when Portugal held the chairmanship of the EC Council of Ministers, but Portugal kept blocking the EC plans in July 1992 because of what it denounced to be Indonesian violation of human rights in East Timor.(*see*:Specific territories) Its decision to block the start of the negotiations followed its unsuccessful attempt to have Indonesia's human-rights record formally raised by the EC at a meeting of the new international aid consortium for Indonesia.(*see*:Economic cooperation)

The new agreement would cover a wider range of topics, and the European Commissioner in charge was reported to have said that the EC must draw up such agreement in order to boost the Community's political and economic presence in the region, and that the new agreement would encourage increased European investments in Southeast Asia, allow the EC to push for better protection of intellectual property rights in the region, and increase EC influence over how ASEAN runs its environment policy.(FEER 09-04-92 p.10,30-07-92 p.9)

EXPULSION

See: Aliens: activities, Diplomatic inviolability, Diplomatic and consular relations

EXTRADITION

See:Diplomatic inviolability

EXTRA-TERRITORIALITY

Use of US antitrust laws against Japanese industrial cartels

The idea of challenging the close business relations between Japanese companies, known as *keiretsu*, had been discussed for years by US trade officials. In February 1992 the US Attorney General unveiled plans to use US antitrust laws against Japanese corporate groups that restrict American imports

into Japan, although other parts of the US administration were strongly opposed.

Recently the US company Honeywell Inc. won a $96 million patent piracy case against the Japanese company Minolta Camera Co. in the US District Court in Newark. Minolta could not avoid the civil complaint because it had economic interests in the US while Honeywell could block Minolta cameras from being sold in the US if Minolta refused to cooperate in the lawsuit.

Legal experts said that a similar approach could be used by the Justice Department to force Japanese companies to cooperate in an antitrust complaint, although the fact that the case was being brought by the US government instead of a company would likely mean the Japanese government would somehow get involved.(IHT 24-02-92)

The plans would imply changing some of the existing guidelines, effectively extending the reach of US law outside US territory. Currently, the US antitrust authorities can invoke American law only to protect consumers, not to boost the prospects for exporters. The condition of consumer protection, however, was only added to the existing law as recently as 1988. Under the proposal American authorities could file a complaint in a US court against a *keiretsu* that was discriminating against US-made products in Japan. The proposal was based on the criticism that the *keiretsu* tend to be hard for foreign companies to break into, and that Japanese antitrust laws were too weak in combatting the collusive practices. Expectedly the Japanese reaction was negative.(IHT 25-02-92) Meanwhile, responding to US criticism, a government-sponsored study group in Japan urged a major increase in criminal penalties for companies participating in illegal cartels.(IHT 03-03-92)

The change in US trade policy was announced in early April 1992. Japan reacted by a statement from the spokesman of the Foreign Ministry that the US rules were "not acceptable under international law." It was reported that Japan was considering counter-measures to blunt the effects of the US move.(FEER 23-04-92 p.54)

FINANCIAL CLAIMS

US compensation for Iranian claim

The US and Iran were reported to be nearing final agreement on compensation of about $275 million to Iran for undelivered American-made military equipment dating from before Iran's 1979 revolution. The agreement involved equipment that Iran paid for, that was in the US for repair, or used to train Iranian military forces in the US. Although the parties had reached agreement on the amount earlier in 1991, it was only later that they agreed on whether the whole amount would be in fact paid to Iran or whether part would go into an escrow account for the reimbursement of eventual American claims. The settlement left unresolved Iranian claims of about $10 billion arising from arms purchases.(*see* 1 AsYIL 297)(IHT 22-11-91)

Settlement of Franco-Iranian financial dispute

A 16-point agreement was signed on 29 December 1991 to settle a 12-year dispute concerning a 1974 loan made by the Iranian government under the Shah to the French Atomic Energy Commission.(*see* 1 AsYIL 297) The loan was to pay for a nuclear plant, but the project was canceled after the Shah was toppled in 1979. France agreed to reimburse (yet?) $1 billion. It is reported that on its part France had an equal counterclaim against Iran for other canceled projects.(IHT 28/29-12-91, 30-12-91)

French contractual obligations towards Pakistan

France had failed to honour a contract signed in 1978 for the supply of a nuclear reprocessing plant. There were conflicting reports about French agreement on a 600 million francs ($118 million) compensation to be spent on defence contracts (Mirage warplanes) and about a French proposal for a soft loan of Ffr.700 million against the Pakistani claim for compensation. The loan would be repayable over 40 years at a nominal annual interest of 0.4% and be used for buying French goods.(FEER 02-07-92 p.12)

FISHERIES

Fishermen detained by Vietnam and Thailand

During an official visit of the Thai foreign minister to Vietnam in September 1991 it was agreed that Vietnam would release 344 of the 846 Thai fishermen detained for allegedly fishing in Vietnamese territorial waters while Thailand promised to free 157 Vietnamese fishermen.(*see also*: Inter-state relations: Vietnam-ASEAN)(FEER 03-10-91 p.15)

Lack of compliance with driftnet fishing regulations

Driftnet fishing has been the subject of several United Nations resolutions.(cf. 1AsYIL 249) The latest was General Assembly resolution 46/215 of 20 December 1991, requiring that driftnet fishing on the high seas be reduced by half by 30 June 1992 and cease entirely by 31 December 1992, but even before that driftnet fishing was subjected to various limitations (cf.UNGA res.44/225 and 45/197, see the Report of the Secretary-General of 8 Nov.1991, UNdoc.A/46/615). The US Commerce Secretary sharply criticized South Korea and Taiwan for continued illegal driftnet fishing in the Pacific in August 1991. Bowing to similar American pressure Japan agreed on 26 November 1991 to comply with the UN moratorium on the use of huge small-mesh fishing nets, extending up to 40 miles, in the Northern Pacific Ocean. Japan said that it would curtail half of its driftnet fishing by the June deadline and the remaining half by the end of 1992.

Japanese fishermen use the nets to catch a species of squid knowing as flying squid. Many had turned to squid fishing in the last decade because they were no

longer able to fish for salmon, which are protected in international waters and can be fished only in coastal waters of the countries where they spawn. The Japanese say that the ban would put about 10,000 fishermen out of work and cripple the fish processing industry, which employs 50,000 or more people. A compensatory package was prepared by the government.(IHT 27-11-91;FEER 29-08-91 p.51,23-01-92 p.29)

Taiwan had agreed to adhere to UN resolution 46/215 of December 1991, but the ban was largely ignored by the fishing industry which was said to rely on driftnetting. Some Taiwan boats deploy 50-80 km of nylon driftnets at once, netting as much as 5 tonnes of tuna daily compared with only 2 tonnes using more environmentally friendly methods. According to official statistics in 1991 some 120 Taiwanese driftnet fishing vessels were deployed in the North Pacific and an additional 100 in the Indian Ocean, but other sources said that the number of driftnet-capable boats based in Taiwan was several hundred more. (FEER 23-01-92 p.29)

Taiwan fisheries

In early 1991 half a dozen Taiwanese fishing boats were impounded by the Soviet Union, in April 1991 a number of boats were detained by the Philippines (*see* 1 AsYIL 298). It was reported in August 1991 that 7 Taiwanese fishing vessels and 26 crew members were being detained in Indonesia, the Philippines and Malaysia. In February 1991 a Taiwanese vessel fishing for squid inside Argentina's 200-mile economic zone was intercepted and a crew member was killed in an incident with the Argentine navy. The crew was held in custody for five months and released only on payment of a deposit of $600,000.

Even when they were not wilfully breaking the law, Taiwanese fishing boats were sometimes detained and their crews jailed. Boat captains often complained that they were being stopped when passing through the territorial waters of countries with which Taiwan does not have official agreements.

In its efforts to conclude more formal fishing agreements an accord was reached with the Philippines in July 1991 (see 1 AsYIL 299) and a memorandum was signed by the Taiwanese and the Soviet state-run fishing company, *Sovryflot* on 19 August 1991 giving Taiwan boats pay-as-you-go access to fishing grounds in Soviet territorial waters.

Popular destinations for Taiwanese fishermen are Indonesia, Vietnam and Myanmar, with fees depending on the kind of fish and the type of fishing gear used. Indonesia is favoured because its fishing grounds are many and its indigenous [fishing] industry small.(FEER 29-08-91 p.40)

FOREIGN INVESTMENT
See also:Oil

Iranian special investment zones

Iran designated the islands of *Qeshm* and *Kish*, a few kilometres off Iran's southern coast, to become special investment zones. Qeshm, located close to the

major Iranian oil port of Bandar Abbas in the Straits of Hormuz, was designated as an industrial zone and would be run by a largely autonomous local government. Foreign investors would be promised unrestricted movement of capital and up to 99 percent equity in local joint ventures. The much smaller island of Kish would be developed as a free-trade transit point for shipments to Dubai and Bahrain, which re-export, among other things, consumer products from East Asia.(FEER 12-09-91 p.46)

Taiwan investments in Vietnam

Fearing that its investments in mainland China would make it too dependent of the government in Beijing the Taiwan authorities started encouraging their businessmen to invest in Vietnam as an alternative. It was said that Vietnam had agreed in principle to exchange trade offices with Taiwan and to sign an agreement for the protection of investments from Taiwan. From among the few foreign investments existing in Vietnam in June 1991, those from Taiwan constituted the largest.(IHT 04-10-91;FEER 31-10-91 p.70)

South China Economic Sphere

It was reported that a shift of Japanese assets was taking place to Asia, with a relative decline in emphasis on the US and Europe. In this context a new term had begun to appear in Japanese media in reference to Hong Kong, Taiwan and the Chinese provinces of Guangdong and Fujian: *Kanan Keizai-Ken* - or South China Economic Sphere.(IHT 27-12-91)

Exclusion of US from Vietnamese oil exploration

According to Vietnamese officials US companies would not be allowed to bid to join the exploitation of Dai Hung, Vietnam's largest oil field off the southern coast, because of the US trade embargo.(IHT 27-12-91)

India

Although India had made an "open door" policy the central plank of its IMF-sponsored program of liberalization and deregulation few foreign companies appeared to have taken up its invitation, and even where they did the scale of their financial participation so far remained low. American companies top the list of foreign investors, with German ones ranking a close second; together the two countries accounted for a third of the $700 million in foreign investments that came into India between 1985 and 1990.(IHT 18/19-01-92)

Investment in aerospace companies

Japan's three leading aerospace companies (Mitsubishi Heavy Industries, Kawasaki Heavy Industries and Fuji Heavy Industries) turned down offers to take a major stake in McDonnell Douglas Corp., America's second-biggest commercial aircraft producer, because, *inter alia*, of fear of a political backlash

from the US. The Japanese are already the biggest foreign suppliers to both Boeing and McDonnell Douglas but political pressures are reported to have prevented the Japanese from graduating from subcontractor to full partner. By contrast, European aerospace companies have offered such partnership status. In 1990 Airbus Industrie proposed the Japanese to join the development of a super jumbojet. The Japanese would have to proceed carefully so as to avoid antagonizing the US government as well as Boeing.

In 1990 MacDonnell Douglas agreed to a memorandum of understanding under which Taiwan Aerospace Corp.(TAC) was offered an investment of $2 billion in McDonnell's civil-aircraft business, which would be spun off into a new subsidiary on 1 January 1992. TAC would receive a 40% stake in the new company, and would get McDonnell's help in setting up its own aerospace industry.(FEER 28-11-91 p.67;05-12-91 p.52) However, difficulties arose in its implementation.

It was reported in May 1992 that TAC was proposing a new deal to McDonnell Douglas. Under the new plan a private Taiwanese leasing company would issue letters of credit for $2-3 billion in orders for the projected MD-12 aircraft, that could be used to raise funds for McDonnell Douglas to pay its debts and begin development of the aircraft. The Taiwanese (private) side would also offer convertible debentures as loans to McDonnell Douglas which could be turned into equity should the MD-12 live up to expectations. The plan would save Taiwan from making a full commitment in the early, high-risk phase of the programme, while giving it an opportunity of equity participation when and if the aircraft succeeds.(FEER 28-05-92 p.66,11-06-92 p.39)

Sino-South Korean investment-guarantee agreement

An investment-guarantee agreement between the two countries was due to go into effect on 26 July 1992. This would start an expected increase in South Korean investments in China by firms which avoid rising wages in South Korea.(FEER 23-07-92 p.53)

FOREIGN PROPERTY RIGHTS

E.C.-South Korean agreement on protection of intellectual property

An agreement was reached on 26 September 1991 to settle a four-year dispute over protection of intellectual property rights for European goods. Under the agreement South Korea was to extend the same copyright and patent protection to EC countries as it had since 1987 to the U.S. In return the EC Commission was to recommend an end to the suspension of EC trade preferences (under the EC Generalized System of Preferences) for South Korea which had been in force since 1988 when Seoul refused to grant such equal protection.(IHT 5/6-10-91;FEER 17-10-91 p.121)

Sino-US dispute over intellectual property rights

The US complained that its exporters suffered more than $400 million in damage to intellectual property rights each year. It demanded that China change its new copyright law to protect computer software and that it amend its patents law to protect chemicals and pharmaceutical products. Later the US Trade Representative set 16 January 1992 as the date China must make concessions in order to avoid punitive tariffs under the "Special 301" provisions of the 1988 Trade Act.(*see* International trade) China accused the US of being unreasonable and of holding it to standards beyond those set by international conventions, but finally the two parties signed an agreement on 17 January 1992: China essentially agreed to adopt most international standards for foreign inventions, and would enact laws that extend the duration and scope of patent (20 from 15 years),copyright and trade-secret protections. It would also eliminate most requirements that force multinationals to license production of their inventions to local Chinese companies instead of exporting directly to China.

Another issue settled concerned the protection of pharmaceutical and other chemical products already patented but not yet available for sale. For the pharmaceutical industry 10 years of safety tests are considered necessary after a product is patented. After initially insisting that only future inventions be covered, China agreed to protect products patented since 1 January 1986.

In the deal on copying China agreed to join the Berne Convention on copyrights on 15 October 1992 and the Geneva Phonograms Convention in June 1993. However, it would ask for a longer period than the usual 3 months after accession before its obligations under the Berne Convention would come into effect. [Rules for the implementation of the Treaties were included in Decree of the State Council No.105 of 30 September 1992](IHT 21-10-91,26/27-10-91,23-12-91,26-12-91,18/19-01-92;FEER 17-10-91 p.121,07-11-91 p.67,30-01-92 p.37,14-05-92 p.47)

US-Taiwan copyright agreement

An important copyright protection agreement between private groups in Taiwan and the US representing the governments was signed on 5 June 1992. The agreement could impose heavy costs on Taiwanese makers of computer products and compact disks and eliminate a thriving trade in pirated foreign films and music. Taiwan agreed to bring laws on patents, trademarks, industrial design, semiconductors and trade secrets up to the standards being negotiated in the GATT Uruguay Round.(IHT 08-06-92;FEER 18-06-92 p.83)

Indo-US patent dispute

It was reported in early December 1991 that a compromise appeared likely in the patent dispute. The 1970 Indian Patent Act accords little protection to discoveries in pharmaceuticals, chemicals and food. No patents are given for products in these areas, only for processes, which means that a rival can copy a product as long as his production process is a little different. Besides, patents run for only 7 years, and licensing can be made compulsory if the discovery is

not commercialized by local production within three years. India would be prepared to grant pharmaceutical product patents if the US would agree to manufacture drugs in India at an affordable price.(FEER 05-12-91 p.64)

Thai-US patent dispute

Thailand on 27 February 1992 extended greater patent protection to pharmaceutical products as a result of US pressure, thus avoiding US trade retaliation.(FEER 12-03-92 p.53)

GENERAL AGREEMENT ON TARIFFS AND TRADE
See also: International trade (China's efforts to re-enter GATT)

Chinese and Taiwanese membership

China reversed an earlier concession made during the visit of the US Secretary of State in November 1991 according to which China agreed to simultaneous accession. The Chinese government later took the position that it would not back membership of Taiwan in GATT as a separate customs territory until China became a member, on the grounds that Taiwan had "no right at all to accede to GATT only by itself by representing a separate customs territory."(IHT 26-09-91,13-12-91)

It was meanwhile reported early April 1992 that the GATT had agreed to set up a working group to study Taiwan's application for membership on the hypothesis of simultaneous admittance.(FEER 02-04-92 p.79)

HONG KONG
See also: Broadcasting

The McConnell bill

A bill was introduced in the US Senate by Senator M.McConnell calling on the US government to recognize the terms of the 1984 Sino-British Joint Declaration on Hong Kong with emphasis on the high degree of autonomy granted to the territory after its return to China in 1997.(IHT 7-11-91)

The scope of the Hong Kong Special Administrative Region

Three issues had come together to raise the question of what would constitute the future Hongkong SAR. The first was the apparent ambiguity in both the Basic Law and in the 1984 Sino-British Joint Declaration. Second, the prospect of the eventual merger of Hongkong with the Shenzhen special economic zone (SEZ) and third, disputes that had arisen between the Hongkong and Chinese border police over the extent of each other's territorial waters.

While the Joint Declaration stated that the Hongkong area to be restored to China would include Hongkong Island, Kowloon and the New Territories, the

Basic Law states that "the area of the Hongkong SAR covers Hongkong Island, the Kowloon Peninsula, and the islands and adjacent waters under its jurisdiction", apparently including the New Territories in "Kowloon Peninsula".

"Kowloon" normally refers to the section of the peninsula below a nine-peaked range of hills, while the New Territories to the north were acquired by Britain under a 99-year lease which expires in 1997. In pre-British times, the present territory of Hongkong was part of Xin An county, which extended north of the present New Territories to include what has now become the Shenzhen and Shekou SEZs.

The maritime boundaries proved problematic during recent anti-smuggling operations, and in May 1990 five Hongkong seamen and two policemen were even detained on the mainland after an encounter in what each side claimed was its territorial waters.

The Chinese and British governments had started discussing the exact boundaries of the territory. The most famous boundary issue recently was over the so-called Walled City, a slum in the middle of Kowloon which somehow had acquired a special status which put it off-limits to Hongkong jurisdiction and required the agreement of the Chinese authorities before the Hongkong government could clear and redevelop it.(FEER 05-12-91 p.10)

Nationality of the chief justice

Hong Kong's chief justice said in October 1991 that he would give up his British passport if asked to continue his service in the Court of Final Appeal after 1997. Under the terms of the Joint Declaration the Chief Justice of the Court must be a permanent resident of Hong Kong with no right of abode in a foreign country.(FEER 24-10-91 p.14)

Composition of the Court of Final Appeal

On 4 December 1991 the Legislative Council rejected the model for the court agreed upon by China and Britain in the Sino-British Joint Liaison Group in September, but China said that Hong Kong had no right to repudiate the accord.

In the Joint Declaration of 1984 under which Britain agreed to return Hong Kong to China provision was made for a Court of Final Appeal (to take the place of the British Privy Council) for which overseas judges from the United States and other countries whose legal systems derive from Britain's could be invited to sit on the court "as required". Afterwards China wanted to limit the number of overseas judges to one, to which Britain acquiesced.(IHT 4/5-01-92;FEER 31-10-91 p.13,19-12-91 p.10)

Hong Kong advisers for China

China announced on 23 January 1992 that it planned to appoint local "consultants" on Hongkong's development in the period preceding the reversion of sovereignty to China. The appointment of 44 influential Hong Kong residents took place on 11 March 1992. Many were on the committee that

drafted the Basic Law that is to be Hong Kong's constitution after 1997.(IHT 12-03-92)

Directly elected seats in legislature

Britain refused to rule out the possibility of increasing the number of directly elected seats in the Legislative Council in the 1995 elections, against the wishes of China which had repeatedly expressed its opposition against such increase before the reversion of the colony to China in 1997. At present 18 of the 60 members are directly elected. The remaining 42 are special interest representatives or government appointees. Britain had already agreed to increase to no more than 20 the number of directly elected seats in the 1995 elections. A corresponding decision of the National People's Congress of China appended to the Basic Law states that the first post-1997 legislature will include 20 directly elected seats. A separate annex to the Basic Law provides for 24 directly elected seats in the second legislature, and 30, or half of the total, in the third.(IHT 27 and 30/31-05-92;FEER 11-06-92 p.18) Meanwhile, Britain had pledged in 1990 to ask China "at the appropriate time" to increase the number of directly elected seats in the legislature without specifying an exact number. On 24 June 1992 the Legislative Council dropped an earlier proposal of 1989 for half of its 60 members to be directly elected in 1995, and substituted a motion simply calling on Britain to reach an early decision on the 1995 election and to seek Chinese acceptance of it "in order to achieve smooth transition of the political system."(IHT 26-06-92)

The airport issue

Since the Sino-British memorandum of understanding of July 1991 (1 AsYIL 304) relations deteriorated again as China became alarmed at the Hong Kong government's varying estimates of the airport's final cost, which had gone from 98.6 billion 1991 Hong Kong dollars to as high as 163.7 billion 1997 Hong Kong dollars. Besides Hong Kong officials said the colony was planning to put up only 13.6 billion Hong Kong dollars for the project, the remainder coming from the private sector and borrowings. Another source of misunderstanding is an additional 5.9 billion Hong Kong dollars that the government planned to make available to cover any possible cost overruns. China views this as debt while Hong Kong officials say it is merely a contingency fund that probably will not be needed. Both sides started new negotiations in Beijing in early July 1992.(IHT 03-07-92) but these ended without an agreement being reached, except that the discussions were passed on to the airport committee of the Joint Liaison Group.(IHT 07-07-92;FEER 16-07-92 p.14)

US offer for immigration

The director of the CIA offered US passports to Hongkong employees of the Foreign Broadcasting Information Service. Staff members who translate Chinese and other Asian radio, television and newspaper reports into English, were given "immediate assurance that they will be able to immigrate to the US,

should they choose to do so", when Hong Kong reverts to China in 1997. The assurance was included in the Intelligence Authorization Act of August 1991.(FEER 12-09-91 p.9)

HOT PURSUIT
(*see also*: Minorities)

Mujahidin Khalq in Iraq

Iranian warplanes attacked an Iranian rebel base deep inside Iraq on 5 April 1992 in retaliation for a raid by the Mujahidin Kalq on two villages in Western Iran. The exiled opposition group denied making raids and Iraq called the raid an act of "blatant and unjustified aggression." On the other hand the air raid gave rise to attacks by Iranian exiles at Iranian embassies in many western capitals. On the following day Iran demanded the extradition of dozens of these opposition protesters around the world.(IHT 06 and 07-04-92)

HUMAN RIGHTS
See also: Economic cooperation, European Economic Community (:EC-ASEAN), Inter-state relations (China-India), (Non-)Interference in internal affairs, International trade (Sino-US), Nationality (Right to return)

Chinese views

During a visit to China in September 1991 the Italian prime minister emphasized that speaking about human rights is not interference in another country's affairs. The General Secretary of the Chinese Communist Party was reported to have responded that providing food and clothing for China's 1.1 billion people constituted observance for human rights, and that human rights are concrete, not abstract.(IHT 17-09-91)

1991 U.S.Foreign Aid Authorization Bill

A section of the 1991 Foreign Aid Authorization Bill would require U.S.companies with joint ventures or offices in China to follow a code of ethics as part of the efforts of the U.S.Congress to defend human rights in China, but U.S.corporations largely opposed the proposals. They charged the bill with "practically making us appear to be agents of the U.S.government." Among other things, the code would prescribe businessmen to prevent discrimination based on religion or political beliefs, protect their Chinese employees' freedom of expression and assembly, discourage political classes in the workplace and appeal to the Chinese government on behalf of political prisoners.(IHT 09-10-91)

UN on human rights in Myanmar

A United Nations team led by Professor YOKOTA Yozo from Japan came to

Myanmar on 21 October 1991 to investigate the state of human rights in the country,a week after the detained opposition leader, DAW AUNG SAN SUU KYI, was awarded the Nobel Peace Prize. A previous UN team visited Myanmar in November 1990.(IHT 23-10-91)

On 17 December 1991 the UN General Assembly adopted resolution 46/132 by consensus, expressing concern at the situation.(IHT 2-12-91) Operative paragraph 3 of the resolution reads: "*Urges* the Government of Myanmar to allow all citizens, including democratically elected political leaders, to participate freely in the political process in accordance with the principles of the Universal Declaration of Human Rights."

Following a request by Bangladesh for Security Council action a UN Under-Secretary General in his capacity as humanitarian relief coordinator visited Myanmar in early April 1992 to try to halt the alleged persecution of the Muslim minority.(*see*:Minorities) (FEER 07-05-92 p.14)

Indian intervention with Myanmar

On 14 November 1991 the Indian ambassador to Myanmar handed a strongly worded Indian statement to the Myanmar foreign ministry. The statement called for the immediate and unconditional release of the leader of the National League for Democracy who had been kept under house arrest for two years.(FEER 28-11-91 p.20)

Vietnam

Vietnam agreed to give the Intenational Committee of the Red Cross access to political prisoners held in re-education camps since the end of the Vietnam War.(IHT 4-12-91)

IMMIGRATION
See:Nationality

INSURGENTS
See also:Border incidents,Dissidents,(Non-)Interference, Military cooperation (Indonesia-PNG), Refugees

United Liberation Front of Asom (Assam, India)

According to Indian officials pro-independence groups from northeastern India had set up bases and offices in neighbouring Bangladesh. According to these reports the ULFA, the main guerilla group in Assam, had established an office in Dhaka, and a transit camp for rebels and three training and arms collection centres near the Indian border.(IHT 03-01-92)

INTELLECTUAL PROPERTY
See: Foreign property rights

INTER-STATE RELATIONS: GENERAL ASPECTS

China-Vietnam

The two countries have a territorial dispute and have been at odds as a result of their support of rival regimes in Cambodia.(IHT 13-09-91) A brief border war broke out in 1979, when China invaded Vietnam to punish it for ousting the Beijing-backed Khmer Rouge regime in Cambodia. Northern Vietnamese towns were seriously damaged and sporadic cross-border duels continued until 1987. The last 23 Vietnamese prisoners were released in August 1991. A major obstacle to normal relations was removed in October 1991 when a peace treaty was signed to end the war in Cambodia. The two sides never officially severed ties and maintained embassies in each other's capitals, but air, rail and telephone links were cut after 1979.

On 5 November 1991 the Vietnamese Communist Party leader and the prime minister arrived in Beijing for talks that marked the normalization of relations.(IHT 6-11-91) It was reported that the two sides had discussed the possible joint development of the Spratly Islands whose sovereignty is claimed by both and several other states in the region.(IHT 7-11-91) On 7 November 1991 a trade accord aiming at the "promotion of friendly cooperation and long-term, sustained and steady development of trade relations" and a "provisional agreement on handling border affairs" were signed.(IHT 8-11-91) It was reported that shortly before the summit the two parties tried but failed to agree on the repayment of the outstanding Vietnamese debt to China. Chinese officials estimated the debt at Rmb 1 billion ($185 million), while according to Vietnam it totaled only $17 million.(FEER 21-11-91 p.11)

On 14 February 1992 the two countries concluded a number of agreements during a visit to Vietnam by the Chinese foreign minister, such as on economic cooperation and on the abolition of visa requirements for diplomats and businessmen. It was also agreed to exchange consulates and to hold an experts' meeting on territorial disputes.(FEER 27-02-92 p.14)

On 8 March 1992 the two countries signed four agreements in Beijing preparing the way for the resumption of direct rail, air, postal and shipping links.(FEER 19-03-92 p.53)

On 1 April 1992 the border crossing at Friendship Gate was reopened officially after having been closed since the border war 13 years ago.(FEER 16-04-92 p.14)

Republic of Korea - Vietnam

During the Vietnam War South Korean troops served alongside US forces. More than 5,000 of them died fighting there. The turnaround in their adversarial ties came in 1988 when Vietnam sent a team to the Olympic Games in Seoul.

Vietnam and South Korea agreed to exchange liaison offices in preparation for establishing diplomatic relations and according to a South Korean foreign ministry announcement on 20 April 1992 the offices would open in July 1992.

Korean firms, which had long ignored Vietnam out of deference to the US trade embargo, had become increasingly active in the past two years. Vietnam may be a potential site to move Korean labour-intensive industries. A consortium of seven *chaebol* (family-owned business groups) won a contract in January 1992 for oil prospecting off the Vungtau coast in southeast Vietnam.(FEER 30-04-92 p.14,07-05-92 p.24)

Thailand - Vietnam
(*see also*:Sanctions)

A visit by the Thai foreign minister to Vietnam from 17 to 19 September 1991 marked a milestone towards ending four decades of hostility between the two countries. Thailand had supported the US war in Vietnam.

The two foreign ministers signed an agreement on establishing a joint commission for economic cooperation and initialled an agreement to promote and protect foreign investment.

Yet some problems remained. In the field of consular relations Thailand wanted to open a consulate in Ho Chi Minh City, while Vietnam would like to open one in Udon Thani in northeastern Thailand. The Thai wish was later granted but the Vietnamese wish met with objections from the Thai military: 50,000 Vietnamese refugees have been living in the region since the 1950s, and even though the policy is to integrate the Vietnamese fully into Thai society, the army remained wary of the refugees' loyalties. It was later reported that Vietnam would set up its consulate in Rayong, on Thailand's eastern seaboard.(*see also*:(Non-)Interference)

On 15-17 January 1992 the Thai prime minister visited Hanoi, the first time ever for a Thai premier. The visit was focused on economic issues. Thailand called on the US to lift its trade embargo against Vietnam. The two sides signed a protocol updating their 1978 agreement on trade, economic and technical cooperation, and a memorandum of understanding on rice trading. Officials denied that the two countries were trying to form a rice cartel, but said they would begin consulting regularly on the international market to determine when to sell rice to obtain the highest prices. The signing of a joint fishing cooperation agreement was put off because of protests from local Vietnamese officials for not being adequately consulted on the drafting of the accord.(FEER 03-10-91 p.15,30-01-92 p.19)

Thailand-Laos

The two countries whose relations had been strained since the Communist victory in Laos in 1975, signed a treaty of friendship and cooperation in February 1992.(FEER 05-03-92 p.14)

Vietnam-ASEAN

The Vietnamese premier visited three Southeast Asian countries in October 1991. It was the first such visit since the Vietnamese intervention in Cambodia in 1978.

In Singapore agreement was reached on the exchange of diplomatic missions, a prospective air services accord and assistance in Vietnam's poorly developed services sector. The two countries established diplomatic relations in 1973 (1975?) but Singapore had delayed opening an embassy due to the invasion of Cambodia. Vietnam had a trade office but no embassy in Singapore

In Indonesia agreements were signed on the promotion and protection of foreign investments, on air transport and on shipping. The two countries also agreed to speed up negotiations to resolve overlapping claims to exclusive economic zones. Indonesia always had good relations with Vietnam despite the latter's intervention in Cambodia.

In Thailand an investment protection and promotion agreement was signed and also a memorandum of understanding granting Thailand priority in buying Vietnam's surplus natural gas. The Vietnamese were not prepared to conclude a fishing cooperation agreement pending negotiations on conflicting claims to overlapping economic zones at sea and Thai agreement to process seafood in Vietnam.(FEER 14-11-91 p.19)

Vietnamese and Laotian accession to Treaty of Amity and Cooperation

Vietnam and Laos were invited by the ASEAN summit meeting in January 1992 to accede to the 1967 ASEAN Treaty of Amity and Cooperation (*see supra*:ASEAN) and did so on 22 July 1992.(IHT 23-07-92;FEER 06-02-92 p.11)

China-United States

The visit by the US Secretary of State to China from 15 to 17 November 1991 resulted in progress on several outstanding issues. On human rights China gave an accounting of more than 800 political prisoners on a list submitted by American officials several months earlier. They were categorized as convicted, under investigation, released or unable to be identified. Agreement was reached on the text of a memorandum of understanding to prevent the import of Chinese prison-made goods into the US. China affirmed that it intended to observe the "guidelines and parameters" of the Missile Technology Control Regime. As to the signing of the Nuclear Non-proliferation Treaty China hoped to complete the ratification process by the end of the year, and sign the treaty three months after that.(*see:* Nuclear capacity)(IHT 18-11-91,22-11-91)

China-Myanmar

On 6 August 1988 an agreement was signed to open official cross-border trade, and since then China seemed to have emerged as Myanmar's most important trading partner.

The chairman of the State Law and Order Restoration Council (SLORC) of

Myanmar visited China on 20-25 August 1991. On the occasion China agreed on an interest-free loan of $9.3 million for unspecified economic projects and on the building of a television station in Myanmar.(FEER 03-10-91 p.24)

Pakistan-Iran cooperation

It was reported that Iran and Pakistan signed 5 agreements in September 1991 providing for cooperation in railways, road building, communications, postal cooperation and oil and gas exploration. Pakistan committed itself to lay a railway line in Iran linking its railhead at Zahedan with Kerman to complete the rail connection between Turkey and Pakistan.(FEER 26-09-91 p.14)

Iran-US relations

The US President said that he would not move to improve relations with Iran until all American hostages were released.Even then, Iran's alleged continuing support for international terrorism, American distrust of Iran's intentions on nuclear projects and other issues, and Iran's reluctance to establish ties with the US remain obstacles in building a relationship. As evidence of Iran's involvement in terrorism, US officials cited Iran's alleged link to the assassination of the former Prime Minister SHAHPUR BAKHTIAR, the officially sanctioned death edict against the British author SALMAN RUSHDIE and support for radical Palestinian groups.(IHT 22-11-91)

Vietnam-United States

In April 1991 the US outlined a four-phase process for normalizing relations with Vietnam.(1 AsYIL 313) The first phase would start with formal discussions between the two governments after the signing of a Cambodian peace treaty. The second phase would begin with a cease-fire and the establishment of the UN Transitional Administration in Cambodia, and would include the partial lifting of the US economic embargo against Vietnam. The third phase would begin after the UN administration in Cambodia had been in place at least six months, and would include an exchange of diplomatic missions and the full lifting of the trade embargo. The final phase, after UN-supervised Cambodian elections due in early 1993, would include full diplomatic and economic ties.(IHT 24-10-91)

After the signing of the Cambodian peace treaty the two countries agreed to set up a working group on normalizing relations. It was reported in January 1992 that Thailand acted as an intermediary in diplomatic contacts between the US and Vietnam. The US position is that it could move toward an exchange of ambassadors if Vietnam could account for 2,266 US soldiers unaccounted for in Indochina - 1,655 in Vietnam, 522 in Laos, 83 in Cambodia and 6 in China.(IHT 23/24-11-91,17-01-92,23-04-92)

On 5 March 1992 the US agreed to provide millions of dollars a year in humanitarian aid in exchange for additional Vietnamese cooperation in resolving the fate of the missing Americans. In return for the aid the Vietnamese government had agreed to allow US investigators to travel on short

notice to areas of Vietnam where there were reported sightings of missing Americans, and to allow investigators greater access to Vietnamese military archives.

Despite the above agreement the US said it was still not prepared to lift the 17-year-old trade embargo that had crippled the Vietnamese economy and angered American investors. The US also said it did not envisage the resumption of full diplomatic relations with Vietnam until the spring of 1993, when free elections were expected in neighboring Cambodia. (IHT 06 and 07/08-03 and 23-04-92;FEER 19-03-92 p.12)

The US resumed formal aid to Vietnam in 1991 when it approved programs to provide artificial limbs to Vietnamese soldiers and civilians. In December 1991 it lifted travel restrictions for Americans wishing to visit Vietnam.(IHT 06-03-92) In April 1992 it allowed the establishment of telecommunications links, thereby entering the second phase of the US "road map" for normalizing relations with Vietnam. Other elements of this phase included permitting US firms to sign contracts to be executed when the embargo would end, lifting remaining restrictions on the activities of US non-governmental organizations in Vietnam and cooperating with other countries to help Vietnam eliminate its arrears in the IMF. On 29 April 1992 the embargo was further eased by allowing commercial sales to meet basic human needs, and lifting restrictions on aid projects by non-governmental organizations.(FEER 23-04-92 p.14,30-04-92 p.12,14-05-92 p.14)

Vietnam-France

It was reported that the French Secretary of state for foreign trade offered Vietnam help to preserve its independence against any Japanese economic invasion. During a meeting with the Vietnamese prime minister he said:"France can, I believe, help strengthen your independence against powerful forces from the region." He warned that while Japanese economic power was an important asset it also "holds some dangers."(IHT 13-02-92)

China-India

The Chinese prime minister paid a visit to India in December 1991, the first in 31 years.(The recent warming trend between the two countries began when the Indian prime minister visited Beijing in 1988.*See* 1 AsYIL 309) The talks produced a joint communique on 16 December 1991 and three agreements, on cooperation in space-related research and technology, on the resumption of border trade in limited areas and improved trade ties, and the reopening of consulates in Bombay and Shanghai. The Chinese and Indian leaders agreed that international concerns about human rights should not take precedence over the need for rapid development, and shared worries that the trend towards assertive nationalism in the former Soviet Union and in Europe would spill into their multinational countries. The prime ministers of both countries emphasized that their countries shared an interest in asserting themselves internationally at a time when an ascendant West is moving to shape the post-Cold War order. On this latter issue they condemned the "emerging

international oligarchy" and said no country or alliance "should be permitted to manipulate world affairs and practice power politics."

The prime ministers barely touched on the unresolved border dispute but agreed that the boundary problem was no obstacle in their joint efforts to strengthen the two countries' relationship.(IHT 12,13 and 14/15-12-91)

China-Soviet Union

China gave an official reaction on the Soviet coup d'etat of 19 August 1991 one day after the event, calling the developments "an internal affair', adding that China opposes interference in other countries' internal affairs and respects the choices of other peoples.(FEER 29-08-91 p.13)

[The Sino-Soviet joint communique of May 1989 committed the Soviet Union and China not to use force or the threat of force against each other in any manner. The ban covered actions involving the use of the land territory, the territorial waters or air space of any third country adjacent to either party.](FEER 03-10-91 p.30)

India-Portugal

The Portuguese president was scheduled to be guest of honour at India's Republic Day parade on 26 January 1992, and so the two countries seem completely reconciled over India's seizure of Goa 30 years ago.(FEER 16-01-92 p.9)

Australia as an Asian power

The visit by the Australian prime minister to Indonesia in April 1992 was reported to be an attempt to move away from the strain in relations resulting from the East Timor incident in November 1991, and part of a continuing courtship of Southeast Asian countries to win acceptance for Australia as being a part of the region instead of the European-American sphere.

During the visit the two countries signed three agreements, covering double taxation, fisheries and extradition.(FEER 07-05-92 p.21)

The United States as a Pacific power

In his address to the Australian Parliament on 2 January 1992 the US President pledged that America's role and purpose as a Pacific power would "remain constant" despite the passing of the Soviet threat and a planned reduction of the US military presence in the region.(IHT 03-01-92)

During the President's visit to Singapore the Prime Minister of Singapore said that a substantial US economic and security presence was needed to maintain a stable balance of power in the region.(IHT 06-01-92)

On 24 July 1992 Japan, worried that its vital trade routes may be disrupted by a conflict between China and other Asian countries in the South China Sea, called for retention of a strong American military presence in the region. The deputy foreign minister said that US involvement "remains extremely

important for peace and stability of the Asia-Pacific region amid the changing international environment."(IHT 25/26-07-92)

Japan-Republic of Korea

During his visit to South Korea the Japanese Prime Minister apologized on 16 January 1992 for "the suffering and sorrow" that his country had inflicted on Korea during its harsh period of colonial rule. On his part the South Korean President referred to Korea's trade deficit, calling it a grave issue that must be settled to facilitate closer relations. He also cautioned Japan not to send troops overseas as part of a plan to assist UN peacekeeping activities:"Japan should contribute to regional peace and stability through economic and non-military means."(IHT 17-01-92)

Japan-DPR Korea

The fourth round of normalisation talks between Japan and North Korea ended in Beijing on 2 September 1991 with little or no apparent progress. North Korea went back on an earlier promise to investigate the case of LI UN HYE, a Japanese woman allegedly kidnapped in Japan and taken to North Korea. North Korea also repeated demands for compensation as a belligerent in World War II and for losses attributed to Japan over the 45 years since the war.(*see*:World War II) Japan had refused to consider either claim in earlier rounds of talks.(FEER 12-09-92 p.14)

Vietnam-Malaysia

On the occasion of his visit to Vietnam in April 1992 the Malaysian prime minister said that there are only two outstanding issues to be resolved between the two countries: the question of the Vietnamese boat people in Malaysia and the overlapping claims in the South China Sea. The Vietnamese prime minister affirmed Vietnamese willingness to accept return of Vietnamese boat people, and the two sides agreed to talk in May 1992 on the overlapping territorial claims. During the visit bilateral agreements were signed on telecommunications links and scientific, technical and economic cooperation as well as a memorandum of understanding on Malaysia's decision to assist Vietnam's rubber industry.(IHT 21-04-92;FEER 30-04-92 p.14)

(NON-)INTERFERENCE IN INTERNAL AFFAIRS

See also: Broadcasting, Economic cooperation, Inter-state relations (China-Soviet Union),Minorities,Persian Gulf,Refugees

Activities of Bhutanese in India
(*see also*:Minorities)

At a meeting between the King of Bhutan and Indian leaders in early September 1991 the latter reiterated that they would not allow their territory to be used

as a staging ground by thousands of Bhutan residents of Nepalese origin who had fled after the king had revoked their citizenship rights.(FEER 03-10-91 p.25)

Cambodia

When Prince NORODOM SIHANOUK received credentials from the new US envoy to Cambodia on 19 November 1991 he asked the US to give aid but in the future not to interfere [in the internal affairs of Cambodia]. He said he wished "that the US could avoid something like the event of 1970" [when the US supported a coup d'etat against the Prince].(IHT 20-11-91)

About a fortnight later the Prince reproached the US of meddling in Cambodia's internal affairs. Reacting to a letter from US senators asking president BUSH to keep the Khmer Rouge from returning to power in Cambodia, he said on 5 December 1991:"It is up to the people of Cambodia to judge, to condemn or not to condemn the Khmer Rouge... The US Congress should not interfere in the sovereignty and internal affairs of the future Cambodian parliament....The parlament of Cambodia should not be a satellite or slave of the US Congress."(IHT 6-12-91)

Singapore

Asiaweek Magazine, whose circulation in Singapore was slashed to 500 from 10,000 copies in 1987 as a result of accusations from the Singapore government about interference in domestic politics, has been permitted to raise the number of copies to circulate to 12,000 as of December 1991.(IHT 6-12-91)

ASEAN attitude toward events in Myanmar

In July 1991 ASEAN foreign ministers rejected a call by the US, the European Community and other Western nations to apply joint pressure on Myanmar to restore democracy and improve human rights (1 AsYIL 307), yet mandated the Philippines to approach Myanmar on human right issues. In December 1991 the Philippine foreign minister visited Myanmar on behalf of ASEAN foreign ministers, but the Myanmar authorities would only receive him as a Philippine official.(IHT 30-01-92;FEER 24-10-91 p.9,28-11-91 p.28)

Malaysian intervention on behalf of Myanmar Muslims

On 9 March 1992 Malaysia lodged a protest with Myanmar over the treatment of Rohingya Muslims forced to flee from Arakan province into Bangladesh.(*see infra*:Minorities) The Malaysian Foreign Minister said the problem could no longer be regarded as a domestic issue because "the action by Myanmar troops has burdened many neighbouring countries and may disrupt regional stability."(FEER 19-03-92 p.12)

Thailand and Vietnam

The Thai army commander charged in October 1991 that the Vietnamese embassy in Bangkok was making unauthorized contact with ethnic Vietnamese living in northeastern Thailand. During the Vietnamese prime minister's visit in late October both sides pledged not to interfere in each other's internal affairs. While the Vietnamese premier pledged to rein in the Vietnamese embassy, he called on both sides to respect each other's sovereignty, apparently referring to Vietnamese suspicions that the Thai military supported Vietnamese guerrillas fighting to overthrow the government in Hanoi.(FEER 14-11-91 p.19)

INTERNAL JURISDICTION
See: (Non-)Interference

INTERNATIONAL TRADE
See also:ASEAN,EEC,Foreign investment,Sanctions

Multifibre Agreement

In negotiations on the extension of the Multifibre Agreement (MFA)(*see* 1 AsYIL 324) several textile exporting countries from South and Southeast Asia demanded significantly more access to EC markets. EC trade negotiators argued that since the talks on phasing out the MFA were being held within the Uruguay Round of GATT negotiations, no major concessions would be made in provisional bilateral deals.(FEER 31-10-91 p.75)

Status of American Honda Motor Co.

As a result of U.S.representation American Honda received French approval to import U.S.made cars into France as U.S.,not Japanese cars. The EC-Japanese agreement (*see*:1 AsYIL 322) did not cover vehicles built in the U.S. The approval was seen as an important symbolic victory to the extent that the U.S.trade officials were willing to argue Honda's case, further strengthening Honda's status as an American automaker.(IHT 17-09-91;FEER 26-09-91 p.79)

"Local content" of North America-made Honda automobiles

The Japanese government considered "discriminating against Japanese interests" a US ruling that Honda Motor Co. owed millions of dollars in tariffs for automobiles imported to the US from Canada because they did not contain enough parts made in North America, *viz.* 46 percent. This was contrary to the Canadian view that the cars were more than 50 percent American and consequently qualified for duty-free treatment under the US-Canada Free-Trade Agreement. According to Honda the North American content of the cars concerned was 69 percent.In responding to the ruling

Japanese officials used American trade-negotiating strategy by accusing the US of promulgating deliberately vague rules to protect its market, complaining of "a certain lack of transparency" in the guidelines concerned. It was also noted that the US trade representative had argued that North American-produced Hondas were "an American car" when seeking to protect them against European Community quotas on Japanese imports(*see supra*).(IHT 04-03-92;FEER 12-03-92 p.53)

Japanese car sales in France

Nissan and Toyota agreed to limit sales in France of their cars made in European factories in exchange for permission to buy their French distributors. The approval was obtained in November and December 1991 respectively after having been postponed by the French Treasury in February 1990. As to cars made in Japan the Japanese carmakers abide by an unofficial limit of 3 percent of the French market.(IHT 24-01-92)

Effect of tariff measures

In August 1991 the U.S.had imposed a special tariff on the import of certain kinds of advanced computer screens in order to protect a nascent sector of the U.S.computer industry. Since several U.S.computer makers were dependent on these imported (Japanese) screens and since the American screen industry was unable to meet their needs the companies must either raise their computer prices or move their operations outside the U.S., which was in fact announced by one of the largest Japanese companies making computers in the United States. The tariff did not apply when the screen was imported as part of a larger computer system. Besides, one of the biggest victims of the tariffs appeared to be IBM which produces the screens in Japan in a joint venture with Toshiba.(IHT 27-09-91)

Sino-US trade relations

The United States opened an investigation (under section "Super" 301 of the Trade Act of 1988, *see* note *infra*) into alleged Chinese trade barriers to U.S.products. The US demanded that existing trade barriers be abolished in order to cut the Chinese trade surplus with the U.S. According to the US its trade deficit was $10 billion in 1990 and was expected to be more than $15 billion in 1991. China disputed the American trade figures and claimed that it was in fact the side running a deficit of $1.4 billion in 1991. According to this reasoning many raw materials used for manufacturing in China originate in the US but do not count as exports to China since they are first shipped to Hong Kong. On the other hand the final products are assessed at their higher value when exported to the US.

The U.S.also accused China of unfairly restricting imports in four ways: import quotas and outright bans on some products, complex import licensing requirements, specific technical standards that match only domestically produced goods, and a refusal to publish rules so that American companies

can avoid legal pitfalls. In addition to the trade imbalance the U.S. charged China of using prison labour to make export goods and Chinese companies of falsifying labels of origin to avoid (American) quotas.

China would be facing US trade sanctions if it would not open its markets to the satisfaction of the US, and also if it did not satisfy the US in ending alleged piracy of intellectual properties such as patents and copyrights. (IHT 11-10-1991, 12/13-10-91;FEER 30-01-92 p.37)

With regard to US accusations on the use of prison labour Chinese officials had consistently asserted that the exportation of prison-made products is against Chinese policy.(IHT 23-10-91) A memorandum of understanding was reached by the two states on 18 June 1992 aimed at preventing the export to the US of goods made in Chinese prisons. Under the agreement US officials would be able to visit Chinese prisons, camps and companies suspected of exporting prison-made goods to the US.(IHT 20/21-06-92;FEER 02-07-92 p.12)

[*Note*: The US Omnibus Trade Act, particularly its "Super 301" provision requires the US administration to identify countries deemed to have unfair trade barriers and, when no improvement can be achieved by negotiations, to apply tariffs to their products by way of retaliation. The Act is controversial outside the US because it is alleged to run counter to provisions of the GATT. The provision lapsed after 1990 but in May 1992 a bill was introduced calling for a renewal for five years of the above provision.](FEER 21-05-92 p.51,28-05-92 p.49)

Most-favoured nation status for China with the US

The US Congress had been trying to make a renewal of China's most-favoured-nation status conditional. In February 1992 the US Senate, though by a less than two-thirds majority, attached conditions to the renewal of China's MFN status with the US, related to improvement of China's record on human rights, trade and missile proliferation. The bill would require China to provide a full accounting and the release of prisoners arrested during the 1989 demonstrations. It also called for the curtailment of "gross violations of internationally recognized human rights", the termination of trade practices restricting the import of US goods and services, and action to protect US intellectual property. Finally, the bill demanded that China take "clear and unequivocal steps" to prevent the transfer of high-performance missiles, chemical and biological weapons and nuclear-weapons technology to other countries.

China rejected the bill, saying that "[t]he bill violates the principle of mutual benefit of bilateral trade."(IHT 27-02-92) The US president vetoed the bill on 2 March 1992 and on 2 June he announced the extension of MFN-status for China for another year.(IHT 03-03-92;FEER 11-06-92 p.8)

Avoidance of duties on imported textiles from China

There had been reports for some time about evidence of dumping of products on the US market by Chinese state-controlled companies. On 5 May 1992 a grand jury in the US District Court in Manhattan, New York, issued an indictment charging a Chinese provincial trade official, three US residents, two Chinese companies and one Californian company of conspiring to defraud the US of more than $100,000 in duties on imported textiles and clothing through the undervaluing of textile goods from China.. The indictment was said to be the first in a broad, continuing investigation of efforts by importers to evade duties and bypass import quotas by shipping textiles made in China through other countries, like Pakistan. In 1991 textiles accounted for $3.9 billion of the $15 billion of US imports from China.(IHT 08-05-92;FEER 21-05-92 p.50)

China's efforts to re-enter GATT

In its efforts to qualify for GATT membership China vowed to abolish duties meant to regulate imports and to trim its list of products subject to import licensing. It also promised to promulgate a Foreign Trade Law and an Anti-dumping Law, and to publish existing trade regulations on import-export administration in order to achieve transparency.(IHT 02-03-92)

Sino-EC trade

Alarmed by China's $12 billion trade surplus with the EC in 1991, the latter warned China to take quick action to open its markets and to stop "predatory export strategies."(FEER 26-03-92 p.65)

Sino-Russian trade

China and Russia signed a trade agreement on 5 March 1992, their fist official agreement since the collapse of the Soviet Union.(IHT 06-03-92)

On 29 July 1992 the Chinese news agency reported that a private Chinese company, the *Nande* Economic Group, had traded 500 railcar loads of light industrial goods for four Tupolev TU-154M passenger jets from Russia in a deal worth 420 million Swiss francs. A centre would soon be opened in Moscow to market products ranging from consumer electronics and machinery to food, textiles and light industrial goods.(IHT 30-07-92)

Sino-Mongolian transit agreement

Until recently most Mongolian exports to Japan and other Asian states had to be shipped at Nakhodka. In order to develop a shorter route to the sea through China an agreement was concluded between China and Mongolia in August 1991, allowing Mongolia to use port facilities near Tianjin. The deal was believed to grant duty-free, unimpeded passage to Mongolian goods. With the present transport infrastructure, however, trains crossing the Sino-

Mongolian border have to stop to change wheels because the two countries have different rail gauges.(FEER 19-09-91 p.72)

US-Singapore trade and investment

The US and Singapore on 11 October 1991 concluded a Trade and Investment Framework Agreement containing a consultation mechanism for thrashing out significant trade issues, such as services, market access and intellectual property.(1 AsYIL 316) The mechanism may ultimately lead to free-trade in the future. Similar framework agreements have been concluded by the US with 29 Latin American and Caribbean countries since the breakdown of the GATT talks in December 1990, while similar framework accords were signed with the Philippines (1989) and Thailand. The agreement with Singapore could be seen against the background of a memorandum of understanding to boost trade and investment, signed by the US and ASEAN in December 1990 and allowing for bilateral agreements.

Some Asian trade officials, among whom Japanese, complained that the US-Singapore agreement contravened an understanding that no country working to strengthen the APEC process should engage in any bilateral or multilateral trade agreements.(IHT 11-10-91, 12/13-10-91;FEER 31-10-91 p.64).

Korean stand on rice import

South Korea's National Assembly unanimously passed a resolution on 15 October 1991 opposing the opening of the country's rice market to imports. The six-point resolution read, in part:"As rice is the root of our culture, the staple of the nation and the major source of income for farmers, the Assembly will never allow the opening of the rice market , even for minimal rice imports."(IHT 16-10-91)

US company selected for Japanese construction project

A US company was the first foreign firm to be given responsibility for a giant Japanese resort, hotel and airport project. It was reported that the Japanese developer had chosen an American contractor in order to win Japanese government approval for the airport. This would show that having an American firm involved can have a positive impact on a project, contrary to some time ago.(*see also*:1 AsYIL 320)(IHT 15-11-91)

OECD on Japanese trade

OECD forecasts on the world economy referred to the Japanese efforts to restructure and open its economy and questioned if removal of remaining structural impediments would help reduce the country's international surpluses."The aggregate external balance is, and will remain, essentially a macro-economic phenomenon, deriving from the saving-investment balances of Japan and its major trading partners, rather than from trade-policy factors.... Bilateral balances will continue to be determined for the most part by

the dynamic evolution of comparative advantage as a result of research and development and innovation."(IHT 20-11-91)

Japanese US subsidiary denied status of US company

In 1991 Brother Industries (USA) Inc. accused Smith Corona of dumping its Singapore-produced type-writers at the US market, threatening jobs of Tennesseans.(*see* 1 AsYIL 322) On 26 September 1991 the US Commerce Department dismissed the complaint, ruling that Brother was not a US producer because its Tennessee plant performed only final assembly of Japanese-made parts. As a foreign-controlled company it did not have standing to file an anti-dumping suit in the US. Previously Smith Corona won an anti-dumping action against Brother and other Japanese typewriter makers in August 1991, on the basis of a ruling that it was a US producer.(FEER 10-10-91 p.79)

Reversely the US Commerce Department ruled on 8 November 1991 that Brother Industries of Japan was not avoiding anti-dumping duties imposed on its portable electric typewriters, contrary to Smith Corona allegations of avoidance by shipping of components from Japan for final assembly at a US plant. The ruling decided that the US factory was more than just a "screwdriver" operation.[Many of the components did not in fact come from Japan but from Malaysia.](FEER 21-11-91 p.83;09-01-92 p.43)

US-Japanese trade

In the US Congress initiatives were taken to introduce a 1992 Trade Enhancement Bill aimed at forcing Japan to bring its trade surplus with the US into "relative balance" over five years. It was said that Japan's cumulative trade advantage since 1980 was $459 billion. The proposed legislation would require the Japanese to reduce their trade surplus with the US by 20 percent a year over five years - either by allowing more sales of American goods in Japan or accepting cuts in US sales of Japanese automobiles.

On the occasion of the visit of the US president to Japan in early January 1992 Japan agreed to import 20,000 more US-made cars by 1994, from under 20,000 in 1991, and to increase its purchase of US car parts to $19 billion a year by 1995, from $9 billion last year. The agreement was the subject of the following remark by the Commissioner for External Trade of the European Communities on 15 January 1992:"We have the impression that certain elements in the agreement might be discriminatory against non-signatories of the agreement", and the next day the Competition Commissioner accused that the US used political pressure to get a bilateral trade deal with Japan, and that there was "mounting evidence that the US is drifting toward a preference for managed trade."(IHT 16-01-92,17-01-92)

Japanese accusations of US violations of rules on international trade

In confronting the US on trade issues an advisory panel of the Japanese Ministry of International Trade and Industry (MITI) attacked America for among the most unfair trade practices in the industrialized world. In its report the council examined how closely countries adhere to rules governing international trade, claiming American policies breach many of these rules. This was the complete opposite of the approach which takes trade surpluses as a measure of the openness of a market and which demands Japan to do more to open its markets to foreign goods and not export too vigorously.

In a kind of report card evaluating how well different countries adhere to international trade rules in 10 areas, the US stood out by failing in nine. The European Community ranked second to last, failing in 6 categories. According to the report, among the unfair US practices are: America too often imposes unilateral solutions to trade problems; it has abused rules that permit a country to halt dumping of products by exporters at unfairly low prices; it has arbitrarily altered its tariffs, and it has resorted frequently to "voluntary restraints" on a country's exports to the US to resolve disputes, a violation of free-trade principles.

A Japanese official said that Japan would try to avoid direct negotiations with the US over trade problems, as happened in the past. Instead, Japan would try to resolve problems by referring to the GATT.(*see infra*)(IHT 08-06-92)

Critics pointed out that the report largely ignored the criticism that Japan's huge trade surplus reflected barriers to import, and also omitted agriculture where Japan maintained strong barriers. Nor did the report address the role of *keiretsu*, the business groupings that some believe keep foreign competitors at bay.(IHT 10-06-92)

Japanese resort to GATT dispute settlement

Japan lodged a complaint with GATT against the anti-dumping duties imposed by the European Community on Japanese audio casette imports. This was seen as signalling the emergence of a more commercially confident Japan, as Japan rarely takes disputes to Gatt, the first time being in 1990 when it secured a ruling against anti-dumping duties on electronic goods assembled in the EC.(FEER 23-07-92 p.41)

Cancellation of contract with Japanese partner

On 18 December 1991 the Los Angeles County Transportation Commission awarded a contract for $122 million worth of automated rail cars to Sumitomo Corp.of America over a lower bid from an indigenous firm, Sumitomo being considered better equipped to perform the contract. In the face of bitter public protests, however, the Commission rescinded the contract despite a Sumitomo offer to bring in an American partner. Japanese officials considered the incident "basically...questionable, as the US government is urging Japan to open its market. We may urge the US in the same way."(IHT 23-01-92,25/26-01-92,28-01-92)

US-Japanese semi-conductor trade
(*see also* 1 AsYIL 321)

In 1986 an agreement was concluded setting up a system of floor prices on Japanese computer chips and calling for American and other non-Japanese chip companies to gain at least 20 percent of the Japanese semiconductor market. When the agreement was renewed in 1991 the floor prices were abolished, but it was quite probable that the 20 percent share would not be met by the deadline of the end of 1991. It was reported in March 1992 that American semiconductor executives were beginning to express concern that their Japanese competitors might be selling chips below production cost, a practice that would violate the semiconductor trade agreement.(IHT 07/08-03-92)

Barriers in Japanese-EC trade

Japan promised to scrap the port-fee system, under which EC ships had to pay higher fees into a Harbour Management Fund than Japanese vessels. EC ship owners lodged a complaint in January 1991 saying that the payments amounted to an illegal trade barrier.(FEER 02-04-92 p.79)

Vietnam-Singapore commercial relations

Vietnam signed an agreement with Singapore on 16 April 1992, allowing shippers from each country to participate in the other's inland trucking business. The current level of direct sea-borne trade between the two countries was estimated at more than 3 million metric tons a year, about 2 million of which was being forwarded to other destinations from Singapore. A few days afterwards an air-services agreement was signed, aimed at boosting trade, tourism and investment between the two countries.Singapore overtook Japan as Vietnam's largest trading partner in 1991. Vietnam has similar agreements with France, Thailand, Malaysia and China.(IHT 17 and 21-04-92)

Vietnam-Malaysia trade relations

Coinciding with a visit by the Malaysian prime minister at the head of a delegation of more than 200 officials and businessmen Vietnam signed three economic and technical agreements with Malaysia on 20 April 1992. One of the agreements was to expand post and telecommunications links between the two countries, and another was on economic, technical and scientific cooperation. A third was a memorandum of understanding on Malaysian technical assistance to Vietnam's rubber industry. The occasion also resulted in an agreement to explore for oil in areas of the South China Sea claimed by only both countries. Malaysia is the biggest investor in Vietnam among the ASEAN member states.(IHT 21 and 22-04-92)

Iranian orders in the West

Iran Air ordered two Airbus aircraft, its first order for large Western-made commercial planes since the 1979 Islamic revolution. The sale obtained US approval which was required since the engines would be made in the US.(IHT 28-04-92)

Termination of voluntary restraint agreement

Japan and the US agreed to end a voluntary restraint agreement on exports of Japanese machine tools to the US at the end of 1993.(IHT 28-04-92)

South-south trade relations

A Group of 15 developing countries emerged as a caucus to promote south-south trade relations at a meeting at Kuala Lumpur in 1989. A second G15 summit took place in November 1991.

One of the projects consisted of the setting up of "bilateral payments schemes", based on an idea conceived by Malaysian and Iranian officials in 1988. In order to avoid the normal credit risks accompanying unconfirmed letters of credit the central banks would agree on an arrangement whereby each agreed to guarantee payment for its exporters.

To help stimulate further trade and investment among countries of the "South" the G15 endorsed a Malaysian proposal to set up a "South Investment, Trade and Technology Data Exchange Centre"(SITTDEC), being a data centre to facilitate trade and investment along the lines of the Trade and Investment Promotion System which is run by the UN.(FEER 16-04-92 p.50)

"Newly industrialized states" and preferential trade

Under the Generalized System of Preferences, adopted under the auspices of UNCTAD and under which industrialized states were to remove all tariffs and duties on certain products from designated developing countries, South Korea, Hong Kong and Singapore had been able to export duty-free to the European Community goods such as electronic components, television sets and other consumer products.

The US withdrew GSP status from South Korea, Taiwan, Hong Kong and Singapore in 1989, and it was reported in July 1992 that the European Community was also reviewing the program: The ten beneficiary countries with the largest economies shared 70 percent of the GSP advantages afforded by the Community.(IHT 11/12-07-92)

(NON-)INTERVENTION

See also:Minorities,Specific territories:Kashmir

Iranian Revolutionary Guards in Lebanon

Iran reportedly decided last month to withdraw its revolutionary guards from Lebanon. The guards arrived in 1982 to fight the Israeli army which had invaded Lebanon earlier that year to drive PLO guerrillas out of the country. According to Lebanese and Iranian newspaper reports the withdrawal was agreed upon at a meeting of the Iranian foreign minister with the Lebanese president at the United Nations, although the whole action was formally denied by the Iranian vice president. The pull-out may be seen as a recognition by Iran that foreign armed interventions belong to a bygone era of expanding the Islamic revolution through force.(IHT 14-10-91,15-10-91,17-10-91)

IRAN-IRAQ WAR

See also:Embargo

United Nations report

In a report on the Iran-Iraq War the UN Secretary General concluded that Iraq was responsible for having started the war. Iranian officials hailed the report as vindication of the Iranian stance.It is not yet known how the finding would affect Iran's claims of billions of dollars in war reparations.(IHT 12-12-91)

Expropriation of Iraqi airplanes

According to Saudi and Kuwaiti sources Iran had decided to expropriate 132 Iraqi military and civilian planes that sought refuge in Iran during the Iraq-Kuwait War. The decision was described as a first step in Iran's claim for hundreds of billions of dollars in damages from Iraq for the eight-year war between the two countries. Six of the planes were Kuwaiti-owned aircraft. After negotiations the first of the planes were returned to Kuwait, but others were being held up over an Iranian demand for $90 million for parking and maintenance fees.(IHT 31-07-92)

JAPAN'S MILITARY ROLE

Participation in U.N.peacekeeping forces

The Japanese cabinet decided on a bill allowing the participation of Japanese forces in United Nations peacekeeping forces.(*see* 1 AsYIL 327) According to the bill no troops could be sent except in the case of a truce and with the approval of all the parties in a conflict. The Japanese forces would withdraw if these conditions collapsed. The troops would probably not number more than 2,000 and would not carry any weapons except light arms for self-defence.These conditions would keep the proposed bill in accordance with the constitution which bars Japan from the use or threat of force to settle

international disputes. (IHT 20-09-91;26-09-91) The bill was approved by the Lower House on 3 December 1991.(IHT 4-12-91)

In the Upper House, the governing Liberal Democratic Party lacked a majority and relied on the support of two smaller parties. The three parties finally reached a compromise. (IHT 27 and 30/31-05-92) The Upper House approved the bill on 9 June 1992.

Under the approved version, up to 2,000 soldiers could immediately join UN peacekeeping units but would
only be involved in logistics, medicine distribution and other non-combat duties. More dangerous operations, such as monitoring cease-fire agreements, removing land mines or disarming warring factions, would require the approval of the Diet and could not be undertaken without the passage of a separate law. A re-examination of the bill would take place in three years, and there would be a temporary moratorium on sending the troops for the immediate future.

Under the existing procedure the bill had to return again to the Lower House for passage into law, which took place on 15 June 1992. In the end Parliament decided that the Japanese troops may carry arms but were only allowed to fire in self-defence and were required to withdraw as soon as a cease-fire collapsed.(IHT 09 and 16-06-92)

Some of Japan's neighbours had some misgivings about the Japanese plans. China, for example, reminded Japan on 28 November 1991 through its foreign ministry:"For historical reasons, Japan's dispatch in any form of its troops on overseas missions is a highly sensitive matter. It is our consistent hope that the Japanese government will act with prudence."(IHT 29-11-91)

JOINT DEVELOPMENT

Tumen River Area Development Programme

A plan on a "Golden Triangle" linking Soviet, Chinese and North Korean districts around the estuary of the Tumen River is being developed.(*see* 1 AsYIL 329) The Tumen River Area Development Programme (TRAD) was taken up by the UNDP at the first meeting of its Northeast Asia Regional Programme, and in the summer of 1991 an international symposium on economic cooperation in Northeast Asia was held in Changchun, Jilin province, China, with delegates from Japan, the Soviet Union, North and South Korea, Mongolia, the US and Canada. The project consists of a triangular zone of free ports and areas for processing industries in Hunchun (China), the North Korean port of Unggi and the Soviet city of Posyet. The plans might become the centrepiece of a broader scheme for regional economic cooperation in what has come to be known as the Japan Sea rim. According to UNDP estimates the Tumen project would need $30 billion.

In the spring of 1992 China approved the establishment of a special economic zone in Hunchun, in the Yanbian Korean Autonomous Region in North East China. According to Japanese news reports North Korea planned to open its first special economic zone, consisting of its northeastern coastal

frontier bordering on China and the Soviet Union and including the ports of Sonbong (formerly known as Unggi) and Najin. Later the old ports of Raijin and Chongjin were mentioned.

After a management committee was formed at a meeting at Pyongyang in October 1991, a six-nation working-level meeting would be held under UNDP auspices at Seoul in February 1992, with delegates from North and South Korea, China, Russia, Mongolia and Japan. The first working group session took place in Beijing in late April 1992.

The Tumen River rises from the crater lake of Changbaishan volcano, and flows eastwards for 530 km along the China-North Korea border into the Sea of Japan. In the 19th century China lost control of the last 15 km of the Tumen, just beyond Hunchun. From there on, the river became the border between Russia and North Korea although China retained navigation rights. A trading area embracing the two Koreas, Japan and northeast China would encompass nearly 300 million people. It would comprise 20% of Asia's land mass and 10% of its population. The idea of a Tumen-centred Northeast Asian block first surfaced in academic papers at the East West Centre in Hawaii and gathered momentum in a series of regional conferences held in Changchun, until the UNDP picked up the initiative. (IHT 03-10-91,04-11-91,14-01-92;FEER 24-10-91 p.22,16-01-92 p.16-20,20-02-92 p.14,14-05-92 p.32,28-05-92 p.30)

Thai-Malaysian joint development

Thailand and Malaysia in 1991 established a Joint Development Authority to exploit oil and gas reserves in a disputed section of the South China Sea adjoining the two countries.(*see* 1AsYIL160) It was reported that disagreements about how to share the cost of exploitation were holding up progress in the talks.(FEER 17-10-91 p.111)

Grant of oil-exploration contracts in the Timor Gap

Indonesia and Australia agreed to grant 11 contracts for oil-exploration in the Timor Gap to 19 companies from 7 countries, with a total investment commitment of $362 million. The contracts require that a minimum of 46 seismic wells will be drilled within six years.

The two countries devised a revenue-sharing arrangement for oil found in the boundary area between Australia and the Indonesian province of East Timor.(FEER 26-12-91 p.77)

Vietnamese-Malaysian joint oil exploration

Malaysia and Vietnam on 21 April 1992 agreed to explore jointly for oil in those areas of the South China Sea over which the two countries both claim sovereignty but where no claim of other countries exist. Another agreement to search jointly in an area of the Gulf of Thailand was signed on 5 June on the same conditions.(FEER 30-04-92 p.67,18-06-92 p.83)

Malaysian-Vietnamese agreement for joint development in the Spratly Archipalego

Vietnam and Malaysia agreed to jointly develop areas around the disputed Spratly Islands where their territorial claims overlap.(IHT 22-01-92)

KOREAN WAR

US soldiers missing from the war

North Korea on 28 May 1992 returned what it said were the remains of 15 more US soldiers killed in the 1950-1953 war. About 8,000 American soldiers are still missing from the war.(IHT 29-05-92)

LIABILITY

Settlement in Bhopal case

The Indian Supreme Court cleared a civil settlement reached between the government of India and the Union Carbide Corp.in 1989 involving a compensation of $470 million on behalf of the victims of the Bhopal gas leak disaster in 1984, but made its approval contingent on the revival of criminal proceedings against those responsible for the gas leak, whereas the original settlement included the quashing of criminal charges. It also handed down other alterations of the settlement involving the enactment of new legislation. Union Carbide had taken the position that while it accepted moral responsibility for the disaster it also believed that the company might have been the victim of sabotage by its own Indian employees.(IHT 04-10-91) On 2 February 1992 an Indian court threatened to order Union Carbide property in India and abroad to be attached unless the former chairman and two other executives of the US-based chemical company appear to face criminal charges of culpable homicide and maiming and causing injury in connection with the 1984 gas disaster.(IHT 03-02-92)

MIGRANT WORKERS

See also:Aliens

Easing of curbs on foreign workers

Malaysia, Taiwan, South Korea, Hong Kong and Singapore announced measures to allow employers to recruit more foreign workers, mainly from Asian countries with large labour surpluses, such as Indonesia, China, the Philippines, India, Bangladesh and Sri Lanka. The easing is intended to contain costs and inflation and to prevent a sharp fall in foreign investment because of increasing labour shortage.(IHT 30-10-91)

The Singapore government on 6 October 1991 announced a plan to allow manufacturing companies to employ more imported labour, up to a maximum level of 45% of their work forces (from the then current 40%) The manufacturers would, however, be subject to an increased monthly charge for each additional worker beyond a 35% level.(FEER 24-10-91 p.79)

Vietnamese workers in Russia

Vietnam and Russia signed a new protocol on 27 May 1992 allowing up to 30,000 Vietnamese guest workers to remain in Russia. In the heyday of Soviet-Vietnamese relations nearly 100,000 Vietnamese worked in the Soviet Union.(FEER 11-06-92 p.12)

MILITARY BASES

The US bases in the Philippines
(*see also*:1 AsYIL 331)

The Philippine Senate started debating the US-Philippine agreement on a new lease for the Subic Bay naval base and voted to reject it on 16 September 1991. The next day the Philippine president revoked an earlier eviction notice for the U.S.base, having the effect of overruling the Senate decision.(IHT 18-09-91)

There was a proposal by the president for a national referendum on the future of the base, eventually overruling the Senate, and the court would be asked by the government to determine its constitutionality. A week later, however, the President decided not to press for a referendum any longer, and instead to arrange a formula for a smooth withdrawal of the U.S.forces(IHT 24-09-91), in order,*inter alia*, to soften the impact on 40,000 Filipino workers and to provide more time for converting the base to civilian use (IHT 03-10-91).

Contrary to the President's preference a simple majority in the Senate agreed on 1 October that American troops should leave the Philippines by September 1992 (and those who strongly opposed the base agreement even demanded that the Americans leave by the end of 1991)(IHT 03-10-91). Meanwhile a group of lawyers filed a petition with the Supreme Court asking the court to rule on the constitutionality of the continued presence of US troops in the Philippines and to extend the jurisdiction of Philippine law to cover Subic.(IHT 02-10-91)

On 2 October 1991 the Philippine government decided to negotiate an executive agreement with the U.S.for the withdrawal of the U.S.forces within a period not exceeding 3 years.This agreement would need the approval of only a simple majority of the Senate.(IHT 03-10-91)

On 26 November 1991 the US handed Clark air base back to the Philippines, and talks were expected soon on a schedule for withdrawal from Subic Bay.(IHT 27-11-91) These negotiations broke down in late December 1991 primarily over the US refusal to hand over a precise timetable for departure or to say whether or not it was keeping nuclear weapons at the base. Consequently the withdrawal would have to take place within one year. (IHT 28/29-12-91)

US access to bases and repair yards in other S.E.Asian countries

It was reported that the US would ask other Southeast Asian states to provide more extensive access for its forces to compensate for the loss of the facilities in the Philippines. So far Singapore was the only country having a formal arrangement with the US.(IHT 25-09-91)

Falling within the scope of this earlier agreement (memorandum of understanding, November 1990, 1 AsYIL 333) that allowed US military planes and ships access to Singaporee ports and airfields both countries reached agreement early January 1992 on the relocation of a US naval logistic command headquarters from the Philippines to Singapore.(IHT 06-01-92)

On 29 April 1992, however, the US defence secretary said that the US would not seek new military bases in Asia to compensate for the loss of its bases in the Philippines. He said the US hoped to reach agreement to use an Indonesian shipyard to repair US vessels on a commercial basis. In the same month the US and Malaysia signed an agreement for the repair of US naval vessels at the privatized Malaysian naval dockyard at Lumut in Perak state.(IHT 30-04-92;FEER 14-05-92 p.14) It was reported in June 1992 that Malaysia, Thailand and Brunei were also reported to have agreed to make their bases available to help sustain a US military presence and that a state-owned Indonesian dockyard had signed a maintenance agreement to service US warships.(IHT 23-06-92)

Russian access to the Cam Ranh Bay base
(*see also* 1 AsYIL 332)

Interfax news agency confirmed on 9 January 1992 that the last major former Soviet warship had left the base and had returned to Vladivostok on 22 December 1991. By the end of 1991 the base population had shrunk to around 1,500 personnel, and it was reported that as of 1 January 1992 only 50 military advisers would remain in Vietnam. The base was the Soviet navy's centre of operations in the region until Soviet power waned.

Later in 1992, however, Russia started seeking to re-establish a naval presence in Southeast Asia, and opened negotiations with Vietnam on a new agreement for access to the naval base at Cam Ranh Bay. The Russian foreign minister insisted on 22 July 1992 that the Russian navy would help maintain regional stability, not serve as an agent for confrontation.(IHT 23-07-92;FEER 23-01-92 p.17,06-02-92 p.14)

MILITARY COOPERATION

United States troops in South Korea

South Korea agreed to pay more for the upkeep of the 43,000 US troops in Korea, from $150 million this year to $180 million in 1992. It was agreed earlier in 1991 that the Korean share in the costs involved for maintaining the US forces would gradually increase to about $280 million in 1995. The total costs are estimated at $2.6 billion. (IHT 28/29-09-91)

Soviet pull-out from Mongolia

All remaining Soviet troops in Mongolia would have left Mongolia by September 1992. Before the country had established a multiparty system more than 40,000 Soviet troops were stationed there. (IHT 7-11-91)

Indonesian-PNG military agreement

The two countries signed a "status of forces" agreement on 14 January 1992, permitting greater cooperation on security matters. The agreement did not allow joint military action but permitted stepped-up levels of training and cooperation in civic matters.

Indonesia and Papua-New Guinea share a 800-km border and in the past there were skirmishes near the border between Indonesian soldiers and a small guerrilla group fighting for an independent state in the Indonesian province of Irian Jaya.(FEER 23-01-92 p.14)

Indonesian-US cooperation

According to the chief of the general staff of the Indonesian armed forces Indonesia would step up joint naval exercises with the US and may eventually engage in joint air force training. Indonesia fully agreed with an accord signed by Singapore that allows US air and naval forces extensive access to the island for repair, resupply and training exercises. He said that the presence of American forces is needed to maintain stability in that part of the world. The admiral was speaking at an unofficial Asia Pacific defence conference.(IHT 29-02/01-03-92)

Indo-US cooperation

The Indian Minister of State for External Affairs told the Indian parliament on 16 March 1992 that the Indian and US navies would carry out joint training exercises in international waters. India thus backed away from its previous, longstanding policy that such joint exercises would compromise India's non-alignment.

The two navies began their first joint maneuvers on 28 May 1992. The 24-hour naval exercise took place in the Arabian Sea and was allegedly to update Indian technology and to improve communications between the fleets.(IHT 29-05-92;FEER 26-03-92 p.12)

MINORITIES

See also: Cambodia, Diplomatic inviolability (:Abduction of diplomat), Sabotage on aircraft

Muslims in Myanmar

According to Bangladeshi military sources Myanmar troops had been carrying out a campaign of "annihilation" against Muslims in the border state

of Arakan(Rakhine), the only Muslim-majority state in mainly Buddhist Myanmar. It was reported that on 20-21 December 1991 the troops had even undertaken a cross-border raid into Bangladesh in hot pursuit of fleeing Muslims. More than 60,000 Myanmar Muslims (known as Rohingyas) appeared to have fled to southeastern Bangladesh.(IHT 20-01-92;FEER 09-01-92 p.21. *See* letter of 13 Feb.1992 from the Minister for Foreign Affairs of Bangladesh to the UN Secretary-General, UNdoc.S/23710) An additional nearly 150,000 were reported to have arrived in Bangladesh in March 1992, raising the number to more than 200,000.(IHT 21/22-03-92;FEER 26-03-92 p.22)

The last time Muslims fled in large numbers from Myanmar was in 1978. In that year a government campaign named *Naga Min*, or Dragon King, drove more than 200,000 Muslims from Arakan across the border. Then, like in 1991, Myanmar denied persecuting the Rohingyas, saying that they were illegal immigrants who had no right to be in Myanmar. In the past four decades since Myanmar independence, however, there had already been several hundred thousand Rohingyas who had emigrated to the Middle East. The latest campaign seemed to have begun in 1989 when people, Buddhist Myanmarese, were moved into new satellite towns in the predominantly Muslim areas of northern Arakan, and Muslims were displaced from their land and homes. (FEER 29-08-91 p.26,26-03-92 p.22,26)

There has been a long simmering rebellion among the Muslims of Arakan. The rebels fall into two main groups: the Arakan Rohingya Islamic Front (ARIF) and the more Islamic-orientated Rohingya Solidarity Organisation (RSO).

The first Muslims on the Arakan coast were Moorish, Arab and Persian traders who began arriving in the 8th century. Their descendents are the present-day Rohingyas and there was the Muslim kingdom of Arakan which was established in the early 15th century. Besides, when Burma was part of British India, the Arakan ricelands attracted many seasonal labourers, particularly from the Chittagong area adjacent to East Bengal (now Bangladesh). Many of them settled in the region and attached themselves to the already well established Muslim community.(FEER 29-08-91 p.28,26-03-92 p.22)

When the foreign minister of Bangladesh visited Myanmar in November 1991 an agreement was reached under which Myanmar agreed to take back more than 30,000 Muslim refugees provided their credentials as citizens of Myanmar could be established beyond doubt. Two similar agreements were concluded on 28 April 1992.(FEER 05-12-91 p.14,07-05-92 p.14)

The plight of the Rohingya Muslims started to cause concern within ASEAN. On 10 March 1992 Malaysia lodged a protest with the Myanmar government over the treatment of the Rohingyas, followed by a statement from Singapore expressing concern at the influx of Rohingya refugees into Bangladesh, and another expression of concern from Indonesia with an appeal to the Myanmar government to solve the problem. The Philippines and Thailand too expressed their concern, the latter noting that Thailand also faced a problem of refugees from Myanmar.(*see* Refugees) The Indonesian foreign minister told a parliamentary hearing that while the problems inside Myanmar are essentially an internal affair, these should be distinguished from the international

dimension which could affect the stability of Southeast Asia. So far, Asean as a group had not changed its stance of non-interference in the internal affairs of a neighbouring country.(FEER 26-03-92 p.27)

Ethnic Nepalese in Bhutan

Alarmed at a shift in the demographic balance as revealed in the 1988 census which showed Nepalese Gurkhas in the majority in five southern districts of Bhutan, the king imposed a Bhutanese-Buddhist cultural hegemony, denied expression of Nepalese Hindu culture and decreed that the traditional Bhutanese dress be worn by all. The teaching of the Nepalese language was dropped from schools and the Bhutanese Dzongkha language was enforced as the official language. The census figures were re-interpreted in 1989 with the king claiming Bhutan's population was only 700,000, of which only 28,000 were ethnic Nepalese and the rest were illegal immigrants (According to the 1988 census the population was 1.37 million, of which Bhutanese Buddhists comprised 48%, the Nepalese 45% and others 7%). Furthermore the 1985 Citizenship Act (which declared 1985 as the cut-off point for citizenship by domicile in Bhutan) was rigorously enforced, resulting in the statelessness of some 30,000 ethnic Nepalese who had no documentary evidence of domicile. The measure sparked mass protests in August and September 1990. In addition, following democratic developments in Nepal the Nepalese settlers in Bhutan began agitating for political rights which in turn led to a police response. This led to an increasing flow of refugees to Nepal.(FEER 03-10-91 p.25,23-07-92 p.10) From its side Nepal had begun to express its concern about the increasing influx of refugees from Bhutan. According to reports in July 1992 the number had already exceeded 60,000. Bhutan, however, refused to acknowledge the existence of the problem.

After bilateral talks during March and April 1992 failed to break the impasse, a SAARC team of jurists from India, Sri Lanka, Bangladesh and Nepal visited southern Bhutan from where most of the refugees had fled. According to the team, the refugee problem arose out of discriminatory Bhutanese laws and violations of human rights by the authorities. The team's report, submitted to SAARC heads of government, called for the repeal of these laws.

It was reported that Nepal planned to persuade Bhutan to take part in a joint endeavour with India to identify all the refugees in the refugee camps and help to repatriate them.(FEER 23-07-92 p.10)

Most of the Nepalese settlements in Bhutan date back to the middle of the last century.

MISSILE TECHNOLOGY

Chinese sale of missile technology

According to US intelligence reports China was continuing to sell missile technology to Syria and Pakistan despite statements that it was willing to curb missile exports according to the 1987 Missile Technology Control Regime (*see*

l AsYIL 270), devised by the US and other powers (but not China) to limit the supply of ballistic missiles to the Third World. [The Regime bans the export of all missiles or launchers for a system that has a range of 180 miles and a payload of 1,100 pounds. An annex to the agreement lists various equipment, technology, or chemicals that are critical to enable a country to build a missile of that payload and range and whose sale is also prohibited.] China had vigorously denied selling entire missiles or warheads to any country in the Middle East or Southwest Asia. (IHT 1/2-02-92)

The US suspicions had led to sanctions against two Chinese missile-producing companies accused of being involved in the missiles and launchers sale to Pakistan, by banning the export of high-performance computers and satellite parts to China and the supply of sensitive equipment. On 21 November 1991 a Chinese Foreign Ministry spokesman said that in accordance with its promise to the US Secretary of State during the latter's visit, China intended to observe the "guidelines and parameters" of the MTCR, saying that "the condition to this is that the US side lifts the three measures or sanctions against China announced on the 19th of last June." In February 1992 the sanctions were lifted.(IHT 22-11-91;FEER 05-03-92 p.14,28-05-92 p.22)

Indo-Russian rocket contract

Russia affirmed that there was no question of suspending $250 million contract to sell rocket engines to India because of US objections to the deal. Under the contract, signed in 1991 between Glavcosmos, the Russian space agency, and the Indian Space Research Organization, Russia was to supply cryogenic rocket engines to India which is trying to develop satellite launching capacity. The US had raised objections because the contract was allegedly violating the Missile Technology Control Regime. Russia was not a signatory to the agreement but was said to have agreed to abide by its provisions.(IHT 04-05-92) Both India and Russia, however, were prepared to allow a review of their program by a committee of experts to satisfy the US that it is not a weapons-oriented project.(IHT 07-05-92)

Indian missile test

India test-fired its *Agni* missile for the second time on 29 May 1992 (the first test occurred in 1989). The missile had an advertized range of up to 1,550 miles and a payload capacity sufficient to carry a nuclear warhead. The test proceeded in defiance of recent US diplomatic pressure aimed at curtailing India's nuclear and missile programs. India claimed the Agni is not a weapons system but a "technology demonstrator".(IHT 30/31-05-92;FEER 11-06-92 p.12)

MONETARY MATTERS

Asia-Oceania forum of central banks

(*see also*:1 AsYIL 334)

Since 1991 the Bank of Japan had been hosting meetings with senior officials from the central banks of Thailand. Malaysia, Singapore, Indonesia, the Philippines, South Korea, Australia and New Zealand. For the meeting of 14 February 1992 China was invited for the first time and had accepted the invitation.(FEER 30-01-92 p.51)

NARCOTICS PROBLEM

Sino-US cooperation

The Chinese anti-narcotics authorities were likely to approve a request by the US Drug Enforcement Administration (DEA) to open an office in Beijing. China is worried about increase in drug addiction in Yunnan province, bordering Myanmar, and about heroin from Myanmar being channelled through its territory.(FEER 03-10-91 p.8)

NATIONALITY

See also:Minorities(:Ethnic Nepalese in Bhutan)

Right to return denied to nationals

The Indonesian parliament on 4 March 1992 adopted a bill on immigration which permits the government to ban the re-entry into Indonesia of citizens deemed to have tarnished the country's image abroad. The significant aspects to the new Act (*see* State practice) are twofold: formal guidelines governing restrictions on travel abroad of citizens and the introduction of a temporary ban to bar citizens from returning home. There were suspicions that the law was targeted primarily at the remaining supporters of the outlawed Communist Party and at members of secessionist movements, such as the Aceh Merdeka movement based in Stockholm and the Fretilin movement seeking independence for East Timor.(FEER 19-03-92 p.12,26-03-92 p.18)

In Taiwan the legislature passed a revision to the National Security Law on 7 July 1992, allowing the government to exclude certain citizens from returning to Taiwan. Persons who may be excluded are those suspected of intending to use violence to undermine national security and social stability.(FEER 16-07-92 p.14)

NEUTRALITY

Supplying missile-parts to a country at war

A Tokyo District Court on 22 April 1992 imposed suspended prison sentences on business executives of Japan Aviation Electronics Industry Ltd. and fined the company the equivalent of $37,000 for having illegally exported missile parts to Iran. The court held, *inter alia*, "Supplying missile parts to a nation at war not only harms international trust in our nation which holds the ideology of a pacifist nation, but also cannot help but exert a grave influence on international relations."(IHT 24-04-92)

NON-ALIGNED MOVEMENT

1992-95 chairmanship and preparation of the 1992 summit meeting

Indonesia was appointed chairman of the 103-nation Non-Aligned Movement for the 1992-1995 period. A ministerial meeting in Accra, Ghana, affirmed the desire of the member states for the movement to continue despite the end of the Cold War. Indonesia effectively began its tenure at the ministerial meeting on 3-4 February 1992 at Larnaca, Cyprus, when Yugoslavia to all intents conceded the chair ahead of the formal handover scheduled for the NAM's summit at Jakarta in September 1992.(*see*:Documents) As a result the meeting of the ministerial coordinating bureau which should prepare the summit meeting was to meet at Bali in May 1992. (FEER 19-09-91 p.14,20-02-92 p.12)

NUCLEAR CAPABILITY

See also:Divided states:Korea

US nuclear arms in South Korea

After the surprise US decision of 27 September 1991 on withdrawal of its ground-based nuclear weapons from Korea the US government announced in October that it would retain its air-delivered nuclear weapons in South Korea for the time being. (IHT 14-10-91) Yet, according to a subsequent unannounced but privately acknowledged US decision all US nuclear weapons were to be withdrawn. The practical effect of the move would, however, be minimal because North Korea would still be in easy reach of American nuclear submarines.

It was reported in November 1991 that the US government was considering allowing international inspectors into American military bases in 1992 to verify that all nuclear weapons were removed from Korean soil, thereby depriving North Korea of any excuse to further forestall international inspection of its own nuclear plants. North Korea had said in the past that it would never allow nuclear inspectors into the country as long as American nuclear missiles were deployed

in the South and - in a condition added recently - as long as the US kept South Korea within its nuclear umbrella, US aircraft are allowed to fly over the Korean peninsula and the US is allowed to make calls on Korean ports with ships or planes carrying nuclear weapons.(IHT 24-10-91,22-11-91,02-01-92)

Following the announcement by North Korea accepting outside inspection (see *infra*) it was reported on 28 November 1991 that the US had begun to withdraw its tactical nuclear weapons from South Korea(IHT 29-11-91) and on 11 December 1991 South Korea disclosed that US atomic weapons had been removed from South Korea. South Korea also offered to provide access to US bases for inspection if North Korea would allow the simultaneous inspection of its nuclear complexes.(IHT 12-12-91,19-12-91,02-01-92)

US attitude towards North Korea's nuclear capacity

The US Secretary of State said on 13 November 1991 that the US considered North Korea's suspected development of nuclear weapons a matter of urgent global concern and that it was actively exploring, with Japan, China and the (then) Soviet Union, ways to curtail the Korean efforts. According to US officials, while the US was concentrating its efforts on finding ways to squeeze North Korea diplomatically and economically in order to force them to open their facility to IAEA inspection, "we need to go beyond that - there should not be a reprocessing facility there at all." The first sign of the multilateral American approach was manifested by the change in the Japanese attitude (*see infra*).(IHT 14-11-91)

Since it is the South Korean position that questions involving unification and relations between North and South should be resolved in a direct dialogue between the two countries, the US affirmed that while it sought to enlist the help of other countries it would not be in any institutionalized form, as with the German unification process.(IHT 14-11-91)

As to the means used to force the North to comply with the Nuclear Non-proliferation Treaty US military officials said that by halting its troops withdrawal (*see*:Divided states:Korea) and mounting a much larger military exercise than usual they wanted to send a clear signal to North Korea.(IHT 22-11-91)

Japanese attitude towards North Korea's nuclear capability

On 13 November 1991 the Japanese prime minister said that North Korea must dismantle a key part of its nuclear facility if it hopes to normalize relations with Japan and receive economic assistance. So far Japan had insisted only that North Korea allow international inspection of the nuclear project at Yongbyon. The prime minister focused on the suspected fuel processing plant which would enable North Korea to turn its nuclear waste into weapons-grade plutonium. Western intelligence experts expected the plant to be operational within two years. From its side North Korea emphasized that it "is a non-nuclear nation and [that it] has no intention to develop nuclear weapons and has no capacity to do it", and that American concern about North Korean intentions was "nothing but a cunning trick to justify the presence of its nuclear weapons in South Korea."

Japan put itself in a difficult position with its demand because it is building a giant fuel reprocessing plant itself intended to feed its civilian nuclear power plants.(*see infra*) Japanese officials conceded that it would be difficult to argue that North Korea must shut its plant while Japan moves ahead.(IHT 14-11-91)

Chinese attitude toward nuclear weapons in Korea

The Chinese foreign minister declared that "[w]e do not want to see the existence of nuclear weapons on the Korean Peninsula", and added,"We hope to see the parties concerned engaged in effective consultation to find a solution to this problem, but we do not wish to see any international pressure."(IHT 15-11-91)

In discussions with the Japanese foreign minister on 5 December 1991 the Chinese deputy prime minister said that China would not help North Korea develop nuclear weapons.(IHT 5-12-91)

North and South Korean attitudes

In November 1991 North Korea announced a four-point proposal that: (1) it was ready to permit international inspection of its nuclear installations when the US began to withdraw its nuclear weapons from South Korea; (2) would permit simultaneous inspection of its facilities with inspection of US bases in South Korea; (3) would negotiate directly with Washington on the inspection question, and (4) would negotiate with Seoul on a nuclear-free zone.(IHT 27-11-91)

On 8 November 1991 the South Korean president declared that South Korea would neither possess nor deploy nuclear weapons on South Korean soil and called on North Korea to make the same pledge. Officials said that the South Korean pledge in effect placed a ban on the re-entry of US nuclear weapons that were being removed by Washington in accordance with the latest US disarmament statement.(*see supra*:Divided states:Korea) Once this removal process had been completed the South Korean government was expected to make a formal statement declaring the absence of nuclear weapons from its territory. However, the US nuclear umbrella would continue to protect South Korea, and the presidential statement in fact did not address the question of whether it changed South Korea's position over the passage of US nuclear-armed vessels or aircraft in its territorial waters or across its airspace.(IHT 9/10-11-91;FEER 21-11-91 p.13) Nevertheless, on 26 December 1991 North Korea pledged to sign an IAEA safeguards agreement and allow inspections soon, and dropped its demand that the US must officially confirm the withdrawal of all US nuclear weapons from Korean soil and that South Korea abandon the protection of the US nuclear umbrella.

In December 1991 North Korea also put forward a new draft agreement on making Korea free of nuclear weapons, containing an undertaking committing both sides to refrain from possessing facilities for reprocessing nuclear fuel or enriching uranium. This was in conformity with the US and South Korean demand that North Korea dismantles the reprocessing plant that they accuse it of constructing. The agreement, in the form of a six-article "Joint Declaration

for a Non-nuclear Korean Peninsula" was initialed on 31 December 1991.(*see* Documents) [The clause on mutual inspection on the basis of agreement was not in conformity with US wishes. The United States had always pressed for a strict inspection regime allowing inspectors to view any suspected nuclear site without permission of North Korea and on very short notice.](IHT 27 and 30-12-91,02-01 and 06-01-92;FEER 09-01-92 p.10)

The signature of this agreement in January 1992 opened the door for the implementation of the non-aggression and reconciliation accord of 13 December 1992.(*see supra*:Divided states:Korea) Both agreements entered into force when the two prime ministers met for a sixth round of North-South talks in Pyongyang 19 to 21 February 1992.(21-01-92,18-02-92)

A further agreement between North and South Korea was concluded on 14 March 1992 (formalized 17 March 1992) to allow inspections of suspected nuclear weapons sites within about three months, including the establishment of a Joint Nuclear Control Commission, as agreed in the Agreement on Reconciliation and Non-aggression.(IHT 16,18 and 20-03-92)

The actual signature of a nuclear safeguards accord by North Korea took place on 30 January 1992 [it signed the Non-Proliferation Treaty in December 1985](IHT 08-01-92,30-01-92,31-01-92) although it was asserted that inspections would be barred until North Korea could inspect South Korea's military bases to ensure that American nuclear weapons had been removed.(IHT 20-02-92) [In order to speed up inspections the US had offered to allow simultaneous inspection of the US air base at Kunsan in South Korea.(IHT 24-01-92)] Ratification took place on 9 April 1992 and under IAEA regulations North Korea must accept nuclear inspection within 90 days of putting the safeguards accord into effect.(IHT 10-04-92) On 14 April North Korea announced that it would open three nuclear plants to international inspection, *viz* an experimental reactor at Yongbyon and two other much bigger plants which were under construction.(IHT 15-04-92) The existence of the first mentioned reactor was not yet known by Western analysts (IHT 17-04-92)

The Korean report which was much more detailed than expected, or even needed, was submitted on 4 May 1992. In its filing to the IAEA North Korea said it had four nuclear reactors currently running or under construction. One was an aging, small research reactor that had been under IAEA inspection for 15 years. Another was described as a 5-megawatt experimental nuclear power reactor at Yongbyon. Nearby is a 50 megawatt reactor still under construction. In addition, North Korea was building a 200-megawatt reactor in North Pyongan Province, and it hoped to build three 635-megawatt plants along the eastern coast.(IHT 07-05-92)

After his first visit to North Korean nuclear plants the director of IAEA told that he had been taken to a partly completed industrial plant to be used for processing spent uranium into plutonium. According to North Korean officials it concerned a research laboratory, conceding that they had produced a small amount of plutonium in experiments. On the other hand the IAEA study group also found evidence supporting the North Korean assertion that its nuclear plants are strictly for peaceful power-generation purposes. The IAEA visit was designed to make arrangements for a formal inspection.(IHT 18-05-92)

Indian attitude towards transfer of nuclear weapons technology

The Indian ambassador to the U.S.divulged that Libya offered in the late 1970s to pay India an amount comparable to its foreign debt in exchange for nuclear weapons technology, but India declined.(IHT 11-10-91)

Sino-Iranian co-operation

China signed an agreement in June 1990 to provide what it described as a "micro-nuclear reactor" for installation at Isfahan. It also provided training for Iranian nuclear engineers and sent delegations of scientists to Iran.(IHT 31-10-91) In a statement from its foreign ministry of 4 November 1991 China confirmed its cooperation program with Iran but emphasized that it was exclusively for peaceful purposes. China had signed commercial contracts with Iran in 1989 and 1991 for the provision of nuclear equipment for scientific and medical research, including an electromagnetic separator for isotope production (calcutron) and a mini-reactor. According to the Chinese foreign ministry all such programs were subject to three principles: they could be for peaceful purposes only, the facilities had to be open to international inspection, and the recipient country could not transfer the technology to another state without China's permission. China had requested the IAEA to enforce safeguards before the equipment was shipped.

According to US intelligence reports in October 1991 the equipment supplied by China was capable of making fissible material for nuclear weapons and the calcutron equipment was considered capable of producing highly enriched uranium. Although the same US sources admitted that the quantity of Chinese-made equipment sold to Iran was not sufficient to produce even a single bomb's worth of enriched uranium, the sale would amount to a significant transfer of technology, and according to US analysis 90 per cent of what Iran was seeking from foreign suppliers could be used equally for nuclear weapons and civilian power.(IHT 1-11-91, 5-11-91,FEER 14-11-91 p.12)

According to newspaper reports the US government had urged China to stop helping Iran's nuclear program. Referring to the IAEA safeguards a US official said,"We're trying to tell the Chinese that in this case, you've got to go beyond the letter of the law."(IHT 18-03-92)

IAEA findings about Iranian nuclear facilities

At the end of a week-long mission officials from the International Atomic Energy Agency said in February 1992 that based on their findings Iran's nuclear activity and ability were entirely for peaceful purposes.(IHT-2-92)

Upon circulation of an Iranian letter relating to the results of the IAEA mission in the UN (UNdoc.S/24239) the Director General of IAEA had an IAEA press release also circulated, and particularly drew attention to a specific paragraph in the press release which read:"The activities reviewed by the team at the above-mentioned facilities and sites were found to be consistent with the peaceful application of nuclear energy and ionizing radiation. It should be clear that the team's conclusions are limited to facilities and sites visited by it and are

of relevance only to the time of the team's visit."(UN doc.S/24301)

Chinese cooperation with other countries

According to US sources there were suspicions that China had helped incipient nuclear weapons programs in at least three other countries: the sale of heavy water to India, long-term technical assistance to Pakistan's nuclear program, and cooperation since 1988 in building a nuclear reactor in Algeria, suspected to be for nuclear weapons research and production. Other sources believed that while China may be willing to help with projects that appear to have military implications, the assistance is limited and falls well short of transferring all that would be necessary to build a nuclear bomb. China denied nuclear assistance of a military nature while being openly active in aiding Pakistan's civilian nuclear energy development, including agreeing in 1989 to sell a 300 MW nuclear power station.(IHT 1 and 16/17-11-91,FEER 14-11-91 p.120)

The International Atomic Energy Agency refused to approve China's proposed sale to Syria of a small nuclear research reactor, apparently in an effort to persuade Syria to accept international safeguards against nuclear weapons proliferation.(IHT 9-12-91)

According to the *China Daily* China had opened negotiations to sell nuclear power plants to Egypt, Iran and Bangladesh. China signed a contract with Pakistan in December 1991 for the sale of a reactor. Iran confirmed that it was discussing a contract with China. The Egyptian embassy in Beijing denied any knowledge of discussions, and the Bangladesh embassy declined to comment. (IHT 31-07-92)

Indian aid to Iran

It was reported that India had been negotiating the sale of a 10 megawatt nuclear research reactor to Iran. Although some of the nuclear technology involved would not have to be subject to international safeguards India had pledged privately that any nuclear exports it makes would be subject to such safeguards. American officials had been pressing India to forgo the proposed sale in an effort to block Iran from expanding the nuclear program it had developed during the last few years with imports and technical assistance from China and Argentina. Iran's heightened interest in nuclear imports had raised alarm among some American officials who said they saw little commercial rationale for the country's expanding nuclear program when it is a major oil producer. Until the present export plans India had prided itself on its record of strictly prohibiting the spread of indigenous nuclear and other so-called dual-use technologies. (IHT 16/17-11-91)

Japanese nuclear program

To fuel its conventional reactors Japan uses enriched uranium supplied by the US. Plutonium can be recovered by reprocessing spent uranium fuel and then used as another kind of reactor fuel, or it can be transformed into

weapons-grade material with relative ease.

Japan planned to start importing shipments of plutonium in 1991 in order to reach energy independence. The plutonium, fabricated in Europe from Japan's spent nuclear wastes, would fuel both conventional nuclear power plants and a small group of fast-breeder reactors which would breed more plutonium for re-use, thus creating a "plutonium cycle". The plan, conceived decades ago, puts Japan in a particularly uncomfortable diplomatic position. At the same time that it is demanding stronger nuclear non-proliferation measures, including abandonment of reprocessing facilities in North Korea, it is promoting at home what may be the world's largest reprocessing program. Moreover, the price of uranium had declined, making plutonium-fed reactors comparatively uneconomical.(IHT 26-11-91)

It was expected that Japan would thus receive more than 30 tonnes of reprocessed plutonium in the next decade. Each shipment would contain roughly a ton of plutonium. The IAEA said that the plans to store huge quantities of plutonium in Japan could pose "political and security problems" in Asia. It urged to place the stockpiles in international custody rather than keep them in Japan. The agency was chiefly worried that other states with nuclear ambitions could use the Japanese precedent to insist that they, too, should have nuclear reprocessing installations and plutonium stockpiles.(IHT 14-04-92;FEER 23-04-92 p.22)

One ton of plutonium, reprocessed in France, would be sent back to Japan by sea sometime between September and December 1992. The specially built plutonium-fuel carrier would be escorted by a Japanese Coast Guard ship. Both the US and Australia were satisfied with the safety precautions being taken. Several countries in Asia and the Pacific, however, became alarmed at the possibility of an environmental disaster and started urging Japan to use an ocean route that is well away from population centers. Among them were Indonesia and some South Pacific island states at a meeting of the South Pacific Forum in July 1992. South Africa said it would bar Japanese ships carrying plutonium from sailing within 200 miles of its coast.

The US had the right to approve or disapprove the final security plan because the US supplied the original uranium fuel used in the Japanese reactors.(IHT 26-11-91,07 and 14-07-92)

China accedes to Non-proliferation Treaty

The Chinese National People's Congress began deliberations on 22 December 1991 on joining the Nuclear Nonproliferation Treaty(IHT 24/25-12-91) and a week later the Congress' Standing Committee authorized the government to sign the treaty.(IHT 30-12-91) The accession finally took place on 9 March 1992.(IHT 10-03-92)

Meanwhile the US reported that China had conducted its largest underground nuclear test ever on 21 May 1992.(IHT 22 May 1992)

Pakistan

China announced that it would export a 300-megawatt nuclear power plant to Pakistan to be installed at Chashma, southwest of Islamabad. The plant would cost $500 million, with Pakistan meeting the local costs and China advancing credit to meet other costs. The power station would be used only for peaceful purposes and would be subject to safeguards and inspections by IAEA. The contract was concluded as part of a 1986 agreement on cooperation in the peaceful use of nuclear technology, and was first agreed to in November 1989 during a visit by the then prime minister of Pakistan to China.

Meanwhile the French President announced during a visit to Pakistan in February 1990 that France would also supply Pakistan with a 900-MW nuclear reactor. At the beginning of the 1970s Pakistan already acquired a reactor from Canada. According to Pakistani energy officials the development of a substantial nuclear-power generating capability is a top priority because of the country's increasingly inedequate energy supply.(IHT 02-01-92;FEER 16-01-92 p.14,23-01-92 p.12)

Pakistan's capability to build an atomic bomb

The prime minister of Pakistan affirmed that his country has made solemn commitments, internationally as well as bilaterally with the US, not to produce nuclear weapons even though it has the technology.(IHT 30-12-91)

During a visit to France the prime minister of Pakistan confirmed on 17 January 1992 that Pakistan is capable of building atomic weapons, but is concentrating on economic development instead. He also affirmed that for Pakistan today it is not possible to ensure comprehensive safeguards as a condition for the acquisition of nuclear plants.(IHT 18/19-01-92) In February 1992 the Pakistan foreign secretary admitted that Pakistan has the components and know-how to assemble at least one nuclear explosive device. He also reiterated Pakistan's pledge not to explode such a device or transfer nuclear technology to other Islamic states or Third World countries. The production of highly enriched uranium and of weapon cores was permanently frozen last year, however, in order to meet US conditions for resuming aid.(IHT 8/9-02-92)

Indo-Pakistan agreement on nuclear installations

Pakistan and India exchanged lists of nuclear installations on 1 January 1992 under an agreement of January 1991 aiming at easing suspicion about each other's nuclear capabilities and at banning attacks on each other's nuclear plants.(IHT 020-01-92)

Efforts for regional control of nuclear weapons in South Asia

India expressed no enthusiasm for a US proposal for five-power (US, Russia, China, India and Pakistan) talks about a zone free of nuclear weapons in South Asia (as proposed by Pakistan), and opposed the idea of signing the Nuclear Nonproliferation Treaty since this treaty discriminated against nations that do

not possess nuclear weapons.(IHT 18/19-1-92;see also UNdoc.A/CN.10/158 of 2 May 1991 *re* Pakistani working paper on regional approach to disarmament)

In rejecting proposals for curbs, India put forward several arguments. Foremost, India insists that Pakistan retains aggressive intentions toward India and that it has its own nuclear weapons. Secondly, as long as China possesses nuclear weapons India cannot consider any proposal that would lead to a nuclear-free zone in South Asia. India also contends that there is an inherent unfairness in the pressure from the large powers on India when they continue to possess large arsenals of their own.(IHT 22-01-92)

In March 1992 the Indian Foreign Secretary said, however, that closer ties with the US could make India more receptive to the proposed conference on a non-proliferation treaty in South Asia.(IHT 12-03-92) While easing its opposition to the proposed five-nation conference on curbing nuclear proliferation on the sub-continent India favoured a bilateral approach to the issue.(IHT 16-03-92;FEER 30-04-92 p.24)

The prime minister of Pakistan affirmed that his country would agree to any regime of control which is non-discriminatory and treats Pakistan and India equally.(IHT 30-12-91) In response to critical comments on the Pakistani nuclear capability reference was made to the following Pakistani proposals: (1) establishment of a nuclear-free zone in South Asia, repeatedly endorsed by the UN General Assembly since 1974; (2) a proposal in 1978 that Pakistan and India issue a joint declaration denouncing acquisition or manufacture of nuclear weapons; (3) a proposal in 1979 for a system of bilateral inspection of all nuclear facilities on a reciprocal basis, simultaneous acceptance of IAEA safeguards and accession to the Nuclear Nonproliferation Treaty; (4) a 1987 proposal for a nuclear nonproliferation agreement in South Asia under the UN.(IHT 22-07-92)

International Atomic Energy Agency

More than 110 countries are members of the IAEA, including several who are not signatories of the 1968 Nuclear Non-Proliferation Treaty and are therefore not subject to the IAEA's scrutiny.

The IAEA's main verification powers are contained in a safeguards agreement dating from the early 1970s that require states to open their nuclear facilities for inspection. There is a growing belief in some quarters that international monitoring and verification arrangements are inadequate. A major hurdle to effective verification is that the IAEA has to give advance notice of their visits, allowing states to hide incriminating evidence. In addition, the IAEA can only inspect nuclear facilities which a host country admits to possessing. An alternative method would include the granting of "challenge" powers, giving inspectors the authority to randomly check installations not necessarily included in a list of declared nuclear facilities. However, greater transparency by more advanced monitoring equipment could lead to spying.(FEER 04-06-92 p.25)

OIL

OPEC (dis)agreement on oil production

OPEC agreed on 25 September 1991 to lift its production ceiling for all its 13 members to 23.6 million barrels a day, yielding to Saudi Arabia's demand and giving members the right to pump as much oil as they can. The agreement ended an era in which OPEC tried for two decades to set the price of oil by regulating its output; and it left the quota system whereby each member had a fixed allocation to produce a certain amount of oil.
(IHT 26-09-91)

In December 1991, however, Algeria called on OPEC to immediately reduce its output of oil by at least two million barrels a day to prop up oil prices. These had fallen $5 per barrel, and reference was made to the impact of recession in the US and economic weakness elsewhere. The call for an emergency meeting was opposed by Saudi Arabia which argued that prices had been driven down by speculators and did not see the situation as critical.(IHT 24/25-12-91)
On 20 January 1992 both Iran and Algeria announced plans to cut oil production in a bid to increase the price of oil. Iran would cut its output by 50,000 barrels a day, and Algeria by 20,000. A week earlier Nigeria, Venezuela and Libya announced reductions totalling 130,000 barrels a day.(IHT 21-01-92)

OPEC reached agreement on 15 February 1992 on reduction of oil production by a little more than 1 million barrels a day from 24.2 million, fixing a new ceiling of 22.9 million barrels. The great difficulty was, however, to reach agreement on the cut in the production of each member state. The accord assigned Saudi Arabia a quota of 7.8 million barrels a day, but Saudi Arabia would not diminish its current output of 8.5 million barrels by more than 500,000 barrels, while insisting on a third of OPEC's output. On the other hand Iran demanded further cuts to 22.5 million barrels.(15/16-02-92,17-02-92)

British and French oil exploration in Cambodia

The (British) Enterprise Oil PLC and the (French) Compagnie Européenne des Pétroles reached agreement with Cambodia on 3 October 1991 to jointly prospect for oil in two offshore blocs in the Gulf of Cambodia. This was the first such accord after years of war and economic isolation. No particulars of the arrangement were made public. 26 offshore and onshore blocs were put for tender by the government in June 1991.(IHT 04-10-91) Later concessions were awarded to a consortium including Premier Oil Pacific, Repsol Exploration, Australasian Oil Exploration and Santos, Japan National Oil and Hungary's Hydrocarbon Institute.(IHT 6-12-91)

Vietnam

It was reported in March 1992 that Vietnam was drafting a new oil law. So far Vietnam had signed 11 production-sharing contracts with companies from Australia, Belgium, Britain, Canada, France, India, Malaysia, the Netherlands and Norway.(IHT 10-03-92)

No US participation in Vietnamese oil exploration

According to Vietnamese officials US companies would not be allowed to bid to join the exploitation of Dai Hung, Vietnam's largest oil field off the southern coast, because of the US trade embargo.(IHT 27-12-91)

Myanmar

According to industry analysts and consultants Myanmar had quietly emerged as a favourite of international oil companies. Ten major companies had already signed contracts. Onshore oil reserves are estimated at up to 3 billion barrels, and billions of cubic feet of reserves are known to exist in the Gulf of Martaban and Bengal Bay. Besides, the territorial waters in the Andaman Sea are thought to contain other deposits. The political opposition, however, has expressly stated that any commercial agreement, including the ten oil contracts, are illegal.(IHT 19-12-91)

PERSIAN GULF

Iranian position

Iran told its Arab neighbours on 9 January 1992 that security in the Gulf was not purely an Arab concern and that there was no need in the region for outside forces. However, the spokesman said that Iran did not object to the Gulf states' buying arms from the West, or to the presence of Western advisers to train Gulf armies. He said:"We do not interfere in the internal affairs of other nations and the type of military cooperation they want to establish with other states." (IHT 10-01-92)

PIRACY
See also:Divided states:China

Southeast Asia

According to the Singapore National Shipping Association there had been 61 cases of pirate attack against ocean-going commercial vessels in Southeast Asian waters in 1991, up from only three in 1989. Other reports even mention 200 pirate attacks in the region in 1991. For the period of the first five months of 1992 44 incidents were reported.

According to ships'captains, most attacks occur in the Strait of Malacca within 100 kilometers of Singapore, in Indonesian territorial waters or near islands in the South China Sea belonging to Indonesia or Malaysia. About 700 ships pass through the straits each week. Another area where attacks commonly occur is close to the Indonesian Anambas Islands in the South China Sea and the islands close to the Karimata Straits, off west Kalimantan (Borneo) Island.

Increasingly violent attacks by pirates, who have begun using fire bombs

against tankers in the sea-lanes of Southeast Asia, raised fears of a maritime disaster such as an oil spill in the Strait of Malacca. Pirates sometimes tie up crew members after robbing a ship, leaving the bridge unmanned.

Despite this persistence of piracy national governments, navies and police failed to suppress maritime crime, because of reluctance to intrude into the territorial waters of other states. Both the Singapore National Shipping Association and the Federation of ASEAN Shipowners'Associations made appeals to regional governments to eradicate piracy, by launching joint maritime police patrols.(IHT 19-11-91,09-07-92;FEER 02-07-92 p.14)

Protection of Vietnamese refugees

The UN High Commissioner for Refugees phased out an anti-piracy program dating from 1982 intended to protect Vietnamese refugees from attacks in the Gulf of Thailand, because the attacks had almost ceased in the last 18 months. Responsibility for policing the seas would thus revert to the Thai navy.(IHT 13-01-92)

POST-COLD WAR ORDER
See:Inter-state relations(China-India)

RAILWAYS

A trans-continental "Silk Road" railway

In late June 1992 passenger rail service began between the Xinjiang Uygur autonomous region in western China and the neighbouring Republic of Kazakhstan. This was to be the first link in a rail route projected to stretch from the Chinese port of Lianyungang on the Yellow Sea across Asia and Europe to the Dutch port of Rotterdam.(IHT 26-06-92)

RED CROSS
See:Aliens

REFUGEES
See also: Cambodia, Inter-state relations (Thailand-Vietnam), Minorities; Annual Report UNHCR,UNdoc.E/1992/59

Forced return of "boat people" to Vietnam
(*see also*:1 AsYIL 339)

In October 1991 there were estimated to be more than 100,000 Vietnamese living in camps in Hong Kong and Southeast Asia. In April 1992 it was reported that since March 1989 17,456 persons had returned voluntarily. There were

64,000 Vietnamese in 11 camps in Hong Kong, 21,600 had undergone screening and fewer than 10 % had qualified as political refugees.

Vietnam had tentatively agreed in September 1991 to accept the involuntary return of Vietnamese refugees who did not qualify as such in the country of refuge and were determined to have fled Vietnam for economic reasons (the so-called Orderly Return Program). The Vietnamese offer to reverse policy was said to have been made in discussions in September 1991 with British, Hong Kong and U.N.officials. The offer might be withdrawn if there were strong objections from the U.S. which opposed mandatory repatriation of Vietnamese.(IHT 3,19/20 and 25-10-91,24-04-92)

A formal agreement with Britain would be signed on 16 October at Hanoi (IHT 16-10-91) but was delayed because of remaining Vietnamese objections against forced repatriation. A spokeswoman expressed the Vietnamese position as follows:"In [view of] the principle of respecting human rights, Vietnam has never accepted forced repatriation. On the other hand, Vietnam [acknowledges] its responsibility towards the Vietnamese citizens who are refused by all countries of refuge, living a prolonged, miserable life in a foreign land. That's why Vietnam is ready to accept back those persons provided their dignity, their orderly repatriation is ensured, and with the necessary financial support of international organizations to help the returnees settle down soon."(IHT 18-10-91)

On 21 October, meanwhile, the Hong Kong government announced that Vietnam had agreed, pending the above overall agreement, to the forced return of a small number (about 250) of so-called "double-backers", i.e. those who had voluntarily gone home to Vietnam once but had returned to Hong Kong again.(IHT 22-10-91,24-10-91;FEER 31-10-91 p.14)

An agreement recognizing the forced repatriation of all refugees in principle was finally signed on 29 October 1991, but it only applied to those who had arrived in Hong Kong after that date. Under the agreement Vietnam was bound to accept everyone who was designated an economic migrant rather than a political refugee. It also guaranteed that no person returned would face punishment or persecution while the UNHCR would verify their treatment. (IHT 30-10-91)

Although the US State Department on 18 October 1991 had still stated that the US was opposed to the expected agreement (IHT 19/20-10-91), it appeared to have given Britain its tacit approval for the new repatriations. There were suspicions that the US government's recent attempts to force Haitian boat people home to Haiti had weakened its case with Britain.(IHT 10-12-91)

The first forcible repatriation took place on 9 November 1991, followed by another on 12 February 1992. Meanwhile at least 3,000 Vietnamese were waiting to return under a voluntary repatriation plan, but Vietnam said it could only take four to five flights a month.(IHT 13-02-92)

Finally an Anglo-Vietnamese overall-agreement was signed on 12 May 1992. It was predicted that it would take as long as four years to repatriate the 50,000 refugees now residing in the camps at the rate of 1,000 a month agreed to by Vietnam. Vietnam had guaranteed that the returning refugees would not be persecuted.(IHT 13-05-92) The first group of 38 persons was returned to Vietnam on 19 June 1992.(IHT 20/21-06-92)

Sri Lankan refugees (Tamils) in India

The Indian and Sri Lankan Foreign Ministers agreed on 6 January 1992 that India would begin repatriating about 200,000 Tamil refugees to Sri Lanka. A chartered vessel would take the first batch of 5,000 persons in the third week of January. Most of the refugees fled to India after the withdrawal of an Indian peacekeeping force from Sri Lanka in 1990. The ministers stressed that the returns would be voluntary.(IHT 06-01-92;FEER 16-01-92 p.14)

Singapore attitude

Singapore's Ministry of Home Affairs said on 21 October 1991 that no refugees would be allowed to enter Singapore until the 148 already in the republic were resettled in other countries, i.e. until the UNHCR and the guaranteeing countries "fulfill their written obligations and remove all present cases." Most of the refugees had overstayed the three-month guarantee period by more than a year.(IHT 22-10-91;FEER 31-10-91 p.14)

Myanmar refugees

An offensive by the Myanmar army drove about 3,000 refugees into Thailand at points in the areas of Ban Mae Sot, Ban Tha Song Yang, Umphang and Ban Mae Sarieng, about 485 kilometres northwest of Bangkok, bringing the refugee total to more than 40,000.(IHT 29-01-92) The total number of people living in refugee settlements along the Thai-Myanmar border was estimated in April 1992 to be 65,000, consisting of a majority of Karens, with substantial numbers of Mons and Karennis.(FEER 16-04-92 p.28)

Other refugees are those along the border with Bangladesh (*see* Minorities), approximately 30,000 people from Kachin state on the Sino-Myanmar border, and nearly 1,500 villagers who fled into the northeastern Indian state of Nagaland to escape fighting in the northwestern Sagaing Division of Myanmar.(FEER 27-02-92 p.16)

Closure of Malaysian refugee camp

The Pulau Bidong camp for boat people was being closed in August 1991, following a Malaysian government decision of 14 August 1991. By that time there were 12,800 Vietnamese boat people in Malaysia, awaiting either repatriation or resettlement.(FEER 29-08-91 p.14)

Indonesian refugees (Acehnese) in Malaysia
(*see also* 1 AsYIL 340)

Malaysia said in October 1991 it would repatriate the approximately 200 or 300 persons who fled the northern Sumatran province of Aceh earlier in 1991. Meanwhile it was reported in June 1992 that 43 Acehnese had camped outside the UNHCR office in Kuala Lumpur claiming they were refugees and demanding political asylum.(FEER 24-10-91 p.14,02-07-92 p.12)

Recognition of refugee status in Japan

On 20 April 1992 Japan granted refugee status to three Myanmar dissidents, the first non-diplomat Myanmarese to win such status.

Japan has granted refugee status to no more than 200 foreigners altogether.(FEER 14-05-92 p.18)

Bangladeshi refugees (Chakma) in India

Bangladesh and India agreed in late May 1992 to arrange for the speedy repatriation of all Chakma refugees to Bangladesh. More than 50,000 Chakma refugees from the Chittagong Hill Tracts region in southeastern Bangladesh fled into India several years ago in the wake of a long-festering insurgency by the Chakma hill tribes.(FEER 11-06-92 p.12)

Pakistani refugees (Biharis) in Bangladesh

Soon after British India was partitioned in 1947 Urdu-speaking refugees from Bihar province in India migrated to what was then East Pakistan. During the liberation struggle of the early 1970s which created an independent Bangladesh out of East Pakistan, most Biharis sided with Pakistan, leading to their being herded into refugee camps in and around Dhaka. They refused an offer of permanent settlement in Bangladesh and claimed themselves to be Pakistanis. They now number some 238,000.

Pakistan at that time was hardly interested in receiving the Biharis who had never lived in West Pakistan, and in 1978 the then president of Pakistan even promulgated an ordinance banning the repatriation of Biharis. Upon pressure from Bangladesh and other Islamic countries he finally agreed in the 1980s to allow the *Rabita Trust*, a Mecca-based Islamic humanitarian body, to raise funds for the repatriation of Biharis. It was estimated in the late 1980s that the migration would cost $400-500 million.

Meanwhile a new government (prime minister BENAZIR BHUTTO) was elected in Pakistan which opposed the return of the Biharis, possibly in view of the experience with earlier migrants from India, most of whom had settled in Sindh province and who had formed the *Muhajir Qaumi Movement*(MQM) which turned out to become a formidable opposition to the prime minister's Pakistan People's Party. The chief minister of the Punjab (NAWAZ SHARIF), an opponent to the prime minister, however, offered to resettle Biharis in his province, and revived the repatriation plan when he became prime minister in late 1990.

At the behest of the Pakistani government the Rabita Trust began a detailed head-count of Biharis in March 1992. Repatriation was planned to begin later in 1992 but funds for the plan had yet to be found.(FEER 25-06-92 p.23)

REGIONAL SECURITY

Discussion in ASEAN

At the ASEAN summit in January 1992 the idea was introduced of inviting the five permanent members of the Security Council to accede to the ASEAN Treaty of Amity and Cooperation. It was dropped, however, when confronted with the argument that it could invite external interference in the region.(FEER 06-02-92 p.11)

RIVERS

Revision of Mekong River agreement

The Mekong Committee was founded in 1957 by the four lower Mekong countries, Thailand, Vietnam, Laos and Cambodia, with backing from Western donor countries and the UN Development Program. When the Khmer Rouge took over the government in Cambodia it rejected the Committee, forcing the other three to continue consultations as the Interim Mekong Committee under an agreement of 1978. It was agreed that the full Committee would be reactivated once Cambodia opted to return to active membership.

Problems started when the Cambodian Supreme National Council (SNC) requested to reactivate its membership in June 1991. Thailand put forward preconditions for this readmittance and the reactivation of the full Committee, asking the replacement of the 1957 agreement by the one of 1978, and arguing that the 1957 agreement was obsolete.

The 1957 agreement required all members to provide each other with detailed information on projects involving the Mekong's waters and tributaries, and prescribed that projects must receive the approval of all members before they could be implemented. The 1978 agreement did not contain this unanimity rule which implied a veto power for each of the member states.

Thailand was worried that the unanimity clause could delay the Kong Chi Moon project, intended to divert water from the Mekong near Nong Khai/Vientiane to irrigate Thailand's arid northeast region. The water would be carried in a 200-km canal and ultimately drain into the Chi and Moon rivers which flow into the Mekong east of Ubon Ratchathani near the Cambodian border. Vietnam was reported to be concerned that the Thai scheme would divert enough water from the river to disrupt its flow in the Mekong Delta in southern Vietnam. A reduced flow would increase salt-water intrusion that already threatens the rice fields in the delta.

Vietnamese officials insisted that their dispute with Thailand was over whether Cambodia should be readmitted without preconditions rather than whether Vietnam would be willing to revise the priciples governing the use of water from the Mekong. Vietnam, Laos as well as the Cambodian SNC rejected the Thai preconditions.

Following this rejection Thailand cancelled a meeting set for early November 1991. The situation deteriorated at the end of February 1992 when Thailand

called off a meeting for the second time in four months. Vietnam for its part boycotted an informal meeting called by Thailand for consultations on 15 March 1992 as well as its continuation on 16 March in which the upper river countries China and Myanmar participated.

It was reported that Thailand appeared to want to reconstitute the committee with all six riparian states. Thailand also excluded the Mekong Secretariat from the informal meetings in March, accusing it of attempting to be a regulator rather than a coordinator, and of inciting the other three countries to side against Thailand. The head of the Bangkok-based Secretariat was asked to resign and to leave the country.(FEER 14-11-91 p.14,02-04-92 p.16)

SABOTAGE ON AIRCRAFT

Air India

A time-bomb was found in an Air India jetliner on 1 December 1991 minutes before it was to leave for London and New York. Investigators blamed Sikh militants, but no arrests were made.(IHT 2-12-91)

SANCTIONS

See also:Foreign investment,Inter-state relations(US-Vietnam),International trade,Missile technology

US sanctions against Vietnam

In September 1991 the US renewed its trade embargo against Vietnam for a year. The US sanctions were imposed after Vietnam invaded Cambodia in 1978 and according to current US policy they would be lifted only after the settlement of the Cambodian conflict and after Vietnam would have accounted for all US personnel listed as missing in Vietnam.(*see also*:1 AsYIL 313 and *supra*:Inter-state relations)

It was reported that the US had warned some major banks to stop violating the US trade embargo against Vietnam. A number of major banks, generally not US-owned, had for years been handling foreign trade transactions for Vietnam in dollars, technically violating the US Trading with the Enemy Act.(FEER 31-10-91 p.74)

Lifting of Vietnam trade sanctions by Thailand

Thailand consented to a Vietnamese request to lift a decade-long ban on the export of items classified as "strategic" to Vietnam as bilateral relations had markedly improved in the past few years.(IHT 19-09-91)

US blockade on IMF and ADB lending to Vietnam

According to expectations the US did not lift its veto on IMF loans to Vietnam at the IMF and World Bank meetings in October 1991. Vietnam owes the IMF arrears of $140 million and as long as this amount remains unpaid Vietnam would be barred from new IMF loans. Other industrialized countries, notably France, tried to help by organizing a special, informal support-group meeting of IMF members on 16 October 1991 to mobilize financial support for Vietnam. The meeting was held on the sidelines of the annual meeting of the World Bank and the IMF. The number of countries supporting renewed assistance had increased since a similar meeting at Washington in April 1991 which produced pledges of support from only France and Australia.(IHT 11,12/13 and 17-10-91;FEER 31-10-91 p.74)

As part of the embargo the US also kept preventing loans from the Asian Development Bank from being disbursed. The US has a 16.3 percent shareholding in the ADB, tying it with Japan for the most influence among the 52 members.(IHT 05-05-92)

Lifting of investment ban on Vietnam

The Singapore government announced that it would lift its ban on investment in Vietnam after a peace settlement on Cambodia would be signed and when the Supreme National Council would have taken its seat in the United Nations. Until such lifting Singapore banned local businessmen from investing in Vietnam but allowed trade with it. International economic assistance to Vietnam was largely frozen since Vietnam had invaded Cambodia.(IHT 12/13-10-91;FEER 24-10-91 p.79)

Impact of US sanctions on Vietnamese Airlines

The US trade embargo precludes US-made aircraft or those with a substantial US-made content from being owned or operated by Vietnam Airlines. It also seemed to bar such aircraft from being leased with foreign crew by the Vietnamese and based in Vietnam, but not if the aircraft is based and maintained outside Vietnam. It seemed that what is critical in the eyes of US enforcement officials is that any deal involving US-built or US-equiped aircraft that "transfers control to Vietnam is illegal." Apparently the transfer of revenues earned on joint services does not fall under the sanctions.

In February 1991 the lease by Vietnam Airlines of a Boeing 737 from the Dutch company Transavia was canceled because of US threats that Transavia's supplies of US-made spare parts for other planes would be cut off if it went ahead. The same happened to another lease of a Boeing 737 from the (Swiss) Trans-European Airways.

In April 1991, however, the lease of a DC-10 from Scandinavian Airlines System would not breach the embargo because the aircraft would, at least notionally, be based at Bangkok for the purposes of the lease while it shuttled back and forth between Bangkok and Ho Chi Minh City. Besides, the plane would be leased along with its cockpit and cabin crews. On this basis TEA

returned with a Boeing 737 which was based at Bangkok from where it would fly to Vietnam and thence onwards for Vietnam Airlines.

A similar deal was arranged for a Bulgarian (leased) Airbus A310 of JES Air which, between flights to and from Europe, was theoretically based in Singapore. In this case, however, it was reported that the US owner of the aircraft (United Technologies Corp.) won an injunction from a Singapore court barring the flights. UTC had sought the injunction on grounds that the charter arrangement might violate the embargo because the plane in question had US-made engines and flight controls, while JES Air maintained that the arrangement was within the bounds of US law.(FEER 27-02-92 p.32,05-03-92 p.21)

Lifting of sanctions against South Africa

Following the abolition of the legal foundations of apartheid by the South African parliament on 18 June 1991 Japan started to lift its sanction by abolishing its restrictions on the movement of persons between the two countries on 21 June 1991, although the restrictions would be upheld as regards sports exchanges so far as sports organizations are concerned which were not yet racially integrated.

Japan announced on 22 October 1991 that it would soon lift its economic sanctions on South Africa, including the ban on imports of iron ore and steel, the suspension of air links, the restrictions on investment and financing, and the call for voluntary abstention from importing Krugerrands and other South African gold coins. The lifting would also mean that Japan's nuclear power industry can again purchase South African uranium and that Japanese companies are free to invest in South Africa. The ban on sales of equipment to the South African police and military, however, would be kept for the time being. The lifting of the sanctions was hailed by South African business circles but was regretted by the African National Congress and the Congress of South African Trade Unions. (IHT 22 and 23-10-91 and contribution Kotera Akira)

Diplomatic relations were resumed on 13 January 1992 after having been absent since the Second World War.(FEER 23-01-92 p.14)

Sanctions against Indonesia because of East Timor incident

In connection with the shooting incident at Timor Island (*see*:Specific territories:East Timor) Canada decided to review its entire aid programme to Indonesia. The Dutch minister for development cooperation announced on 21 November 1991 that the Netherlands was suspending funding for all new development projects in Indonesia until the Indonesian investigation into the killings would yield an acceptable result.(*see*:Economic cooperation) Denmark decided to respond in the same way and Portugal, that has no diplomatic relations with Indonesia, urged the European Community to impose a trade embargo. The European Parliament urged EC member states to impose an arms embargo on Indonesia and asked them to consider curtailing or suspending aid and cooperation agreements with Indonesia.(*see*:EEC)(IHT 22-11-91;FEER 05-12-91 p.10,09-01-92 p.8)

US sanctions against Pakistan

The US impounded 3 naval reconnaissance aircraft that were about to be delivered by US manufacturers. The aircraft were already paid and the purchase was initially cleared by the US government, but it was later said that the planes would be released only after Pakistan agreed to comply with US nuclear non-proliferation requirements.(FEER 02-07-92 p.12)

SOUTH ASIAN ASSOCIATION FOR REGIONAL COOPERATION (SAARC)

See also:Minorities(:Ethnic Nepalese in Bhutan)

Cancellation of summit meeting

A sixth summit meeting scheduled for 7-9 November 1991 at Colombo was called off following Indian insistence that no summit could be held without the personal attendance of all the heads of state or government of the seven member states. At last year's summit meeting at Male, however, India did not object to the Sri Lankan prime minister, who was not head of state or government, representing the Sri Lankan president.(FEER 21-11-91 p.22)

SPACE ACTIVITIES

See also:Broadcasting

Asian developments in the field of commercial satellites

Countries in East Asia will spend nearly $800 million over the next few years to build and launch new commercial satellites. The state-owned Korean Telecom awarded McDonnell Douglas Corp. a contract to launch the first two South Korean communication satellites in 1995. A Thai locally listed telecommunication company signed a contract with Hughes to build two satellites for launch in 1993.(IHT 29-11-91;FEER 21-05-92 p.51)

The Malaysian telecommunications company, Binariang, signed a memorandum of understanding on 12 November 1991 with Hughes Aircraft Co. for the purchase of a satellite. It was agreed with the European Arianespace that the latter would launch the satellite before 1995. Kourou, the launching place, is located 3 degrees north of the equator, the position at which Malaysia plans to launch its satellite. With regard to the Chinese company Great Wall Industry Corp. which was also vying to launch the satellite, it was said that China's rocket-launching facilities at Xi Chang were located 38 degrees above the equator which would make the cost to navigate the satellite into position very high.(IHT 26-03-92)

The Indonesian government said earlier in 1991 that it would launch a third satellite in July 1992 on a US Delta rocket.

The old Palapa B-1 satellite was to be bought by a newly established company, Pasifik Satelit Nusantara (PSN) from the state-owned telecommunications

company (Telkom) and would be used to compete on trans-Pacific telephone traffic in an inclining orbit.(IHT 29-11-91;FEER 23-01-92 p.47)

Chinese-Hong Kong joint venture

APT Satellite Co.,set up in Hong Kong in April 1992 by Hong Kong's Chia Tai International Communications Co. and three mainland companies, plans to buy two communications satellites and equipment from GM's Hughes Communications International Inc. The first satellite, the APSTAR-1, for which an agreement had already been signed, would be launched by mid-1994. The company expected a huge demand for telecommunications and satellite transponders in the Asia-Pacific region in the near future.(IHT 26-05-92)

Japanese space project

Japan ruled out joint development of the European Space Agency's *Hermes* manned space shuttle and will not give the project major financial and technological support. It will instead proceed with its own project to build *Hope*, an unmanned space shuttle set for completion by the year 2000, about two years ahead of *Hermes*.

Although both sides emphasized the dissimilarity of the two projects as the reason for the reluctance to cooperate, a more important factor might be Japan's wish to wean itself from technological dependence on the US and to gain independent access to space. At the same time the US would be wary of any alliance that might help Japan to compete in one of America's last areas of technological supremacy.

Even today Japan needs approval from the US to launch payloads on Japanese rockets developed largely with American technology. This could change next year (1993) when the H-2 rocket, designed entirely with Japanese technology and having a lift capacity comparable to the European *Ariane*, is scheduled to make its first flight.(IHT 26-02-92)[In July 1992 engine problems forced a further one-year delay in the first launching of the H-2, which is now planned for early 1994.]

Japan first successfully launched a 130-kilogram satellite with an N-1 rocket in 1975. Since then it had orbited 23 satellites with N-1, N-2 and H-1 rockets for communication and television network use. The first stage of the H-1 is based on 25-year old US Delta rocket technology licensed by McDonnell Douglas.(IHT 09-07-92)

Failure of Chinese launching rocket

A Long March rocket which was to have launched an Australian telecommunications satellite failed to lift off on 22 March 1992. It was believed to be the fourth failure of the Long March rockets which have sent 30 Chinese satellites and one foreign satellite into space since 1964.(IHT 23-03-92)

SPECIFIC TERRITORIES WITHIN A STATE: KASHMIR

Attitude of Pakistan on Kashmir

The prime minister of Pakistan re-affirmed that the Kashmir issue is an unresolved international dispute. Pakistan supports the aspirations of the Kashmiri people for self-determination but it has not supplied arms.(IHT 30-12-91)

Efforts by Pakistan to prevent entry of Muslim militants into Indian-held Kashmir

Pakistani troops set off landslides, erected barricades and dismantled bridges on 10 February 1992 to try to stop a planned march by Muslim militants of the Jammu and Kashmir Liberation Front across a heavily guarded cease-fire line into Indian-held Kashmir. Pakistan said it would use force to block the march. More than 40,000 troops were deployed in and around Muzaffarabad, capital of Pakistan-controlled Kashmir. At the other side Indian troops laid mines near the border and imposed a curfew in an effort to block the march. India threatened to shoot if the demonstrators crossed the cease-fire line. The march erupted in violence on 12 February when the police fired on the protesters. It was reported that the Pakistan government was caught between its wary Islamic supporters and its efforts to engage India in a dialogue over the Kashmir issue (IHT 11-02-92,13-02-92; *see* letters dated 13 Feb.1992 and 17 May 1991 from the Minister for Foreign Affairs of Pakistan to the UN Secretary-General, UNdoc.S/23600)

SPECIFIC TERRITORIES WITHIN A STATE: TIBET

Chinese response to the Dalai Lama's plans

In response to a remark made by the Dalai Lama in a speech at Yale University on 9 October 1991 that he hoped to return to Tibet soon but only if the Chinese government granted him freedom to travel throughout Tibet and talk directly to Tibetans, a Foreign Ministry spokesman said that the most important thing would be that the Dalai Lama stop his activities aimed at splitting China and undermining the unity of its nationalities, and abandon his position on Tibetan independence.(IHT 11-10-91)

SPECIFIC TERRITORIES WITHIN A STATE: EAST TINOR

(See also survey in UN doc.A/AC.109/1115; Indonesian note verbale of 29 May 1992 in UNdoc.A/47/240)

Visit by Portuguese parliamentary delegation

Indonesia and Portugal agreed on terms to allow a Portuguese parliamentary delegation to visit East Timor. An advance team would go to Timor in October 1991. It would include representatives from the United Nations which continued to recognize Portugal as the administrating power. At the last minute, however, the two sides disagreed about which journalists would be eligible to accompany the delegation. Indonesia objected to the inclusion of a journalist whom the Indonesian foreign minister described as a propagandist for Fretelin, the armed group fighting for Timorese independence. According to the Indonesian side an agreement had been worked out by the two countries' ambassadors to the UN permitting either government to object to journalists proposed by the other side. As a result of the conflict the visit was suspended.(FEER 05-09-91 p.14,07-11-91 p.12)

Clash with the army

On 12 November 1991 a funeral procession in the East Timor capital Dili led to a clash between about 3,500 demonstrators and the army, with a controversial number of casualties. Estimates ranged from 19 to 115. The funeral service followed a memorial service to mourn two youths killed in a clash with the police and coincided with a visit by a UN human-rights rapporteur.(IHT 13-11-91,FEER 05-12-91 p.10) A seven man-commission of investigation was appointed by the Indonesian President on 19 November 1991. It was headed by a Supreme Court judge and consisted of officials from the Interior, Justice and Foreign ministries, the armed forces, an East Timorese legislator and a member of the Supreme Advisory Council.(IHT 20-11-91) In its preliminary report the Commission said that troops initially fired in self-defence against demonstrators who stabbed an officer and injured another soldier, but that "the actions of a number of security forces have gone beyond what was necessary, claiming many victims." The Commission had strong reason to conclude that the death toll was about 50, with 91 injured.(IHT 27-12-91) On the basis of the advance report two senior officers with direct operational authority over East Timor were replaced.(FEER 09-01-92 p.8) As a result of the findings of a special military council the army took punitive measures against six senior officers in February 1992.(IHT 28-02-92)

Initially there were instances of the Red Cross being denied access to the victims in the military hospital, but the Indonesian authorities had provided the Red Cross with lists of those said to be wounded or detained as a result of the violence.(IHT 20-11-91) About a week after the incident the restrictions on access were partly lifted, and on 25 November 1991 the head of a delegation of the International Committee of the Red Cross in Indonesia said that the Red Cross had begun interviewing the Timorese held in a local military hospital.(IHT 26-11-91)

International criticism of the shooting came mainly from Western states: the US, the Netherlands, Australia, Canada and Portugal. On 28 November 1991 the UN Secretary General said that he was considering sending an investigatory mission for which he said he had the necessary facilities from the Indonesian

government.(IHT 28-11-91;FEER 05-12-91 p.10)

In response to the planned visit of a Portuguese "peace boat", the *Lusitânia Expresso*, with about 100 students and journalists on board who planned to lay wreaths in Dili to honor the victims of the November 1991 shooting the Indonesian authorities declared East Timor temporarily off-limits to foreign journalists. The Indonesian territorial waters were declared closed to the boat, since the voyage was politically motivated, aimed at instigating confrontation, aggravating tension, inducing divisiveness and inciting disturbances. For these reasons the voyage was considered prejudicial to the peace, good order and security of Indonesia, and thus contrary to the established notion of innocent passage. Military officials warned that passengers of the boat would be arrested if they tried to land. The boat would be treated in the same way as if it were a fishing vessel intent on poaching. Upon a corresponding verbal warning by the Indonesian navy the approaching ship turned away on 11 March 1992 and returned to Darwin.(IHT 27-02-92;FEER 05-03-92 p.14,26-03-92 p.20. The Portuguese and Indonesian versions of the incident are documented in statements by the two governments dated 26 March 1992, UNdoc.A/47/134-S/23757 and 8 April 1992, UNdoc.A/47/152 respectively)

STATE SUCCESSION

Status of Soviet Union successor states

In his letter of 27 December 1991 to the President of the Russian Federation the Japanese prime minister stated the Japanese understanding that there was continuity of statehood between the Soviet Union and the Russian Federation and that all international agreements between Japan and the Soviet Union would continue to be valid between Japan and the Russian Federation. In its recognition of the other successor states of the Soviet Union the Japanese government emphasized, *inter alia,* the importance of abiding by the obligations under international agreements concluded between the Soviet Union and other countries.(Foreign Press Center Japan, Press Release 0837-09, 28 Dec.1991)

STRAITS

Detention of arms cargo by Turkey

The freighter *Cape Maleas*, carrying Bulgarian-made anti-aircraft guns, rocket launchers, weapons and ammunition for Iran was stopped on its way through the Bosporus and was impounded on the order of an Istanbul court. Passage of arms and warships between the Black Sea and the Aegean is controlled by treaty law requiring that they be declared to the Turkish authorities. Iran lodged a diplomatic protest. It referred to "the Turkish court's illogical and unprincipled decision" and described the Turkish action as "invalid and unacceptable" and a "violation of international rights and commercial relations between countries." The Iranian deputy foreign minister

for Asia and Oceania called on Turkey to reimburse Iran for all expenses "resulting from the vessel's illegal impounding, its consignment and other damages, as soon as possible."(IHT 14/15-03-92)

TAXATION

Labuan tax haven

An offshore tax haven under the name of International Offshore Financial Centre (IOFC) was established by Malaysian Act of Parliament on 1 October 1990 on Labuan Island, 10 km off the East Malaysian state of Sabah.(FEER 31-10-91 p.63)

TERRITORIAL CLAIMS

Japanese - Soviet(Russian) dispute over the "Northern Territories"

(*see also*:Economic cooperation, and 1 AsYIL 346)

In October 1991 Japan reversed its postwar strategy for dealing with the Soviet Union. It had always refused to offer economic aid except for a small amount of humanitarian assistance until the Soviet Union resolved the territorial dispute over the four islands north of Hokkaido. The change in policy came when the Japanese government announced a plan on a $2.5 billion aid package.(IHT 14-10-91) The plan was discussed but not realized as the parties were not able to agree on a mutually acceptable link with the territorial question. The discussions did result in a Soviet announcement on an immediate reduction of its military presence on the four disputed islands by one-third (of the about 8,000 Soviet troops), to be followed eventually by further cuts. The two parties also agreed to scrap visa requirements for travel between the Kurils and Japan.(IHT 15-10-91)

On his first visit to Japan since the break-up of the Soviet Union the Russian foreign minister said in March 1992 that Russia intended to honor the 1956 (draft-)agreement and that Japan's policy of refusing large-scale aid without the return of the islands may prove counter-productive, since political forces in Russia were using the country's mounting economic problems as a political weapon.(IHT 21/22-03-92) In an effort to bridge the existing gap Japan suggested in April 1992 that it might agree to an immediate return of two of the four islands if there were a recognition of Japan's right to the other two and a promise that they would be returned at a fixed date in the future. Such a compromise would mean that Japan could play a full role in the Group of Seven's joint aid plan for the former Soviet republics.(IHT 20-04-92,17-07-92;FEER 07-05-92 p.14)

The political declaration that resulted from the G-7 meeting at Munich in July 1992 agreed on the perception that the "Northern Territory" issue is not only a problem between Japan and Russia but a common concern of global importance.(IHT 08-07-92;FEER 16-07-92 p.11)

Meanwhile an arrangement on the movement of persons to and from the islands was made by an exchange of letters between the Japanese and Soviet foreign ministers of 14 October 1991. It provided for the possibility of mutual visits between the islands and the Japanese mainland. This arrangement has been interpreted by the Japanese government in a restrictive sense in that visits by Japanese should take place in groups and in accordance with specific procedures, and limited to former inhabitants of the islands, campaigners for their return and the press.(Contribution Kotera Akira)

Chinese legislation on sovereignty over certain islands

In February 1992 China promulgated new legislation on its territorial sea in which it affirmed its claim of sovereignty over the Spratly (Nansha), Paracel (Xisha) and Diaoyutai (Senkaku) island groups.(*see* State practice)

The Japanese embassy lodged a protest to the Chinese foreign ministry with regard to the Senkaku(Diaoyutai) islands, demanding a "correction" of the Chinese legislation. The embassy claimed:"It is without doubt that the Senkaku islands are our own territory, not only in terms of historical aspects but also in international law, and the Japanese Government is actually governing the islands effectively." The protest was rejected by China. However, during his visit to Japan in early April 1992 the General Secretary of the Chinese Communist Party said that China maintained its opinion that the issue of the islands be left to future generations.[The Diaoyutai (Senkaku) islands lie between Taiwan and Okinawa and are disputed between Japan and China/Taiwan. The islands were placed under US administration after the defeat of Japan in World War II, but were returned to Japanese control in 1971.]

Malaysian officials said they would formally seek a clarification of the Chinese law and its implications. Vietnam was reported to have sent secret protest notes in an attempt not to escalate the dispute, while its Foreign Ministry drew attention to the agreement reached by the two sides in November 1991 to resolve the islands conflict peacefully. The Philippine Defence Secretary said he wanted to "see to it that the Spratlys do not become a military flash point." Finally, Indonesia called the Chinese action "unfortunate."(IHT 07-04-92,FEER 12-03-92 p.8)

Spratly (Chin.:Nansha,Vietn.:Truong Sa) Islands

The Spratlys are a far-flung group of 433 mostly barren islands and islets in the southern South China Sea. In addition to the mineral wealth that may be near them, they command shipping lanes. According to various sources (but reports differ), Vietnam maintains a military presence on 21 islands or islets, China on seven, the Philippines on eight, Malaysia on two and Taiwan on one.(IHT 09-07-92)

A meeting was held in Jakarta, starting 29 June 1992, to promote cooperation between China, Taiwan, the Philippines, Malaysia, Vietnam and Brunei, i.e.the countries involved in the dispute over areas of the South China Sea.(IHT 30-06-92)

It was reported that Malaysia planned building an airstrip on Terumbu Layang Layang atoll. The runway would cater to light aircraft in efforts to improve security and promote tourism there and on two neighbouring atolls.(FEER 12-09-91 p.14)

Vietnam and Malaysia agreed to jointly develop areas around the disputed Spratly Islands where their territorial claims overlap.(IHT 22-01-92)

Meanwhile Chinese troops landed on another islet in the disputed archipelago. According to Vietnamese sources a Chinese tugboat had landed soldiers and construction material on a partly submerged reef by the Vietnamese name of Da Lac and claimed as Vietnamese territory, where the Chinese set up a territorial marker. In an official protest Vietnam accused China of having "seriously violated Vietnamese territorial sovereignty."(In 1988 the Chinese navy sank at least one Vietnamese vessel and seriously damaged two others in a clash in the Spratlys, killing nearly 100 Vietnamese.)(IHT 09-07-92)

The Vietnamese note did not change the Chinese stand concerning its sovereignty over the islands. A foreign ministry spokesman said:"It is China's view that there is an abundance of historical records that show those islands are Chinese territory since ancient times."(IHT 10-07-92) In response to suggestions from ASEAN circles about an international conference to settle the dispute, China said that it might negotiate with Vietnam but that it did not want to involve other claimant countries in the conference. It was ready to seek a solution through bilateral negotiations but "opposed to having the issue internationalized."(IHT 17-07-92)

On 21 July 1992 the Chinese foreign minister said in a meeting with the foreign ministers of ASEAN that China was ready to put aside the core dispute and explore prospects for joint development of the area. The Vietnamese foreign minister said that pending a settlement of the dispute, no country should do anything to make the situation more complicated. Both the Chinese and Vietnamese foreign ministers attended the annual ASEAN foreign ministers meeting as observers.

At the above mentioned meeting the ASEAN ministers issued a declaration calling for disputes over sovereignty in the South China Sea to be settled by negotiation, without resort to force.(*see* Documents)(IHT 22 and 23-07-92)

Meanwhile the Vietnamese News Agency reported that Vietnam had set up a fishing port at a major island in the Truong Sa archipelago "to meet the increasing activities of state-owned fishing enterprises and private fishermen in the area".(IHT 29-07-92)

Chinese exploration contract in disputed territory

China signed an oil exploration contract with the (US) Crestone Energy Corp. on 8 May 1992. The contract covered some 25,000 square kilometres of the Vanguard Bank area (Chinese name: Wan'an Bei) in the South China Sea that lies some 260 km off southern Vietnam and is being claimed by both China and Vietnam. According to Vietnam the area forms part of its continental shelf. In a strongly worded statement the Vietnamese foreign ministry said that the agreement had "seriously violated Vietnam's sovereign rights over its

continental shelf and exclusive economic zone." For China, the area lies on the Chinese side of a median line between the nearest Vietnamese island to the west and the so-called Prince of Wales Bank, claimed -and reportedly occupied- by China.

The Chinese government had pledged to back up the company with its navy if necessary. The last time such a contract was awarded for disputed area was apparently in 1973 when the collapsing government of South Vietnam granted oil concessions to Western companies. That led to a battle in January 1974 between Chinese and Vietnamese naval forces. In 1988 there was another brief naval battle between China and Vietnam over the disputed areas of the South China Sea.(IHT 19-06-92;FEER 09-07-92 p.14)

The Islands of Sipadan and Ligitan

The Joint Commission set up by Indonesia and Malaysia to deal with the opposite claims of the two countries to the two islands (*see* 1 AsYIL 348) held its first meeting on 7-11 October 1991. The two parties agreed to intensify discussions aimed at resolving their dispute.(FEER 24-10-91 p.14)

Abu Musa Island

Abu Musa is the largest of three islands originally belonging to the United Arab Emirates that were occupied by Iran in 1971. It lies north of Dubai, roughly midway between Iran and the Emirates and had a population of about 700 Emirate citizens.

Despite its 20-year occupation Iran had agreed that the island's status was subject to eventual negotiations with the Emirates. By the middle of April 1992, however, Iran expelled all Arabs from the island and seized island property belonging to the Emirates, including a desalination plant and a school. According to newspaper reports it had been suggested to the Arab residents that they apply for Iranian identity cards. The President of the Emirates had asked Oman, which retains friendly relations with Iran, to mediate in the dispute.(IHT 17-04-92)

Batu Puteh Island

Batu Puteh (called Pedra Branca in Singapore) is a small island, little more than 500 sq.m., 15 km off the coast of Johor and some 50 km east of Singapore. Singapore has maintained the Horsburg lighthouse at the island since its independence and has built a helipad in order to facilitate that maintenance. The island had been administered from Singapore for the last 150 years. No one bothered to question sovereignty over the island until it was gazetted in a new map as part of Malaysia in 1979. This prompted Singapore to lay claim to it by virtue of its long occupation and administration of the lighthouse. Singapore also relies on a 1953 letter from the then State Secretary of Johor granting Singapore possession of the island.

The island is also being claimed by the state of Johor. Initially the claim by Singapore was countered by the view that Batu Puteh was historically part of

the Johor sultanate, and Singapore was only being allowed to use the island. It was also claimed that no state functionary ever had the right to negotiate over sovereignty, which was a matter for the sultan and the ruling council.

Both sides agreed to bring their claims to the negotiating table. The issue rested there until 1989, when radar facilities were being installed on the island to aid marine navigation, and fishermen from Johor were shooed away by the Singaporean navy.

In February 1992 it was reported that Malaysia had decided to settle the dispute by using legal principles instead of history. The Malaysian prime minister reportedly pointed out that it was important for Malaysia to stick to legal principles so as not to jeopardize its claims to other islands. In February 1992 Singapore had presented documents supporting its claim to Malaysia, on 29 June 1992 Malaysia presented its documents to Singapore.(FEER 17-10-91 p.37,24-10-91 p.14,06-02-92 p.14,13-02-92 p.20,02-07-92 p.21,09-07-92 p.12)

TERRITORIAL WATERS

See:Hong Kong

UNITED NATIONS

See also:Cambodia

Participation in UN peace-keeping

India offered to send a 5,000-strong army brigade to the UN peacekeeping force to be deployed in Cambodia. Given that the total force was expected to be around 15,000 this would be an overly large component from one country. India already had 34 military officers serving with the advance UN force.(FEER 05-03-92 p.9)

Abuse of UN authority

According to US intelligence reports a North Korean government-owned cargo ship, the *Dae hung Ho*, left Korea in early February 1992 with an unknown number of missiles and related manufacturing, assembly or production equipment, on its way to Syria. The missiles were alleged to be so-called Scud-Cs, an indigenous, advanced version of the Soviet-designed Scud-B with a range of about 360 miles.(IHT 21-02-92) Early March the US government was examining the option of boarding the ships by US naval warships operating as part of the multinational group enforcing the UN trade embargo against Iraq. Although US officials said they had no authority to seize military cargoes bound for Iran or Syria, the intention would be to snare the North Korean vessels in the anti-Iraq enforcement program, and once their destination was properly documented by a boarding party, they would be allowed to proceed. Other US officials, however, looked skeptically at the legality of the disingenuous use of UN authority.(IHT 07/08-03-92) The ship arrived on 9 March 1992 in the Iranian port of Bandar Abbas, undetected by the

US navy.(IHT 11-03-92) The Iranian cargo ship *Iran Salaam* which was also suspected of carrying North Korean missiles, was expected to reach Iran within 24 hours.(IHT 14/15-03-92)

UNRECOGNIZED ENTITIES

See also:Divided states:China

Australia-Taiwan

Australia is represented in Taiwan by an office operated by the Australian Chamber of Commerce, some of the staff being Australian government officials "on leave". Despite the official policy a minister of economic affairs from Taiwan visited Australia in July 1991 and had meetings with Australian ministers.

Visas granted to visitors from Taiwan carried the condition that the holder did not have "any official or other status". It was expected that the requirement would be quietly dropped when it would no longer look as if Australia was surrendering to Taiwan's demands.(FEER 03-10-91 p.58)

China-South Korea

Talks on normalizing ties were expected to start in November 1991 when the Chinese foreign minister would be in Seoul to attend the ministerial meeting of the APEC. Earlier in the year the two countries opened trade offices with limited consular functions in each other capitals.(IHT 09-09-91)

On 20 December 1991 a trade accord granting each other most-favoured-nation status was initialed by the state-run Korea Trade Promotion Corp. and the China Chamber of International Commerce. The two governments were expected to exchange memoranda guaranteeing the agreement after its signature on 31 December 1991. The agreement was expected to come into effect by the end of January 1992. It leaves out key items like air links and investment. An investment guarantee agreement was pending: South Korea has about $40 million of investments in China.(IHT 21/22-12 and 31-12-91/01-01-92)

Vietnam-Taiwan

A Taiwanese trade mission visited Vietnam in September 1991, marking the highest-level contact between Hanoi and Taipei since 1975. Taiwan is the largest foreign investor in Vietnam and is rapidly becoming one of the country's most important trading partners.(FEER 10-10-91 p.79)

Vietnam-South Korea

Vietnam and South Korea agreed in April 1992 to exchange liaison offices to facilitate growing economic cooperation and to perform some diplomatic and consular functions.(FEER 23-07-92 p.12)

VISAS

Denial to critics of the state

Two US senators who had been outspoken critics of China's human right practices were denied visas for a visit to China, with plans to travel to Tibet, in April 1992. The visa applications were not rejected but it was said that the timing of the proposed visit was "inconvenient".(FEER 23-04-92 p.14)

WORLD BANK

Japanese challenge of World Bank policy

It was reported that Japan started challenging the alleged undue faith of the World Bank in market mechanisms, and consequently in deregulation and liberalization, emphasizing instead the positive role that the governments of Japan and East Asian NICs have played in their countries' economic development by government industrial and credit-allocation policies.(FEER 12-03-92 p.49)

WORLD WAR II

Responsibility and apologies

During a visit to Japan by Queen BEATRIX of the Netherlands in October 1991 the Japanese prime minister apologized for Japan's wartime atrocities against Dutch citizens, expressing "sincere contrition" for the "unbearable suffering" of tens of thousands of Dutch settlers and soldiers who were interned when Japanese troops captured Indonesia which was a Dutch colony at the time.(IHT 24-10-91)

A proposed resolution in the Japanese parliament expressing regret over Japan's wartime aggression on the occasion of the 50th anniversary of the attack on Pearl Harbor ran into trouble because of a furor in Japan over President BUSH's refusal to apologize for the atomic bomb attack on Hiroshima.

Government spokesmen made it clear that no one in the government would apologize for the war. This was in keeping with the government's view that it will take decades for historians to determine who was responsible for the war. Although most American historians say Japan was clearly responsible, Japanese argue that Japanese responsibility was diluted by the fact that it was surrounded by hostile colonial empires. The prime minister also reiterated Japan's opposition to paying reparations to individuals in foreign countries, since it had already made payments to the countries themselves:"Japan has already legally solved the issue of individuals' rights to demand war reparations by concluding treaties with the governments of peoples to whom Japan had caused annoyances." But there was considerable confusion over what should be

said or not said, and even over the meaning of what had already been said.(IHT 6-12-91)

Nevertheless, less than three hours after the US President made a conciliatory speech in Hawaii to commemorate the anniversary of the attack on Pearl Harbour in 1941, the Japanese foreign minister made a statement in which he said that "Japan is deeply remorseful over these [Japanese] past actions" and expressed "[his] sincerest condolences to all those people [of] the countries concerned, as well as Japan, who sacrificed their lives in the course of the war....Japan, for its part, should face squarely the historical fact that the Pacific War, which inflicted unbearable suffering and sorrow on many peoples of the Asian-Pacific region, was started fifty years ago today with Japan's surprise attack on Pearl Harbor."(IHT 9-12-91)

War reparation for North Korea

The Japanese foreign minister said on 19 January 1992 that Japan would consider war reparations to North Korea and other economic aid if North Korea would allow international inspection of its nuclear facilities. Japan had refused to consider the reparations issue during the normalization talks in 1991, claiming that Korea was not a combatant in World War II, being a Japanese colony at that time.(FEER 30-01-92 p.12)

War reparation for Chinese

While China had formally waived war reparation claims when it established ties with Japan in 1972 the General Secretary of the Chinese Communist Party said that Chinese citizens may seek compensation on their own for damages inflicted by the Japanese Army during the Second World War.(IHT 07-04-92)

Forced prostitution

The Japanese government admitted on 13 January 1992 that the Japanese Imperial Army had recruited tens of thousands of Korean women to serve as prostitutes during the war, after having argued in the past that private companies had set up the operations as contractors to the army. The admission was affirmed with regard to Korean, Chinese, Taiwanese, Philippine and Japanese women by a government report of 6 July 1992 and the release of relevant documents from government archives. But it was said that the official investigation had found no proof that the women were coerced.

The government hinted that survivors might be offered some kind of compensation. However, since Japan settled issues of wartime compensation for Korea by treaty in 1965 when the two countries resumed full diplomatic ties, there would be no official compensation for the victims, but the government had been talking about finding private sources of funds that would settle claims without setting the precedent of reopening reparations claims.(IHT 14,16,21 and 23-01-92,07-07 and 11/12-07-92;FEER 16-07-92 p.14) During a visit to South Korea in January 1992 the Japanese prime minister apologized for the forced prostitution of teenagers and young women during the war while saying

that compensation was up to the courts.(IHT 23-01-92) Nevertheless South Korea decided to ask Japan to compensate the women. Since the issue of forced sex was not specifically referred to in the 1965 normalisation treaty which covered war reparations, Korea felt justified in seeking redress for the "comfort women".(IHT 22-01-92)

Meanwhile three of the women filed a suit in the Tokyo District Court in December 1991 seeking $160,000 each in damages.(IHT 16-01-92,22-01-92)

Chemical weapons abandoned by the Japanese

As a condition for endorsing a worldwide treaty banning chemical weapons China demanded that Japan take "full responsibility" for destroying about 2 million chemical weapons that its forces abandoned as they retreated from northern China during the 1940s. It was reported that China submitted a confidential working paper on the matter in February 1992. According to the Indonesian delegate to the conference who was appointed to mediate the dispute, Japan, being reluctant to assume total responsibility for an operation that may well cost hundreds of millions of dollars, promised help after months of wrangling but would not sign a blank check.(IHT 11/12-07-92)

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BIBLIOGRAPHY OF INTERNATIONAL LAW CONCERNING ASIAN AFFAIRS*

EDITORIAL INTRODUCTION

This bibliography follows last year's format. It therefore provides information on (1) books, articles and other materials dealing with Asian topics and topics directly related to Asia, published both within and outside the Asian continent; (2) in exceptional cases, other publications considered of interest; (3) publications in the English language only. With a few exceptions the materials included are published after 1988, the cut-off date of the previous bibliography.

The headings of last years's bibliography have been maintained, but the currently important topic of 'peace-keeping' has been added to heading no. 8.

In the preparation of this bibliography good use has been made of book review sections in established professional journals of international law, of Asian studies and of international affairs, while special mention should also be made of the bibliography on Public International Law published by the Max Planck Institute of Foreign Public Law and International in Heidelberg, Federal Republic of Germany, and of the regular lists of acquisitions of the Peace Palace Library in The Hague, The Netherlands. In future it is hoped to establish regular contacts for this bibliography section with law libraries and legal publishers in Asian countries.

1. General
2. States and groups of states
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* Edited by J.J.G. Syatauw, General Editor

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, Volume 2, 387-405

13. Decolonization and self-determination
14. International economic relations
15. Development
16. Information and communication
17. United nations and other international organizations

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AGREEMENT ON RECONCILIATION, NON-AGGRESSION AND EXCHANGES AND COOPERATION BETWEEN SOUTH AND NORTH KOREA
13 December 1991*

The South and the North,

In keeping with the yearning of the entire Korean people for the peaceful unification of the divided land;

Reaffirming the three principles of unification set forth in the July 4(1972) South-North Joint Communique;

Determined to remove the state of political and military confrontation and achieve national reconciliation;

Also determined to avoid armed aggression and hostilities, reduce tension and ensure peace;

Expressing the desire to realize multi-faceted exchanges and cooperation to advance common national interests and prosperity;

Recognizing that their relations, not being a relationship between states, constitute a special interim relationship stemming from the process towards unification;

Pledging to exert joint efforts to achieve peaceful unification;

Hereby have agreed as follows;

CHAPTER I
SOUTH-NORTH RECONCILIATION

Article 1: The South and the North shall recognize and respect each other's system.

Article 2: The two sides shall not interfere in each other's internal affairs.

Article 3: The two sides shall not slander or vilify each other.

Article 4: The two sides shall not attempt any actions of sabotage or overthrow against each other.

Article 5: The two sides shall endeavor together to transform the present state of armistice into a solid state of peace between the South and the North and shall abide by the present Military Armistice Agreement (of July 27, 1953) until such a state of peace has been realized.

Article 6: The two sides shall cease to compete or confront each other and shall cooperate and endeavor together to promote national prestige and interests in the international arena.

Article 7: To ensure close consultations and liaison between the two sides, South-North Liaison Offices shall be established at Panmunjom within three(3) months after the coming into force of the Agreement.

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* Unofficial translation from: *Commentaries to the Fundamental Agreement between the South and the North* (in Korean, published by the National Unification Board, 1992). The Agreement entered into force on 19 Feb. 1992.

Ko Swan Sik et al. (eds.), Asian Yearbook of International Law, Volume 2, 409-428

Article 8: A South-North Political Committee shall be established within the framework of the South-North High-Level Talks within one(1) month of the coming into force of this Agreement with a view to discussing concrete measures to ensure the implementation and observance of the accords on South-North reconciliation.

CHAPTER II
SOUTH-NORTH NON-AGGRESSION

Article 9: The two sides shall not use force against each other and shall not undertake armed aggression against each other.

Article 10: Differences of views and disputes arising between the two sides shall be resolved peacefully through dialogue and negotiation.

Article 11: The South-North demarcation line and areas for non-aggression shall be identical with the Military Demarcation Line specified in the Military Armistice Agreement of July 27, 1953 and the areas that have been under the jurisdiction of each side until the present time.

Article 12: To implement and guarantee non-aggression, the two sides shall set up a South-North Joint Military Commission within three(3) months of the coming into force of this Agreement. In the said Commission, the two sides shall discuss and carry out steps to build military confidence and realize arms reduction, including the mutual notification and control of major movements of military units and major military exercises, the peaceful utilization of the Demilitarized Zone, exchanges of military personnel and information, phased reductions in armaments including the elimination of weapons of mass destruction and attack capabilities, and verifications thereof.

Article 13: A telephone hotline shall be installed between the military authorities of the two sides to prevent accidental armed clashes and their escalation.

Article 14: A South-North Military Committee shall be established within the framework of the South-North High-Level Talks within one(1) month of the coming into force of this Agreement in order to discuss concrete measures to ensure the implementation and observance of the accords on non-aggression and to remove military confrontation.

CHAPTER III
SOUTH-NORTH EXCHANGES AND COOPERATION

Article 15: To promote an integrated and balanced development of the national economy and the welfare of the entire people, the two sides shall engage in economic exchanges and cooperation, including the joint development of resources, the trade of goods as domestic commerce and joint ventures.

Article 16: The two sides shall carry out exchanges and cooperation in various fields such as science and technology, education, literature and the arts, health, sports, environment, and publishing and journalism including newspapers, radio and television broadcasts and publications.

Article 17: The two sides shall promote free intra-Korean travel and contacts for the residents of their respective areas.

Article 18: The two sides shall permit free correspondence, meetings and visits between dispersed family members and other relatives and shall promote the voluntary reunion of divided families and shall take measures to resolve other humanitarian issues.

Article 19: two sides shall reconnect railroads and roads that have been cut off and shall open South-North sea and air transport routes.

Article 20: The two sides shall establish and link facilities needed for South-North postal and telecommunications services and shall guarantee the confidentiality of intra-

Korean mail and telecommunications.

Article 21: The two sides shall cooperate in the economic, cultural and various other fields in the international arena and carry out joint undertakings abroad.

Article 22: To implement accords on exchanges and cooperation in the economic, cultural and various other fields, the two sides shall establish joint commissions for specific sectors, including a Joint South-North Economic Exchanges and Cooperation Commission, within three(3) months of the coming into force of this Agreement.

Article 23: A South-North Exchanges and Cooperation Committee shall be established within the framework of the South-North High-Level Talks within one(1) month of the coming into force of this Agreement with a view to discussing concrete measures to ensure the implementation and observance of the accords on South-North exchanges and cooperation.

CHAPTER IV
AMENDMENTS AND EFFECTUATION

Article 24: The Agreement may be amended or supplemented by concurrence between the two sides.

Article 25: This Agreement shall enter into force as of the day the two sides exchange appropriate instruments following the completion of their respective procedures for bringing it into effect.

JOINT DECLARATION OF THE DENUCLEARIZATION OF THE KOREAN PENINSULA
20 January 1992*

The South and the North,

Desiring to eliminate the danger of nuclear war through denuclearization of the Korean peninsula, and thus to create an environment and conditions favorable for peace and peaceful unification of our country and contribute to peace and security in Asia and the world,

Declare as follows:

1. The South and the North shall not test, manufacture, produce, receive, possess, store, deploy or use nuclear weapons.

2. The South and the North shall use nuclear energy solely for peaceful purposes.

3. The South and the North shall not possess nuclear reprocessing and uranium enrichment facilities.

4. The South and the North, in order to verify the denuclearization of the Korean peninsula, shall conduct inspection of the objects selected by the other side and agreed upon between the two sides, in accordance with procedures and methods to be determined by the South-North Joint Nuclear Control Commission.

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* Unofficial translation from: *Commentaries to the Fundamental Agreement between the South and the North* (in Korean, published by the National Unification Board, 1992). The Agreement entered into force on 19 Feb. 1992.

5. The South and the North, in order to implement this joint declaration, shall establish and operate a South-North Joint Nuclear Control Commission within one(1) month of the effectuation of this joint declaration.

6. This Joint Declaration shall enter into force as of the day the two sides exchange appropriate instruments following the completion of their respective procedures for bringing it into effect.

ASEAN FRAMEWORK AGREEMENT ON ENHANCING ASEAN ECONOMIC COOPERATION
Singapore, 28 January 1992

Article 1: Principles

1. Member States shall endeavour to strengthen their economic cooperation through an outward-looking attitude so that their cooperation contributes to the promotion of global trade liberalisation.

2. Member States shall abide by the principle of mutual benefit in the implementation of measures or initiatives aimed at enhancing ASEAN economic cooperation.

3. All Member States shall participate in intra-ASEAN economic arrangements. However, in the implementation of these economic arrangements, two or more Member States may proceed first if other Member States are not ready to implement these arrangements.

Article 2: Areas of Cooperation

A. Cooperation in Trade

1. All Member States agree to establish and participate in the ASEAN Free Trade Area (AFTA) within 15 years. A ministerial-level Council will be set up to supervise, coordinate and review the implementation of the AFTA.

2. The Common Effective Preferential Tariff (CEPT) Scheme shall be the main mechanism for the AFTA. For products not covered by the CEPT Scheme, the ASEAN Preferential Trading Arrangements (PTA) or any other mechanism to be agreed upon, may be used.

3. Member States shall reduce or eliminate non-tariff barriers between and among each other on the import and export of products as specifically agreed upon under existing arrangements or any other arrangements arising out of this Agreement.

4. Member States shall explore further measures on border and non-border areas of cooperation to supplement and complement the liberalisation of trade.

B. Cooperation in Industry, Minerals and Energy

1. Member States agree to increase investments, industrial linkages and complementarity by adopting new and innovative measures, as well as strengthening existing arrangements in ASEAN.

2. Member States shall provide flexibility for new forms of industrial cooperation. ASEAN shall strengthen cooperation in the development of the minerals sector.

3. Member States shall enhance cooperation in the field of energy, including energy

planning, exchange of information, transfer of technology, research and development, manpower training, conservation and efficiency, and the exploration, production and supply of energy resources.

C. Cooperation in Finance and Banking

1. Member States shall strengthen and develop further ASEAN economic cooperation in the field of capital markets, as well as find new measures to increase cooperation in this area.
2. Member States shall encourage and facilitate free movement of capital and other financial resources, including further liberalisation of the use of ASEAN currencies in trade and investments, taking into account their respective national laws, monetary controls and development objectives.

D. Cooperation in Food, Agriculture and Forestry

1. Member States agree to strengthen regional cooperation in the areas of development, production and promotion of agricultural products for ensuring food security and upgrading information exchanges in ASEAN.
2. Member States agree to enhance technical joint cooperation to better manage, conserve, develop and market forest resources.

E. Cooperation in Transportation and Communications

1. Member States agree to further enhance regional cooperation for providing safe, efficient and innovative transportation and communications infrastructure network.
2. Member States shall also continue to improve and develop the intra-country postal and telecommunications system to provide cost-effective, high quality and customer-oriented services.

Article 3: Other Areas of Cooperation

1. Member States agree to increase cooperation in research and development, technology transfer, tourism promotion, human resource development and other economic-related areas. Full account shall also be taken of existing ASEAN arrangements in these areas.
2. Member States, through the appropriate ASEAN bodies, shall regularly consult and exchange views on regional and international developments and trends, and identify ASEAN priorities and challenges.

Article 4: Sub-regional Economic Arrangements

Member States acknowledge that sub-regional arrangements among themselves, or between ASEAN Member States and non-ASEAN economies, could complement overall ASEAN economic cooperation.

Article 5: Extra-ASEAN Economic Cooperation

To complement and enhance economic cooperation among Member States, and to respond to the rapidly changing external conditions and trends in both the economic and political fields, Member States agree to establish and/or strengthen cooperation with other countries, as well as regional and international organisations and arrangements.

Article 6: Private Sector Participation

Member States recognise the complementarity of trade and investment opportunities, and therefore encourage, among others, cooperation and exchanges among the ASEAN private sectors and between ASEAN and non-ASEAN private sectors, and the consideration of appropriate policies aimed at promoting greater intra-ASEAN and extra-ASEAN investments and other economic activities.

Article 7: Monitoring Body

The ASEAN Secretariat shall function as the body responsible for monitoring the progress of any arrangements arising from this Agreement. Member States shall cooperate with the ASEAN Secretariat in the performance of its duties.

Article 8: Review of Progress

The ASEAN Economic Ministers' Meeting and its subsidiary bodies shall review the progress of implementation and coordination of the elements contained in this Agreement.

Article 9: Settlement of Disputes

Any differences between the Member States concerning the interpretation or application of this Agreement or any arrangements arising therefrom shall, as far as possible, be settled amicably between the parties. Whenever necessary, an appropriate body shall be designated for the settlement of disputes.

Article 10: Supplementary Agreements or Arrangements

Appropriate ASEAN economic agreements or arrangements, arising from this Agreement, shall form an integral part of this Agreement.

Article 11: Other Agreements

1. This Agreement or any action taken under it shall not affect the rights and obligations of the Member States under any existing agreements to which they are parties.
2. Nothing in this Agreement shall affect the power of Member States to enter into other agreements not contrary to the terms and objectives of this Agreement.

Article 12: General Exceptions

Nothing in this Agreement shall prevent any Member State from taking action and adopting measures which it considers necessary for the protection of its national security, the protection of public morals, the protection of human, animal or plant life and health, and the protection of articles of artistic, historic and archaeological value.

Article 13: Amendments

All Articles of this Agreement may be modified through amendments to this Agreement agreed upon by all the Member States. All amendments shall become effective upon acceptance by all Member States.

Article 14: Entry Into Force

This Agreement shall be effective upon signing.

Article 15: Final Provision

This Agreement shall be deposited with the Secretary General of the ASEAN Secretariat who shall promptly furnish a certified copy thereof to each Member State.

ASEAN AGREEMENT ON THE COMMON EFFECTIVE PREFERENTIAL TARIFF (CEPT) SCHEME FOR THE ASEAN FREE TRADE AREA (AFTA)
Singapore, 28 January 1992

Article 1: Definitions

For the purposes of this Agreement:

1. 'CEPT' means the Common Effective Preferential Tariff, and it is an agreed effective tariff, preferential to ASEAN, to be applied to goods originating from ASEAN Member States, and which have been identified for inclusion in the CEPT Scheme in accordance with Articles 2(5) and 3.
2. 'Non-Tariff Barriers' mean measures other than tariffs which effectively prohibit or restrict import or export of products within Member States.
3. 'Quantitative restrictions' mean prohibitions or restrictions on trade with other Member States, whether made effective through quotas, licences or other measures with equivalent effect, including administrative measures and requirements which restrict trade.
4. 'Foreign exchange restrictions' mean measures taken by Member States in the form of restrictions and other administrative procedures in foreign exchange which have the effect of restricting trade.
5. 'PTA' means ASEAN Preferential Trading Arrangements stipulated in the Agreement on ASEAN Preferential Trading Arrangements, signed in Manila on 24 February 1977, and in the Protocol on Improvements on Extension of Tariff Preferences

under the ASEAN Preferential Trading Arrangements (PTA), signed in Manila on 15 December 1987.

6. 'Exclusion List' means a list containing products that are excluded from the extension of tariff preferences under the CEPT Scheme.

7. 'Agricultural products' mean:

a. agricultural raw materials/unprocessed products covered under Chapters 1-24 of the Harmonised System (HS), and similar agricultural raw materials/unprocessed products in other related HS Headings; and

b. products which have undergone simple processing with minimal change in form from the original products.

Article 2: General Provisions

1. All Member States shall participate in the CEPT Scheme.

2. Identification of products to be included in the CEPT Scheme shall be on a sectoral basis, i.e., at HS 6-digit level.

3. Exclusions at the HS 8/9 digit level for specific products are permitted for those Member States, which are temporarily not ready to include such products in the CEPT Scheme. For specific products, which are sensitive to a Member State, pursuant to Article 1(3) of the Framework Agreement on Enhancing ASEAN Economic Cooperation, a Member State may exclude products from the CEPT Scheme, subject to a waiver of any concession herein provided for such products. A review of this Agreement shall be carried out in the eighth year to decide on the final Exclusion List or any amendment to this Agreement.

4. A product shall be deemed to be originating from ASEAN Member States, if at least 40% of its content originates from any Member State.

5. All manufactured products, including capital goods, processed agricultural products and those products falling outside the definition of agricultural products, as set out in this Agreement, shall be in the CEPT Scheme. These products shall automatically be subject to the schedule of tariff reduction, as set out in Article 4 of this Agreement. In respect of PTA items, the schedule of tariff reduction provided for in Article 4 of this Agreement shall be applied, taking into account the tariff rate after the application of the existing margin of preference (MOP) as at 31 December 1992.

6. All products under the PTA which are not transferred to the CEPT Scheme shall continue to enjoy the MOP existing as at 31 December 1992.

7. Member States, whose tariffs for the agreed products are reduced from 20% and below to 0%-5%, even though granted on an MFN basis, shall still enjoy concessions. Member States with tariff rates at MFN rates of 0%-5% shall be deemed to have satisfied the obligations under this Agreement and shall also enjoy the concessions.

Article 3: Product Coverage

This Agreement shall apply to all manufactured products, including capital goods, processed agricultural products, and those products falling outside the definition of agricultural products as set out in this Agreement. Agricultural products shall be excluded from the CEPT Scheme.

Article 4: Schedule of Tariff Reduction

1. Member States agree to the following schedule of effective preferential tariff reductions:
a. The reduction from existing tariff rates to 20% shall be done within a time frame of 5 years to 8 years, from 1 January 1993, subject to a programme of reduction to be decided by each Member State, which shall be announced at the start of the programme. Member States are encouraged to adopt an annual rate of reduction, which shall be (X-20)%/5 or 8, where X equals the existing tariff rates of individual Member States.
b. The subsequent reduction of tariff rates from 20% or below shall be done within a time frame of 7 years. The rate of reduction shall be at a minimum of 5% quantum per reduction. A programme of reduction to be decided by each Member State shall be announced at the start of the programme.
c. For products with existing tariff rates of 20% or below as at 1 January 1993, Member States shall decide upon a programme of tariff reductions, and announce at the start, the schedule of tariff reductions. Two or more Member States may enter into arrangements for tariff reductions to 0%-5% on specific products at an accelerated pace to be announced at the start of the programme.

2. Subject to Articles 4(1)(b) and 4(1)(c) of this Agreement, products which reach, or are at tariff rates of 20% or below, shall automatically enjoy the concessions.

3. The above schedules of tariff reduction shall not prevent Member States from immediately reducing their tariffs to 0%-5% or following an accelerated schedule of tariff reduction.

Article 5: Other provisions

A. Quantitative Restrictions and Non-Tariff Barriers

1. Member States shall eliminate all quantitative restrictions in respect of products under the CEPT Scheme upon enjoyment of the concessions applicable to those products.

2. Member States shall eliminate other non-tariff barriers on a gradual basis within a period of five years after the enjoyment of concessions applicable to those products.

B. Foreign Exchange Restrictions

Member States shall make exceptions to their foreign exchange restrictions relating to payments for the products under the CEPT Scheme, as well as repatriation of such payments without prejudice to their rights under Article XVIII of the General Agreement on Tariffs and Trade (GATT) and relevant provisions of the Articles of Agreement of the International Monetary Fund (IMF).

C. Other Areas of Cooperation

Member States shall explore further measures on border and non-border areas of cooperation to supplement and complement the liberalisation of trade. These may include, among others, the harmonisation of standards, reciprocal recognition of tests and certification of products, removal of barriers to foreign investments, macroeconomic consultations, rules for fair competition, and promotion of venture capital.

D. Maintenance of Concessions

Member States shall not nullify or impair any of the concessions as agreed upon through the application of methods of customs valuation, any new charges or measures restricting trade, except in cases provided for in this Agreement.

Article 6: Emergency Measures

1. If, as a result of the implementation of this Agreement, import of a particular product eligible under the CEPT Scheme is increasing in such a manner as to cause or threaten to cause serious injury to sectors producing like or directly competitive products in the importing Member States, the importing Member States may, to the extent and for such time as may be necessary to prevent or to remedy such injury, suspend preferences provisionally and without discrimination, subject to Article 6(3) of this Agreement. Such suspension of preferences shall be consistent with the GATT.

2. Without prejudice to existing international obligations, a Member State, which finds it necessary to create or intensify quantitative restrictions or other measures limiting imports with a view to forestalling the threat of or stopping a serious decline of its monetary reserves, shall endeavour to do so in a manner, which safeguards the value of the concessions agreed upon.

3. Where emergency measures are taken pursuant to this Article, immediate notice of such action shall be given to the Council referred to in Article 7 of this Agreement, and such action may be the subject of consultations as provided for in Article 8 of this Agreement.

Article 7: Institutional Arrangements

1. The ASEAN Economic Ministers (AEM) shall, for the purposes of this Agreement, establish a ministerial-level Council comprising one nominee from each Member State and the Secretary General of the ASEAN Secretariat. The ASEAN Secretariat shall provide the support to the ministerial-level Council for supervising, coordinating and reviewing the implementation of this Agreement, and assisting the AEM in all matters relating thereto. In the performance of its functions, the ministerial-level Council shall also be supported by the Senior Economic Officials' Meeting (SEOM).

2. Member States which enter into bilateral arrangements on tariff reductions pursuant to Article 4 of this Agreement shall notify all other Member States and the ASEAN Secretariat of such arrangements.

3. The ASEAN Secretariat shall monitor and report to the SEOM on the implementation of the Agreement pursuant to the Article III(2)(8) of the Agreement on the Establishment of the ASEAN Secretariat. Member States shall cooperate with the ASEAN Secretariat in the performance of its duties.

Article 8: Consultations

1. Member States shall accord adequate opportunity for consultations regarding any representations made by other Member States with respect to any matter affecting the implementation of this Agreement. The Council referred to in Article 7 of this Agreement, may seek guidance from the AEM in respect of any matter for which it has

not been possible to find a satisfactory solution during previous consultations.

2. Member States, which consider that any other Member State has not carried out its obligations under this Agreement, resulting in the nullification or impairment of any benefit accruing to them, may, with a view to achieving satisfactory adjustment of the matter, make representations or proposals to the other Member States concerned, which shall give due consideration to the representations or proposals made to it.

3. Any differences between the Member States concerning the interpretation or application of this Agreement shall, as far as possible, be settled amicably between the parties. If such differences cannot be settled amicably, it shall be submitted to the Council referred to in Article 7 of this Agreement, and, if necessary, to the AEM.

Article 9: General Exceptions

Nothing in this Agreement shall prevent any Member State from taking action and adopting measures, which it considers necessary for the protection of its national security, the protection of public morals, the protection of human, animal or plant life and health, and the protection of articles of artistic, historic and archaeological value.

Article 10: Final Provisions

1. The respective Governments of Member States shall undertake the appropriate measures to fulfil the agreed obligations arising from this Agreement.

2. Any amendment to this Agreement shall be made by consensus and shall become effective upon acceptance by all Member States.

3. This Agreement shall be effective upon signing.

4. This Agreement shall be deposited with the Secretary General of the ASEAN Secretariat, who shall likewise promptly furnish a certified copy thereof to each Member State.

5. No reservation shall be made with respect to any of the provisions of this Agreement.

STATEMENT OF GENERAL PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

Adopted by the Special Session of the Asian-African Legal Consultative Committee on Environment and Development, Islamabad, 1 February 1992[1/2]

The Asian-African Legal Consultative Committee, after an exchange of views on legal aspects of environment and development, affirms:

a. That the environment is the common concern of mankind and that the environment and development are intrinsically and inextricably linked;

b. That the principle of sustainable development shall be given due effect, and development shall not be pursued in such a manner as would endanger the environment;

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1. While adopting the statement, the Committee, *inter alia,* agreed to place certain terms and expressions in brackets so as to accommodate the concerns of some delegations.

2. Text from UNdoc. A/CONF.151/PC/WG.III/5 Annex.

c. That all members of the international community shall ensure that no appreciable or significant harm is caused to the environment and that the environment does not suffer severe and irreversible degradation;

d. That the responsibility of member States of the international community shall be [common but differentiated] [differentiated] and the application and enforcement of environmental standards by the developing countries shall be in accordance with their respective capabilities and responsibilities;

e. The need to protect intergeneration equities within the context of the progressive development and codification of international environmental law;

f. That the developed countries, in the interest of the common future of mankind and the protection and preservation of the environment, seriously consider making available to the developing countries [new] [adequate] and environmentally sound technologies on a [preferential and non-commercial] [most favourable] basis;

g. That the developed countries, international and regional organizations and financial institutions consider, explore and where necessary make provision for [new] additional and adequate financial resources to the developing countries to meet the objectives of sustainable development and the protection and preservation of the environment;

h. That the United Nations Conference on Environment and Development should accord priority to the improvement and strengthening of the existing institutional mechanisms relating to environment and development in the United Nations system and to enhancing their better cooperation and coordination;

i. That any instrument to be adopted by the Conference should include appropriate provision for the peaceful settlement of disputes.

PRINCIPLES ON GENERAL RIGHTS AND OBLIGATIONS

Proposal submitted to the Preparatory Committee for the UNCED, on behalf of the States Members of the United Nations that are members of the Group of 77*

Principle 1. National sovereignty over natural resources

States have the sovereign right over their own natural resources. Pursuant to their own environmental and development policies, they have the responsibility to ensure that activities within their jurisdiction do not cause damage to the environment of other States or of areas beyond the limits of their national jurisdiction.

Principle 2. The human being as the centre of environmental concerns

Human beings are at the centre of environmental concerns. In this context, the quality of the environment is dependent on the satisfaction of basic human needs. Human beings should be guaranteed a healthy life, free from hunger, disease and poverty.

Principle 3. Right to development

The right to development is an inalienable right and therefore the development needs of all developing countries shall be treated as a matter of priority.

* Un doc. A/CONF.151/PC/WG.III/L.20 and Rev.1, of 19 March 1992

Principle 4. Integration of environment and development

States and international organizations shall address environmental issues in the process of development by integrating environmental concerns with the imperatives of economic growth and development.

Principle 5. Main responsibility

The major historical and current cause of the continuing deterioration of the global environment is the unsustainable pattern of production and consumption, particularly in developed countries. Thus, the responsibility for containing, reducing and eliminating global environmental damage must be borne by the countries causing such damage, must be in relation to the damage caused and must be in accordance with their respective responsibilities. All countries, in particular developed countries, shall make commitments to address their unsustainable patterns of consumption.

Principle 6. Equity

To meet the needs of present and future generations, considerations of equity must include damage caused to the environment in the past, the growth and development needs of the present generation and the apportionment of equal shares of global environmental space.

Principle 7. Special needs of the developing countries

A new form of international cooperation is essential for addressing sustainable development, in which access to and transfer of environmentally [safe and] sound technology on preferential and concessional terms as well as provision of adequate, new and additional financial resources are of paramount importance for the transition of developing countries to sustainable development.

Principle 8. Environment and trade

States shall cooperate to promote an international economic environment supportive of sustainable development. In this connection, the developed countries shall ensure that their actions are conducive to the growth of the world economy in general and the development of the developing countries in particular. Global environmental considerations cannot justify restrictive trade practices or new forms of conditionality.

Principle 9. Environmental, economic, social and cultural diversity

States shall respect and conserve ecological, economic, social and cultural diversity. Environmental standards that are valid for the most advanced countries may be inappropriate and of unwarranted economic and social cost for the developing countries. Therefore, environmental management objectives and priorities for the developed and developing countries, based on living standards, social and economic conditions as well as natural resource endowments, will be different.

States and peoples recognize the importance of the sustainable use of biological diversity as a fundamental factor of development and will strenghten their efforts in this regard.

Principle 10. Scientific understanding and research and development, and exchange of information

Research, free exchange and transfer of scientific knowledge and experience shall be ensured to strengthen national scientific and technological capacities in developing countries to protect the environment and promote growth and sustainable development.

Principle 11. Endogenous capacity-building

The efforts of the developing countries aimed at endogenous capacity-building in environment and development shall be supported, in order to enable them to take effective preventive and corrective actions.

Principle 12. International and transboundary movement of hazardous activities and substances

Measures taken in a specific country to reduce and/or control activities or projects harmful to the environment shall not lead to the displacement and transfer of these activities or projects to another country. Toxic and hazardous substances and wastes, dangerous genetically modified organisms, and radioactive wastes shall be treated at the point of generation. Transboundary treatment or disposal of these substances shall be banned. Measures shall also be taken to halt the international illicit traffic in toxic and hazardous substances and wastes. The countries of origin and entities involved in such activities shall bear the liability for compensation.

Principle 13. Contamination

States are responsible for the damage caused to the global environment by the use of all weapons of mass destruction. The use of weapons of mass destruction is a crime against both humanity and the environment.

Principle 14. Decentralized management of environment at the national level

At the national level, the management of the environment is best achieved when the issues are dealt with the full participation of all citizens.

Each individual has the right to a clean and ecologically balanced environment, to be informed of the state of the environment and of all activities that have a negative impact on the environment and to participate in the decisions affecting their environment.

Principle 15. Environmental regeneration

Environmental regeneration is a common concern. Degraded ecosystems and

ecological processes shall be rehabilitated. Areas affected by desertification, aridity and drought and areas vulnerable to sea-level rise also deserve special consideration. Therefore, all States and international organizations shall support such efforts of developing countries.

Principle 16. Special situation of the developing countries

The special situation of the developing countries shall be fully taken into account. Underdevelopment, poverty and environmental problems are closely interrelated and environmental protection in developing countries shall be viewed as an integral part of the development process and cannot be considered in isolation from it.

Full recognition shall be given to the special situation, realities and problems of the developing countries in the implementation of the principles of this Declaration.

Principle 17. The right of people under occupation

The environment and natural resources of people under occupation should be protected. Therefore, any policies or measures that may lead to the degradation of their environment or to the depletion of their natural resources shall be immediately halted.

Principle 18. Peaceful settlement of environmental disputes

States shall resolve their environmental disputes peacefully in accordance with the Charter of the United Nations.

ASEAN DECLARATION ON THE SOUTH CHINA SEA
Manila 22 July 1992[1]

We, the Foreign Ministers of the member countries of the Association of South-East Asian Nations,

Recalling the historic, cultural and social ties that bind our peoples as States adjacent to the South China Sea,

Wishing to promote the spirit of kinship, friendship and harmony among our peoples who share similar Asian traditions and heritage,

Desirous of further promoting conditions essential to greater economic cooperation and growth,

Recognizing that we are bound by similar ideals of mutual respect, freedom, sovereignty and mutuality of interests,

Recognizing that South China Sea issues involve sensitive questions of sovereignty and jurisdiction of the parties directly concerned,

Conscious that any adverse developments in the South China Sea directly affect peace and stability in the region,

Hereby -

[1] Text from UNdoc. A/47/357-S/24368.

1. *Emphasize* the necessity to resolve all sovereignty and jurisdictional issues pertaining to the South China Sea by peaceful means, without resort to force;
2. *Urge* all parties concerned to exercise restraint with the view to creating a positive climate for the eventual resolution of all disputes;
3. *Resolve*, without prejudicing the sovereignty and jurisdiction of countries having direct interests in the area, to explore the possibility of cooperation in the South China Sea relating to the safety of maritime navigation and communication, protection against pollution of the marine environment, coordination of search and rescue operations, efforts towards combating piracy and armed robbery as well as collaboration in the campaign against illicit trafficking in drugs;
4. *Commend* all parties concerned to apply the principles contained in the Treaty of Amity and Cooperation in South-East Asia as the basis for establishing a code of international conduct over the South China Sea;
5. *Invite* all parties concerned to subscribe to this declaration of principles.

THE JAKARTA MESSAGE: A CALL FOR COLLECTIVE ACTION AND THE DEMOCRATIZATION OF INTERNATIONAL RELATIONS*
6 September 1992

1. We, the Heads of State or Government of the Non-Aligned Movement, representing the vast majority of humankind, meet in Jakarta, Indonesia, at a momentous juncture in history; a time of profound change and rapid transition, a time of great promise as well as grave challenge, a time of opportunity amidst pervasive uncertainty.
2. The collapse of the bipolar structure of the world presents unprecedented possibilities as well as challenges for cooperation among nations. Interdependence, integration and globalization of the world economy are among these new realities.
3. The world today is still far from being a peaceful, just and secure place. Simmering disputes, violent conflicts, aggression and foreign occupation, interference in the internal affairs of States, policies of hegemony and domination, ethnic strife, religious intolerance, new forms of racism and narrowly conceived nationalism are major and dangerous obstacles to harmonious co-existence among states and peoples and have even led to the disintegration of states and societies.
4. Consistent with its fundamental principles and objectives, the Movement has made many contributions to bringing about improvements in the present international political climate. These have also fully vindicated the validity and relevance of Non-Alignment and its basic approach in addressing international problems and developments.
5. This new era in international relations has renewed hopes for building a new and equitable international order, for stable peace and common security and for economic and social justice. Such a new order must be firmly rooted in the rule of law, the principles of the United Nations Charter as well as equitably shared responsibility and joint commitment to global cooperation and solidarity. Its structure should be comprehensively conceived and dedicated to peace and justice, to security and

* NAC10/Doc.12/Rev.1. Text from: *Tenth Conference of Heads of State or Government of Non-Aligned Countries, Jakarta, 1-6 September 1992 - Final Documents* (Jakarta, Gramedia, 1992). Also reproduced in UNdoc. A/47/675.

development, to democracy both within and among states and to the promotion of the fundamental rights and freedoms of individual human beings as well as of nations. We must ensure respect for the sovereignty of nations and the strict adherence to the principle of non-interference in the internal affairs of other states, which should not be diluted or abridged under any pretext. We shall continue to strive for the democratization of international relations.

6. We are committed to the peaceful resolution of disputes in all regions of the world through a sustained process of dialogue and negotiation and encourage the establishment of regional mechanisms towards this end where appropriate.

7. We remain unflinching in our support for the legitimate struggle of the Palestinian people to secure their inalienable rights to self-determination and independence and reiterate our demand for the withdrawal of Israel from all occupied Arab lands, including Jerusalem. We hope that a just and lasting settlement of the question of Palestine on the basis of the principles and resolutions adopted by the United Nations shall soon be reached through the current peace process.

8. *Apartheid* and racial discrimination remain particularly repugnant features of the current scene and their abolition can brook no further delay. We reaffirm our solidarity with the people of South Africa in their struggle to establish a united, non-racial and democratic South Africa.

9. We are heartened by the progress being made in limiting nuclear and conventional armaments. But the disarmament agenda is still unfinished and much more remains to be done. A nuclear-weapons-free world has always been the vision of our Movement. This alone can ensure human survival and is the collective responsibility of all nations. We also urge accelerated efforts on other priority issues, particularly the prohibition of all weapons of mass destruction.

10. Today, peace and stability are dependent on socio-economic as much as on political and military factors. Diminishing prospects for economic growth and social advancement, large-scale unemployment, mass poverty and severe environmental degradation endanger peace and stability.

11. We are deeply concerned over the negative impact of global military expenditures on the world economy. Resources released through disarmament and arms reduction should be rechannelled towards the economic and social development of all countries, and especially of the developing countries. This will, at the same time, facilitate the attainment of security at lower levels of armaments.

12. In the economic sphere, inequitable international structures and unequal relations have resulted in deepening disparities and unacceptable injustices which continue to widen the prosperity and technology gap between the developed and developing countries.

13. Our Movement is committed to wage war on poverty, illiteracy and underdevelopment. We shall seek to advance broad-based and people-centred development, including the promotion of human resources development. And we call for the accelerated development of the developing countries based on equitable distribution, growth and stability.

14. The progress of Non-Aligned and other developing countries remains hampered by an unfavourable external economic environment characterized by inadequate access to technology, unabated protectionism, historically low prices for commodities and raw materials, severely contracted financial flows and the crushing burden of debt and debt servicing resulting in reverse financial flows to the developed countries and multilateral institutions. In this context, the critical socio-economic situation in Africa, where millions suffer economic and social deprivation, cries out for concerted action. Africa deserves our special attention.

15. We are dismayed over the failure to conclude the Uruguay Round for

Multilateral Trade Negotiations. We urgently call upon the developed countries to ensure without further delay a balanced, equitable and satisfactory conclusion of the Round which takes into account the interests of all parties, especially the development needs and concerns of the developing countries.

16. A shift of focus in international relations towards strengthening multilateral cooperation for development has become indispensable. In this regard, we call for the reform and restructuring of the world economic system and for the strengthening of the United Nations' capacity for enhancing international development and cooperation. Never before have the fate and fortunes of the North and South been so inextricably linked. Towards this end, we call for the re-activation of a constructive dialogue between the developed and developing countries, based on genuine interdependence, mutuality of interests and of benefits, and shared responsibility.

17. At the same time, determined efforts to intensify South-South cooperation on the basis of collective self-reliance is imperative. We see South-South cooperation as vital for promoting our own development and for reducing undue dependence on the North. It is also an integral element in the attainment of a new and equitable international economic order. We must develop more effective means of pooling the resources, expertise and experiences internal to the South. We are determined to initiate concrete and practicable forms of cooperation in areas such as food production and population, trade and investments, and to devise realistic modalities for their implementation. In this way the concept of collective self-reliance can be translated into reality. Towards this end, we consider the coordination of our efforts and strategies with the Group of 77 of crucial importance through the establishment of a Joint Coordinating Committee.

18. We reaffirm that basic human rights and fundamental freedoms are of universal validity. We welcome the growing trend towards democracy and commit ourselves to cooperate in the protection of human rights. We believe that economic and social progress facilitate the achievement of these objectives. No country, however, should use its power to dictate its concept of democracy and human rights or to impose conditionalities on others. In the promotion and the protection of these rights and freedoms, we emphasize the inter-relatedness of the various categories, call for a balanced relationship between individual and community rights, uphold the competence and responsibility of national governments in their implementation. The Non-Aligned countries therefore shall coordinate their positions and actively participate in the preparatory work of the Second World Conference on Human Rights in June 1993, in order to ensure that the Conference addresses all aspects of human rights on the basis of universality, indivisibility, impartiality and non-selectivity.

19. Rapid degradation of the environment threatens the very survival of humankind. We welcome the outcome of the Rio Conference which addressed the inseparable issues of environment and development. Sustainable development calls for a new global partnership, including the provision of new and additional financial resources to developing countries and adequate access for them to environmentally sound technology.

20. We welcome the proposal to convene the World Summit for Social Development which should place people and their social needs at the heart of United Nations endeavours and provide an opportunity for addressing the multidimensional aspects of social issues.

21. We believe that the full and equal integration of women into the development process at all levels is a central goal of the Non-Aligned Movement. We are committed to the success of the forthcoming 1995 World Conference on Women: Action for Equality, Development and Peace.

22. The right to a standard of living adequate for health and well-being is a fundamental human right, especially for all children, and the promotion of this right is

a moral imperative for the international community. We therefore reaffirm our commitment to the full and effective implementation of the Declaration and the Plan of Action of the World Summit for Children.

23. The United Nations, as the universal embodiment of multilateralism, has a unique opportunity to become the primary, collective instrument to construct a new, just and equitable world order. To ensure the achievement of these objectives, our Movement is determined to play a leading role in contributing to the revitalization, restructuring and democratization of the United Nations System. To this end, we have decided to establish a high-level Working Group charged with the elaboration of concrete proposals for the restructuring of the United Nations.

24. We are of the conviction that coordination among Non-Aligned countries at United Nations Headquarters must be strengthened. The Coordinating Bureau should define priority issues on which such coordination should be enhanced, including those related to the functioning of the Security Council and the strengthening of the role of the General Assembly.

25. The central role of the United Nations in the maintenance of international peace and security, within the framework of the collective security provisions of the Charter, is more crucial than ever. The report of the Secretary-General of the United Nations, 'An Agenda for Peace', is a timely contribution.

26. We underline that respect for international law is the foundation for peace and security, and is particularly important in this era of transformation in the relations among nations. In this day and age, there is no place for the unilateral use of force and for claims to exercise extra-territorial rights by States.

27. Since Bandung 37 years ago, we have consistently struggled for the realization of our fundamental principles and objectives. As we chart our course for this decade and beyond, the Movement is committed to the shaping of a new international order, free from war, poverty, intolerance and injustice, a world based on the principles of peaceful co-existence and genuine interdependence, a world which takes into account the diversity of social systems and cultures. It should reflect global, not separate, interests. And it should be sought through the central and irreplaceable role of the United Nations. We, the members of the Non-Aligned Movement, holding fast to the principles and ideals as originally articulated by our founding fathers, do hereby affirm the fundamental human rights to development, social progress, and the full participation of all in shaping the common destiny of humankind. Through dialogue and cooperation, we will project our Movement as a vibrant, constructive and genuinely interdependent component of the mainstream of international relations. Only then, can a new international order take shape on a truly universal basis, ensuring harmony, peace, justice and prosperity for all.

LIST OF DOCUMENTS OF SPECIAL INTEREST TO ASIA, NOT REPRODUCED IN THE PRESENT VOLUME

	Text in UNdoc:
Declaration on Fact-finding by the UN in the Field of the Maintenance of International Peace and Security (UNGA Res. 46/59)	A/RES/46/59 (17 Jan. 1992)
Report of the Secretary-General on Cambodia	S/23613 (19 Feb. 1992)
Report on studies and Documentation for the World Conference [on Human Rights]: Compilation of proposals of the Asian Group for studies and Documentation for the World Conference: Study topics	A/CONF.157/ PC/36 (10 Apr. 1992)
Kuala Lumpur Declaration on Environment and Development, issued by the Second Ministerial Conference of Developing Countries on Environment and Development, 26-29 April 1992	A/47/203
An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping, Report of the Secretary-General pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992	A/47/277-S/24111 (17 Jun. 1992)
Protection of the environment in times of armed conflict: information received from the International Committee of the Red Cross	A/47/328 (31 Jul. 1992)
Information on the Sixth session of the Governing Council of the UN Compensation Commission (letter 30 June 1992 from the President of the Governing Council to the President of the Security Council) – with enclosure: Provisional Rules for Claims Procedure	S/24363 (30 Jul. 1992)
First annual report on the activities of the UN Compensation Commission, July 1991 – June 1992 (1 Sep. 1992; with list of decisions 1 – 10 of the Governing Council)	S/24589 (28 Sep. 1992)
Study on treaties agreements and other constructive arrangements between States and indigenous populations, first progress report submitted by the Special Rapporteur to the Common Human Rights, Sub-Commission on Prevention of Discrim. and Protect. of Minorities	A/CN.4/Sub.2/ 1992/32 (25 Aug. 1992)

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